

Winning Wage Justice



NATIONAL EMPLOYMENT LAW PROJECT

An Advocate's Guide to State and City Policies to Fight Wage Theft

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By the National Employment Law Project
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Table of Contents

1	Introduction	5
2	How to Use This Guide	9
3	Raise the Cost to Employers for Violating the Law	17
1.	Triple Damages: Meaningful costs to deter violations of wage and hour laws	19
2.	Stop the Clock: Ensure workers have time to bring wage theft claims	21
3.	Revoke Business Licenses: A strong tool to increase employer compliance.....	25
4.	Pay When Due: Deterring late payment of wages.....	28
5.	Award Attorney’s Fees to Plaintiffs: Encourage lawyers to help workers file lawsuits	31
6.	Criminal Penalties: Use the full power of the law to crack down on wage theft.....	34
4	Make Government Agencies Effective Enforcers of the Law	37
1.	Community Input and Collaboration: Draw on grassroots knowledge for smart enforcement	39
2.	Targeted and Affirmative Enforcement: Agencies should not wait for complaints	41
3.	More Agency Funding: Beef up enforcement to match the scale of the problem.....	44
4.	Cleaning up the Complaint Process: Set priorities, timelines and clear procedures	46
5.	Limited English Proficient Workers: Ensure access to enforcement agencies	50
6.	Enhanced Enforcement Tools: Tap the full power of government agencies	53
5	Better Protect Workers From Retaliation	55
1.	Anonymous, Confidential or Third-Party Claims: Protect the identity of workers	57
2.	Presumption of Employer Retaliation: Deterring employer backlash against workers	60
3.	Equal Rights and Equal Recourse: Uphold undocumented workers’ rights under state law	63
4.	Leverage U Visas: Protect immigrant workers who bring wage theft claims.....	67

6	End the Exclusions in Minimum Wage and Overtime Standards	71
1.	Extend Minimum Wage and Overtime Protections to Agricultural Workers	73
2.	Extend Minimum Wage and Overtime Protections to Domestic Workers	76
3.	Extend Minimum Wage and Overtime Protections to Home Care Workers	79
7	Stop Independent Contractor Misclassification and Hold Subcontracting Employers Accountable	83
1.	Task Forces and Commissions: Vehicles to document and fight the problem.....	85
2.	A Broad Definition of the Employment Relationship: The key to holding employers accountable	90
3.	Written Disclosure of Employment Status: Arm workers with the information they need.....	96
8	Ensure Workers Are Paid for All Hours Worked	99
1.	Paid Meal and Rest Breaks: Hold the line on workers' time	101
2.	Daily Overtime: Safeguard the eight-hour day	104
3.	Written Notice and Wage Statements: Ensure workers' right to know	106
9	Guarantee that Workers Can Collect from Their Employers	111
1.	Wage Liens: A strong incentive for employers to pay unpaid wages	113
2.	Wage Bonds: Secure unpaid wage payments from shaky businesses	117
3.	Wage Pools: Ensure (and insure) unpaid wage payments.....	120
	Endnotes	125

1

Introduction

By any measure, wage theft in America is threatening to become a defining trend of the 21st century labor market. In the past year alone, workers recovered tens of millions of dollars in unpaid wages from their employers in a range of industries. For example, Staples paid \$42 million in illegally underpaid wages to its assistant store managers, New Jersey truck delivery drivers received \$2 million in an unpaid overtime settlement, Walmart settled an unpaid wages case for \$35 million in Washington State, and New York car wash workers received \$3.5 million in unpaid overtime.¹

Behind these high-profile cases sits a growing body of research that documents a broad and worsening wage theft crisis in America. In a landmark 2009 study, *Broken Laws, Unprotected Workers*, researchers surveyed more than 4,000 workers in low-wage industries in Chicago, Los Angeles, and New York, and found that 26 percent had been paid less than the minimum wage in the preceding week, and 76 percent had either been underpaid or not paid at all for their overtime hours.²

Dozens of studies by organizers and advocates in specific industries have uncovered similar rates of wage-related violations (as well as related health and safety, workers compensation, and right-to-organize violations).³ And in audits of employers in 1999 and 2000, the US Department of Labor (USDOL) found high rates of minimum wage, overtime and other violations across the country, including in 50 percent of Pittsburgh

restaurants, 74 percent of Georgia day care centers, 50 percent of St. Louis nursing homes, 38 percent of Reno hotels and motels, and 47 percent of adult family homes in Seattle, to name just a few.⁴

Wage theft is not incidental, aberrant or rare, committed by a few rogue employers at the periphery of the labor market. It takes place in industries that span the economy—including retail, restaurants and grocery stores; caregiver industries such as home health care and domestic work; blue collar industries such as manufacturing, construction and wholesalers; building services such as janitorial and security; and personal services such as dry cleaning and laundry, car washes, and beauty and nail salons. Immigrants, women and people of color are particularly hard hit, although all workers are at risk of the many forms of wage theft: being paid less than the minimum wage, working off the clock without pay, getting less than time and a half for overtime hours, having tips stolen, and seeing illegal deductions taken out of paychecks.

Minimum wage and overtime laws are the anchors of the employment relationship in the United States. They are the central vehicle by which public policy guarantees fundamental protections for workers. If we cede these most basic laws to rampant evasion and violation, we are effectively setting the clock back to the early 1900s, before the enactment of the Fair Labor Standards Act (FLSA), when the lack of any wage floor resulted in terrible working conditions.

The wage theft crisis has many roots. Repercussions for violating the law are often not strong enough to dissuade employers, and declining resources and ineffective strategies by government enforcement agencies mean that employers have little fear of getting caught. Inadequate protections for workers who want to make claims of wage theft result in high rates of retaliation. And new forms of work and production, including outsourcing to subcontractors and misclassifying workers as independent contractors, have created confusion and allowed employers to move growing numbers of workers outside the reach of the law.

The case for fighting wage theft is first and foremost about fairness and justice—but it is also about economics. There is the significant cost to workers and their families, which in one week alone is estimated to be \$56.4 million in New York, Chicago and Los Angeles combined.⁵ There is the cost to taxpayers in lost revenues when employers fail to pay payroll taxes. There is the cost to our local economies, with fewer dollars circulating to local businesses, stunting economic recovery. And there is the cost to growth and opportunity as generations of workers are trapped in sub-minimum wage jobs.

Every day, millions of responsible, profitable employers in this country comply with minimum wage and overtime laws. When we allow their unscrupulous competitors to

undercut them on labor costs, we are starting a race to the bottom that will reverberate throughout the entire labor market in a cascading loss of good jobs. Everyone has a stake in this issue. Fighting wage theft is not about adding new burdens onto law-abiding employers. It is about smarter enforcement of laws that are already on the books, closing gaping loopholes and enacting stronger enforcement tools.

In this guide, our goal is to support and build upon the surging grassroots energy around wage theft campaigns in cities and states across the country. Advocates are using high-profile street protests and new organizing strategies to target unscrupulous employers. They are mounting multi-year campaigns to update legal protections and set up new enforcement mechanisms. And they are pushing the issue of wage theft onto the airwaves, educating the public and lawmakers alike about the scale of the problem and how to fight it. In the process, they are creating strong, enduring coalitions of worker centers, unions, legal services groups, policy think tanks, and other low-wage worker advocates.

By providing our allies a concrete menu of innovative policies to strengthen enforcement of minimum wage and overtime laws—as well as strategic guidance on identifying which policies make sense in a given community—our hope is that we help turn the tide and shift the American workplace from wage theft to wage justice.

2

How to Use This Guide

A brief overview of US wage and hour laws and their enforcement

Federal law sets a baseline of minimum wage and overtime standards. States have the option to pass their own laws that set stronger standards and cover more workers—but they cannot weaken federal standards.

1. **Federal minimum wage law:** The Fair Labor Standards Act establishes a nationwide minimum wage floor (currently \$7.25 an hour) and an overtime rate of time and a half, as well as record-keeping requirements and child-labor protections.
2. **State minimum wage laws:** Currently 17 states and the District of Columbia have state laws establishing minimum wage levels higher than the federal level. Various states also have stronger overtime and record-keeping standards, higher damages for violating the law, and broader coverage of workers.
3. **Citywide minimum wage laws:** Minimum wage laws at the city level are quite rare, and currently exist in only three cities plus the District of Columbia. (In many states, state law prohibits local wage-setting).

continued on page 12

Glossary

KEY TERMS AND CONCEPTS

Federal minimum wage and overtime law: The federal law that covers wage payment is the Fair Labor Standards Act (FLSA). It provides for a minimum wage per hour for many workers, an extra wage of “time and a half” for work beyond 40 hours a week, and includes rules about child labor. States may not pass laws that fall below federal standards, but they may pass laws that give workers extra protection and higher minimum wages.

State minimum wage and overtime laws: Most states have a law that establishes a state minimum wage, and most have a law that requires extra pay for hours worked over 40 in a week. Currently 17 states plus the District of Columbia have minimum wage standards higher than the federal standard. Other states have standards that are almost identical to federal law. Five states currently have no state minimum wage law at all, and five have a state minimum wage that is lower than federal law (which applies only to workers not covered by federal law).

State wage payment laws: Every state has a law that requires payment of promised wages in a timely and regular manner. These laws cover promised wages in any amount—not just the minimum wage.

Wage and hour laws: We use “wage and hour laws” as a generic term for any law that covers claims for unpaid minimum, overtime and promised wages, as well as rest breaks, meal periods, child labor, etc.

U.S. Department of Labor: The United States Department of Labor (USDOL) is the federal agency that enforces minimum wage and overtime requirements under the FLSA. The USDOL has district offices in most states (except Alaska, Delaware, Maine, Mississippi, North Dakota, South Dakota, Vermont and Wyoming), and regional offices in Chicago, Denver, Los Angeles, New York, New Orleans, and Seattle.

State Departments of Labor: Most states have a state department of labor. The powers and duties of the departments vary greatly. In some states, the department may have no enforcement staff and no role in enforcing wage laws; in others, there is a well-developed set of wage laws enforced by a staff of investigators and administrators. States have a variety of names for these agencies, including state department of labor and industry and state department of commerce. Some states have no state department of labor.

State Attorneys General: All states have an attorney general (AG), who is the chief lawyer for the state and in charge of enforcing and defending state laws. Some states have attorneys in the AG’s office whose job is focused on enforcing state wage and hour laws.

Legal services: The federally-funded nationwide system of free lawyers for low-income people is called the legal services program. Some states also have legal services or legal aid offices that are funded by other sources, and these have broader ability to represent low-income people, including undocumented workers. Some but not all legal services offices work on wage and hour cases. Their services are typically free for low-income workers.

Private bar or private lawyers: Most lawyers work in private law firms, groups of lawyers who offer their services to the public for a fee. Some private law firms are expert in wage and hour law. Some will represent workers, including victims of wage theft, for no cost or a small cost, and will ask the judge to make the employer, if found at fault, pay the lawyer's fee

Civil v. criminal law: There are many differences between the systems of law that we call "criminal" and "civil." The two most important for wage theft are as follows. In the civil system, a case can be brought by a worker or a lawyer on the worker's behalf. An agency or a judge can order the employer to pay the worker the money that is owed, often with additional penalties (see below). In the criminal system, an employer can be taken to court only by a prosecutor or attorney general. The judge can order that the employer be put in jail, as well as that the employer pay the money owed to the worker.

Wage theft: Wage theft is a term of art that means cases in which an employer fails to pay a worker.

Damages: In cases of wage theft, damages are usually monies paid directly to the worker. They are often simply the amount of unpaid wages, and are awarded to the worker either by a court or an enforcement agency.

Liquidated damages: In cases of wage theft, liquidated damages are monies ordered to be paid by the employer to the worker, *in addition to the amount of wages owed*. For example, many state laws provide for double or "treble" (triple) damages, meaning that the employer is ordered to pay the worker two or three times the wages owed as compensation.

Penalties: Legally, a "penalty" is an amount of money that a violating employer has to pay to the state if the state seeks it. Penalties are not typically paid to a complaining worker.

Fines: Fines are assessed by labor agencies against employers in an administrative proceeding. Typically, a fine is paid to the state agency rather than to the worker. In most cases, proceeds from fines go into a general state fund, but in some cases, the money from fines goes directly into the enforcement budget of the agency.

Judgment: A judgment is a final order from a court or agency ordering an employer to pay a specific amount of money to an individual.

Remedy: In the legal sense, a remedy is anything that a judge orders as a way to correct the problem that led to the lawsuit. For example, judges may order an employer to pay workers their unpaid wages; order employers to change their practices in the future; and award attorneys fees to the worker's lawyer.

Statute of limitations: Statutes of limitations are laws that set deadlines for filing a lawsuit or a complaint within a certain time after the act of wage theft occurs.

Class actions: Class actions are cases filed by one or more workers on behalf of a larger group of workers who have experienced a similar violation of their rights. Most state wage and hour laws allow workers to file class actions. The advantage of a class action is that the employer has to pay for all of the workers that it abused, without all of the workers having to take an active role in the lawsuit.

Record-keeping: Some state laws require employers to keep track, in writing, of the basic details of a worker's wages and hours. Typically, the required records might include total wages paid to a worker, hours worked, and deductions made from pay.

Enforcement of minimum wage and overtime laws happens at multiple levels, by multiple institutions and constituencies. Broadly speaking, there are three main pillars of enforcement, all of which play a central role—this is truly a case of needing all hands on deck:

1. **Government enforcement:** In terms of sheer scale and financial and legal resources, the government is the main enforcer of minimum wage and overtime laws, at both federal and state level.⁶ State departments of labor, state attorneys general, and the US Department of Labor are the key relevant arms of enforcement. (Strategic enforcement initiatives, task forces and commissions have also pulled in other government agencies for collaboration, including state departments of tax and revenue and unemployment insurance.)
2. **Private enforcement:** Workers and their representatives can bring wage theft cases against their employers in court, including small claims court.
3. **Workplace monitoring:** Unions have traditionally been a key actor in ensuring that employers in their industry comply with workplace regulations; recently, community-based worker centers have started to play a similar role via direct-action campaigns against specific employers.

Grassroots groups and advocates have made great strides in recent years in elevating the issue of wage theft to the public arena, in the process winning important organizing and legislative victories. But the scale and depth of the problem means that we need to do much more—both in terms of strengthening our laws and strengthening our enforcement of them.

For example, state labor laws often have weak penalties for violators, weak retaliation protections, or insufficient mechanisms to ensure that workers are able to collect their unpaid wages. At the same time, government enforcement at all levels often suffers from inadequate and declining resources, a lack of sustained commitment over time, and ineffective complaint-driven strategies. Bringing private litigation to scale is hampered by the often small size of individual claims, which makes suits unattractive to lawyers. And with union membership at only 7.2 percent of the private sector, the challenges of increasing monitoring in the workplace in the short term are significant.⁷

States and cities have a central role to play in scaling up the fight against wage theft. For a start, in more than a dozen states, minimum wage and overtime protections are stronger under state law than federal law, and so should be enforced at that level in order to give maximum legal benefit to workers. State departments of labor and attorneys general can also bring additional staff and resources to the table, which are badly needed given the still paltry number of investigators at the federal level.

Most important, the movement against wage theft remains firmly grounded in the grassroots: the local community groups, worker centers, unions, legal services providers and other advocates that continue to form the base of the fight for wage justice.

Content of the guide

In this guide, we lay out 28 policies that advocates can campaign for at the state and city level and that will strengthen the ability of workers, worker representatives and government agencies to fight wage theft. For each, we identify the problem being addressed, issues to consider in evaluating the policy, common challenges raised by opponents, recent campaigns, and an overview of good models and precedents.

- **Scope:** We focus on policies that strengthen enforcement of minimum wage, overtime and wage payment laws—as well as key provisions under those laws, such as protection against retaliation by employers, the ability to actually collect unpaid wages, and closing coverage loopholes that exclude millions of workers.
- **Policy goals:** We organize the policies in this document under seven broad goals that in combination form a coherent set of strategies to fight wage theft:
 1. Raise the cost to employers for violating the law
 2. Make government agencies effective enforcers of the law
 3. Better protect workers from retaliation
 4. End the exclusions in minimum wage and overtime laws
 5. Stop independent contractor misclassification and hold subcontracting employers accountable
 6. Ensure workers are paid for all hours worked
 7. Guarantee that workers can collect from their employers
- **Top picks:** Throughout the guide we flag a number of policies with a “NELP Top Pick” icon, to indicate ones that in our assessment have a big impact or represent innovative new models.
- **Warning:** Because state and local laws are complex and have multiple interpretations, this guide should not be interpreted as giving legal advice. We have not researched all aspects of state laws and are only suggesting good models for legislative and administrative reforms.



Questions to consider when identifying potential wage theft campaigns

There is no standard formula for putting together a state or local wage theft campaign. This guide provides a menu of possible policies, but advocates will need to conduct a thorough assessment of their community's needs; the legal, policy and political landscape in their state and city; and the availability of important local resources such as lawyers and researchers.

In what follows, we offer a series of questions that local advocates should work through with their members and allies as part of a wage theft campaign development process.

1. **Understanding the problem:** A key first step is identifying the scope and scale of the wage theft problem and the obstacles to addressing it. This does not mean that groups have to mount large, ambitious surveys (although worker centers have developed viable and innovative models for member-driven surveys in recent years). Through a combination of talking with their constituents, conducting worker focus groups, canvassing allied organizations, interviewing enforcement agency staff and other research strategies, advocates can answer a range of questions:
 - a. What are the main wage theft problems in the community—such as minimum wage and overtime violations, non-payment of wages, retaliation by employers, misclassification of workers as independent contractors, inability to take rest and meal breaks, inability to collect on wage theft judgments, and so forth? Who are the workers who are hardest hit?
 - b. What types of employers are violating the law? For example, is it small fly-by-night businesses or big employers that have industry clout? Is the problem worse in specific industries, and if so, which ones?
 - c. What are the biggest barriers to addressing the problem? For example, is it inert public enforcement agencies, weak laws with weak damages, collaboration by employers with the police or immigration authorities whenever workers complain, or workers' lack of access to legal resources?
2. **Identifying organizational priorities:** Different advocacy groups may have different organizational priorities, and sorting through those will be key to identifying the best policies around which to build a campaign. For example, legal services providers might be most focused on improving wage theft litigation outcomes for their clients. Community groups, worker centers and unions might be focused on improving employer compliance with minimum wage laws in a particular industry or a particular neighborhood, or across the entire labor market in their region—and be focused on organizing their base as well as winning policy reforms. None of these are mutually exclusive and advocacy groups may well have multiple priorities.

3. **Mapping the legal landscape at the state and city level:** This is perhaps the most important step in shaping a state wage theft campaign. It is crucial to emphasize that high rates of wage theft do not necessarily mean that the laws on the books are weak. In a number of states, existing wage and hour laws are strong enough to fight wage theft, but are not enforced enough or used in court. In these cases, advocates should focus on improving enforcement of wage and hour laws, including leveraging public agency resources; increasing the capacity of legal services providers and law firms to bring cases in court; building up the resources of worker centers and unions to monitor workplaces; and potentially, writing new laws that amplify and improve enforcement tools for existing law. As advocates consider the right mix of legislative and administrative reforms, answers to the following set of questions will be critical:
 - a. What are the current provisions of the state's minimum wage, overtime and wage payment laws, and what are their strengths and weaknesses? (Note that five states currently do not have their own minimum wage law, in which case a possible long-term campaign would be to establish such laws.)
 - b. Does the state have its own department of labor, and does it have staff and funding dedicated to wage theft enforcement? Does the Attorney General's office handle wage theft enforcement? And is there an adequate federal DOL presence in the state to leverage for wage theft claims?

Exploring City Policy Campaigns

Most campaigns to crack down on wage theft will be pursued at the state level—through new or amended state statutes or regulations or enforcement agency practices—since fighting wage theft chiefly involves strengthening and enforcing state laws that require employers to pay the minimum wage and to pay wages on time. However, in some states coalitions are exploring innovative local ordinances to leverage local government authority to combat abuses.

For example, in some states, cities have the legal authority to enact their own local minimum wage laws, and can then implement them with city-level enforcement systems. In other states where cities may not have the authority to enact a local minimum wage, activists and local leaders are exploring ways that local ordinances can help combat violations of state wage protections. These measures build on the traditional powers that cities may possess—for example, the authority to punish theft, or to issue business licenses. They are exploring using those powers to establish new penalties for wage theft—for example, by suspending liquor licenses of businesses that cheat their workers, or establishing other local law remedies for non-payment of wages owed. And in other cases, advocates are using existing city laws that prohibit theft of services to punish wage theft.

Some questions that coalitions should consider in exploring the feasibility of a local wage theft ordinance campaign include: Have cities in my state historically had the legal authority to enact ordinances that punish theft? Is there a risk that the state legislature might attempt to step in and block an ordinance if one were enacted? What level of staffing does the city government have, and could it realistically implement a new law that gave it authority to punish wage theft?

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- c. What is the capacity and current engagement of labor and employment lawyers and legal services offices on wage theft issues? Are courts receptive to complaints and accessible to claimants? Is the small claims court a viable option for workers seeking to recover their unpaid wages?
 4. **Figuring out the politics and identifying allied campaigns:** The final key step is to figure out the political landscape, including standard organizing questions for any campaign (analyzing which levels of government have legal and regulatory power, identifying opponents and allies, understanding the political calendar, strategizing on how to mobilize the base, etc.). Advocacy groups reading this guide will already have a good sense of how to organize and mount a grassroots campaign. We would only add that especially when it comes to wage theft—which is sometimes still treated as a narrow issue—it can be enormously useful to look for collaborations with other allies and even other campaigns. In particular, advocates should be sure to scan their state for campaigns to raise the minimum wage, which we do not cover in this guide, but which are a natural complement to wage theft advocacy (and there may be opportunities to integrate strong enforcement provisions into minimum wage bills). Other candidates for this kind of collaboration include partnering on responsible contracting laws that include strong screening-out of wage and hour violators bidding for public contracts, or multi-industry campaigns to broadly improve enforcement across the labor market.
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All of us at the National Employment Law Project are deeply committed to supporting our grassroots allies in the fight to end wage theft, and look forward to using this guide to support state and local campaigns in winning wage justice for our communities.

3

Raise the Costs to Employers for Violating the Law

The increase in wage theft campaigns, headline stories and many research studies together demonstrate clearly that wage theft has become a chronic issue in our economy. This raises an obvious question: Why do some employers utterly ignore wage laws?

The answer is just as obvious: Because they can. In many states, wage laws are weak and enforcement is tepid. Employers know that if they fail to pay wages, the worst that may happen is that they will eventually have to pay the bare amount of wages owed. In effect this amounts to a free loan. If there are no consequences to violating the law beyond nominal penalties, employers experience no “lesson learned.” They simply do not have sufficient incentive to comply with the law.

In order to promote compliance with bedrock wage laws, states must punish violators with monetary and other penalties that not only adequately compensate the workers who have been harmed, but also effectively deter employers from violating the law in the future.

This chapter outlines a number of strategies at the state and local level that are meant to achieve this goal. These include:

- Increasing compensation to workers in the form of triple damages
- Increasing civil fines against employers
- Taking away the violator’s license to do business
- Criminalizing wage theft, including making it punishable by jail time

In addition, states can improve the ability of workers who have experienced wage theft to achieve representation and redress, in particular by:

- Allowing workers to recover attorneys' fees and costs in litigation
- Lengthening the time limits within which workers must file their claims so that workers can recover all wages owed

These measures, combined with hard-hitting enforcement, can move whole industries to become more law-abiding.

1. Triple Damages: Meaningful costs to deter violations of wage and hour laws

NELP
Top Pick



The Policy

Compensation to workers who have experienced wage theft should be high enough to make it worth the trouble to make a complaint and to deter violations in the future. Triple (or “treble”) damages laws force the employer to pay the worker three times the amount of wages owed but not paid. These laws often apply both in private lawsuits and agency claims for unpaid wages.

How Does the Policy Work?

Given the often small amounts of money that are at stake when low-wage workers are underpaid, the imposition of at least treble damages is vital to compensate and deter violations. It punishes lawbreakers by making them directly liable to workers in an amount that will make them think twice about breaking the law in the future.

This strategy has the greatest potential to impact compliance with minimum wage and wage payment laws in states with a strong private right of action for workers who have not been paid the wages that they are owed, or with an enforcement agency that is aggressive in pursuing available damages in administrative wage claims. It is least effective for employers who are under-capitalized or whose assets might be hard to reach.

What Are the Challenges to Achieving This Policy?

The best state laws require treble damages in all wage claims. However, some state legislators may seek to introduce exceptions and additional conditions, for instance:

- Requiring workers to show that an employer’s minimum wage or wage payment violation was willful or flagrant before imposing treble damages
- Making the imposition of treble damages non-mandatory, or leaving it to the discretion of the court or administrative agency
- Imposing treble damages only when the employer is a prior offender
- Imposing treble damages only after the employer fails to satisfy a judgment for unpaid wages

These burdens will make the damages less effective as a deterrent and require more investment on the worker’s part to recover wages that are likely way past due.

Which States Provide for Treble Damages for Wage Violations?

Five states impose treble damages in minimum wage claims: Arizona, Idaho, Massachusetts, New Mexico and Ohio. Ten states allow for treble damages in other wage claims: Arizona, Idaho, Maine, Maryland, Massachusetts, Michigan, Nebraska, North Dakota, Vermont and West Virginia (with some limitations).

Recent Campaigns

In Miami-Dade County in Florida, a coalition of advocates including Florida Legal Services, the Florida Immigrant Advocacy Coalition, the Florida Immigration Coalition and South Florida Interfaith Worker Justice won passage of a broad anti-wage theft ordinance in 2010 that included triple damages for wage theft violations.

In New York, Make the Road New York introduced an omnibus bill addressing various issues related to wage theft in 2010. An award of triple damages for wage theft violations was included in the original bill, but did not make it into the final bill that was signed into law in December 2010.



Model Legislation for Treble Damages for Unpaid Wages

Based on Arizona law at A.R.S. § 23-364(G)

Any employer who fails to pay the wages required under law or agreement with an employee shall be required to pay the employee the balance of the wages owed, including interest thereon, and an additional amount equal to twice the underpaid wages. The department of labor and the courts shall have the authority to order payment of such unpaid wages and other amounts.

2. Stop the Clock: Ensure that workers have time to bring wage theft claims

Background: The Statute of Limitations

A statute of limitations is a deadline within which to bring a legal action. After the deadline has expired, workers lose the right to make a complaint. This has proven to be a major obstacle to pursuing compensation for wage theft. That is because workers, particularly in low-wage industries, often do not know their legal rights or when those rights have been violated, or hesitate to file claims for fear of retaliation. Moreover, many employers string workers along, claiming they do not have the money on hand but promising to pay them later. When workers fail to assert their rights on time, the clock runs out, leaving them without recourse and unable to recover the back wages and damages they are owed.

Statutes of limitations also apply to agency claims. Even strong labor departments can take a long time to initiate and conduct wage claim investigations. Reports have criticized the U.S. Department of Labor for backlogs and delays in investigating complaints, sometimes as long as six months to a year or more.⁸ When workers have violations that extend back longer than that timeframe, the statute of limitations means that some wages become unrecoverable every day that the agency takes to complete its investigation. In other words, workers can lose thousands of dollars of unpaid wages while their claim sits on someone's desk.

The Policy

Lengthening the Statute of Limitations

A typical statute of limitations for minimum wage and wage payment laws is 2 to 3 years. But some states have extended their statute of limitations—to as many as 4 to 6 years—giving workers a longer timeframe to initiate a wage claim. States can also provide a statute of limitations that expressly recognizes continuing violations for longer recovery periods. These measures protect workers who may delay filing wage claims because they do not know their rights, are afraid to come forward, or see complaints as a last resort.

Suspending the Statute of Limitations

State law can suspend (or “toll”) both the administrative and private lawsuit statute of limitations when a worker files a wage claim with the state department of labor. In states that have done so, the time spent investigating the case does not count against the deadline, until the claim is resolved or removed from the administrative process. Suspending the statute of limitations for the agency claim protects workers from the risk

of collecting only a fraction of the back wages they would have been able to collect at the time the complaint was filed. Suspending the statute of limitations for lawsuits preserves the right of workers to pursue a claim on their own against an employer.

How Does the Policy Work?

Extending and suspending the statute of limitations is an effective policy to ensure that workers' valid wage claims do not expire, help workers collect all back wages owed, preserve workers' rights to pursue a lawsuit, and give state agencies sufficient time to investigate claims. This measure benefits all workers. In particular, it is effective for workers who do not know at first that their rights have been violated, who are afraid to exercise their rights, who decide to tolerate underpayment of wages for some time, or who prefer informal resolutions and view legal recourse as a last resort.

On the agency front, suspending the statute of limitations addresses well-known issues of backlogs and inefficiency in investigating claims. For instance, a U.S. Government Accountability Office (GAO) report on the federal Department of Labor (DOL) enforcement of wage and hour laws pointed to significant delays in investigating complaints, complaints not recorded in the WHD database, and a poor complaint intake process.⁹ Inefficiencies and backlogs prevent many state agencies from initiating investigations until 6 months and sometimes much longer after a complaint is received.¹⁰

What Are the Challenges to Achieving This Policy?

The primary challenge advocates will face in extending and tolling the statute of limitations in their state will come from employers who fear exposure to higher damages and a greater risk of lawsuits based on old complaints. They may argue that the longer it takes for a claim to be brought the greater the danger that relevant evidence has been destroyed or altered and that the parties' memories are weaker, and that therefore court resources may be spent on weak claims.

Advocates can respond by pointing out that these policies would actually be more likely to *decrease* litigation against employers by allowing more time for the agency wage claim process, investigation, and determination of the merits of a claim.

Advocates may also develop allies in their state labor agencies who support extending or tolling the statute of limitations because it would take some pressure off them and allow more time for the administrative wage claim process.

Which States Lengthen or Suspend the Statute of Limitations for Wage Claims?

Extending the Statute of Limitations

The following states provide for an extended statute of limitations for minimum wage or other wage lawsuits¹¹:

- California: 3-year statute of limitations for minimum wage suits, 4 years in wage payment suits upon a written contract, and 2 years in wage payment suits upon an oral contract (Cal. C.C.P. § 337-339).
- Florida: 4 years in minimum wage suits, 5 years if the violation was willful (F.S.A. Const. Art. 10 § 24).
- New York: 6 years in unpaid wage lawsuits (NY Lab Law § 198(3)).
- Oregon: 6 years for all wage lawsuits except overtime claims (2 years) (Or. Rev. Stat. § 12.080).
- Washington: 3 years in claims of unpaid wages upon an oral contract and 6 years in claims of unpaid wages upon a written contract (R.C.W. 4.16.040(1) & 4.14.080).

Tolling or Suspending Deadlines

- Ohio provides for suspending a statute of limitations for 3 years after the violation, 3 years after the violation ceased if it was a continuing violation, or one year after the final disposition of an agency case, whichever is later (OH Const. Art. II, § 34a).
- Washington provides that the statute of limitations for lawsuit is tolled during agency investigation of a wage complaint. It explicitly defines that the investigation begins when the wage complaint is filed and ends after the final disposition of the case (R.C.W. 49.48.083).
- Arizona tolls the statute of limitations for lawsuit during any investigation of an employer. Arizona law also explicitly states that a civil action may include all violations that are part of a continuing course of conduct regardless of the date they occur (A.R.S. § 23-364).
- New Mexico provides that the statute of limitations for a lawsuit should be tolled during agency investigation of an employer (N.M.S.A. 1978 § 37-1-5).

Recent Campaigns

A coalition including Columbia Legal Services, CASA Latina, and the Washington State Labor Council won a set of changes to the administration of state wage law in Washington State in 2010. These changes included a provision that tolled the statute of limitations during the investigation of a wage complaint. The investigation begins on the date the employee files the wage complaint and terminates when a final decision is reached or the complaint is revoked by the worker.

Make the Road New York's wage theft bill, which was signed into New York state law in 2010, includes a provision suspending the statute of limitation from the date a worker files a wage claim with the New York State department of labor until the conclusion of the investigation.



Model Legislation Tolling (Suspending) and Extending Statute of Limitations in Wage Claims

Extending the statute of limitations

Based on New York law at N.Y. Lab. Law § 198

Notwithstanding any other provision of law, an action to recover upon a liability imposed... must be commenced within six years. All employees shall have the right to recover full wages, benefits and wage supplements accrued during the six years previous to the commencing of such action, whether such action is instituted by the employee or by the commissioner.

Tolling and continuing violations

Based on Ohio Law at OH Const. Art. II, § 34.a (Excerpted)

An action for equitable and monetary relief may be brought against an employer by the attorney general and/or an employee or person acting on behalf of an employee or all similarly situated employees in any court of competent jurisdiction ...for any violation of this section or any law or regulation implementing its provisions within three years of the violation or of when the violation ceased if it was of a continuing nature, or within one year after notification to the employee of final disposition by the state of a complaint for the same violation, whichever is later.

3. Revoke Business Licenses: A strong tool to increase employer compliance



The Policy

Most businesses require some kind of license to keep their doors open. For some, it can be as simple as a city-issued business license with virtually no rules on compliance. For other industries, regulation is much more detailed and more closely monitored, as with liquor licenses or health permits.

One way to raise compliance with wage and hour laws is to require employers to disclose any outstanding wages owed and judgments or orders of unpaid wages, and to pay all wages due, as a condition for issuance or renewal of business licenses or registrations.

How Does the Policy Work?

This policy can be a powerful way to set industry-wide standards, requiring not just individual employers but the entire industry to be in compliance with employment laws as a condition for doing business. This method can be effective in industries where a license or registration is a prerequisite for operation, such as a license for farm labor contractor or garment manufacturer. It can also work well where a license is a significant source of revenue for the business, such as a liquor license for restaurants.

Requiring compliance with wage and hour laws as part of the licensing requirement can be an effective way to change employers' behavior. For instance, after the New York State Department of Labor shared the finding of a steeplechase trainer's overtime violations of his backstretch workers, the New York State Racing and Wagering Board revoked his license, concluding that he was "financially irresponsible."¹² By revoking a license that is integrally connected to the employer's business, the employer will likely feel that there is no choice other than to comply.

States already impose conditions on the issuance and renewal of business registrations and licenses. These conditions vary depending on the nature of the businesses, but may include, for instance, the review of an applicant's character, responsibility and competency, compliance with local, state and federal laws and regulations, and promotion of the public interest. For example, in New York State, a failure to pay court-ordered child support constitutes sufficient cause for revocation of a liquor license. Accordingly, licensing requirements may be amended to include compliance with state and federal employment and labor laws.

What Are the Challenges to Achieving This Policy?

Advocates need to conduct careful research before deciding to use the licensing strategy. In some circumstances, the state or local agency that issues a permit or license may not have the legal authority to regulate employers' satisfaction of unpaid wages and compliance with the wage and hour laws.

When deciding which business license to condition, advocates should consider a license that is essential for the employer's business operation, for it will create a stronger incentive to comply with the law.

Finally, advocates should engage in discussions with the licensing agency to make sure it has the will and the resources to take on added verification and enforcement duties, including progressive steps toward license revocation such as probationary licenses or suspension periods. An employer statement that it is in compliance, especially after a court or agency has ordered the employer to pay wages owed, should not be sufficient to show that the employer has mended its ways.

Because this strategy targets employers' operating permits or licenses, there will be opposition from the business community. Opponents will try to frame the proposed measure as harmful to economic recovery and job creation, and therefore ultimately harmful to workers. Advocates can argue in reply that the measure supports recovery, as the tens of millions of dollars workers lose to wage theft represents lost consumer buying power and money that would be spent in the economy.

Which States Provide for Potential License Revocation for Law-Breaking Employers?

Examples where license issuance or renewal is conditioned on compliance with wage and hours law are scattered and may operate at the city rather than state level.

In San Francisco, the local Minimum Wage Ordinance allows the Living Wage/Living Health Division of the Office of Contract Administration to request city agencies to revoke or suspend any registration certificates, permits or licenses held or requested by the employer until a wage and hour violation is remedied (San Francisco Admin. Code, Ch. 12 R).

Most states with farm labor contractor laws suspend contractor licenses for those who have violated the law. The California Labor Code also requires garment manufacturers to disclose in their new and renewal applications for license or registration any outstanding judgments involving unpaid wages. California also requires the Labor Commissioner to deny applications that show outstanding judgments unless the applicant submits a bond or a cash deposit sufficient to cover all unpaid judgments. (See wage bond section in Chapter 9).

Recent Campaigns

Advocates across the country are exploring the use of licensing to bring employers into compliance with wage and hour laws.

In 2008, the Restaurant Opportunities Center of New York (ROC-NY) introduced the Responsible Restaurant Act in the New York City Council, providing the city with a process to consider employment law violations when granting operating licenses to restaurants; the bill is still pending.

In Los Angeles, a broad coalition of community and legal groups, including worker leaders, is developing a wage theft ordinance that includes the licensing strategy. The proposal will likely require businesses with more than \$100,000 in revenue to obtain a wage theft and tax compliance permit from the City of Los Angeles. The City of Los Angeles would have the authority to revoke a person's wage theft and tax compliance permit if the person is found to be in violation of any provision of the ordinance.



Model Legislation Providing for License Revocation

Based on San Francisco Admin. Code § 12R7(b)

Where prompt compliance is not forthcoming, the Agency may take any appropriate enforcement action to secure compliance, including initiating a civil action pursuant to ..., except where prohibited by state or federal law, requesting that City agencies or departments revoke or suspend any registration certificates, permits or licenses held or requested by the Employer or person until such time as the violation is remedied.

4. Pay When Due: Deterring late payment of wages

The Policy

Late payment is an aspect of wage theft that is separate from non-payment and serious in its own right. When wages are paid late, workers may themselves be subject to late payment penalties, court action for unpaid bills, or lose access to telephone service, electricity, insurance, or even cars and homes.

Late payment takes two forms in particular. First, many employers chronically pay wages late, choosing to give priority to other business expenses. Others use a termination or a quit of a job to defer wage payments, in the hope that departing workers will not bother to retrieve their last paycheck.

To deter and punish these practices, a number of states make employers pay extra to workers who are paid late. Agency fines and criminal penalties are on the books in certain states as well. Another option is to impose a short pay period for workers who quit or are terminated.

How Does the Policy Work?

The most effective form of late payment penalty is a separate fine that employers must pay to workers who have not been paid on time, supplementary to the overdue wages. The penalties are best designed as a separate violation or in combination with other penalties for non-payment (such as triple damages). Pay interval compensation, one way to design these penalties, can be a powerful deterrent to chronic late payment of wages. The federal Seafarer's Act penalty of two days' wages for each day payment is delayed is credited for virtually eliminating wage theft by shipowners.¹³

Some states impose criminal penalties for failure to pay on time, but in practice these are less likely to be pursued by prosecutors. Other states impose agency fines for failure to pay on time, but these, too, are less likely to be pursued by personnel-strapped agencies except in combination with a simple claim for non-payment of wages.

Requiring prompt payment of outstanding wages to workers who quit or are terminated from their jobs is the best way to combat late payment and non-payment in those circumstances. It is especially useful for workers engaged in day labor construction or agriculture where the employer moves frequently from workplace to workplace, or for workers who do so themselves, for instance relocating to other cities on a temporary basis in search of jobs.

What Are the Challenges to Achieving This Policy?

Employers may argue that a late payment penalty imposes too high a burden on employers, particularly when it is combined with other penalties like triple damages. Advocates should consider the problems to be addressed and the purpose behind each penalty that they propose, and be ready to argue that compensation for late payment addresses a substantively different problem than compensation for non-payment.

Which States Provide Penalties for Late Payment of Wages?

Forty-three states require that workers be paid at a particular interval, either monthly or bi-weekly. However, in order to ensure that last paychecks are received, some state laws require that workers who are terminated or who quit their jobs receive pay in a shorter time period, usually one to three days.

In 18 states (Alaska, Arizona, California, Colorado, Connecticut, District of Columbia, Massachusetts, Michigan, Minnesota, Missouri, Montana, New Hampshire, Nevada, Oregon, Utah, Vermont, Virginia and West Virginia) a final paycheck must be paid between one and 3 days after a worker is terminated. In the District of Columbia and Nevada, final paychecks must be issued within a week of when a worker quits his or her job.

Most states have laws providing for a particular pay interval, typically one month or every two weeks. Only Alabama, Florida, Georgia, Mississippi, Nebraska and South Carolina have no mandatory pay periods. While many states allow for penalty wages or liquidated damages for unpaid wages, and their statutes also cover failure to pay on time, only a few states have separate laws providing for separate damages for late payment violations. For example, Idaho law provides for a monetary penalty for an employer's failure to pay on time, which is calculated on a daily basis for up to fifteen days, or a total of \$750, whichever is less. Under Idaho law, in non-payment cases a worker may claim treble damages, and must choose one over the other. But in California, these damages are *in addition* to damages owed to workers for non-payment of wages.

continued on page 30



Model Legislation on Penalties for Pay Interval Violations

Example 1

Based on California law at Cal. Labor Code § 203

If an employer willfully fails to pay, without abatement or reduction ... any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days. An employee who secretes or absents himself or herself to avoid payment to him or her, or who refuses to receive the payment when fully tendered to him or her, including any penalty then accrued under this section, is not entitled to any benefit under this section for the time during which he or she so avoids payment.

Example 2

Based on Agricultural Worker Protection Act at 29 U.S.C. §§ 1832(a) and 1854(c)(1)

Each [employer] which employs any [worker] shall pay the wages owed to such worker when due.

If the court finds that the respondent has intentionally violated any provision of this chapter or any regulation under this chapter, it may award ... statutory damages of up to \$500 per plaintiff per violation.

5. Award Attorney's Fees To Plaintiffs: Encourage lawyers to help workers file lawsuits

NELP
Top Pick

A green starburst badge with a white checkmark inside, containing the text 'NELP Top Pick'.

The Policy

States can enable workers to bring wage theft claims by adding a reasonable amount for attorney's fees and other costs of litigation to the damages that a worker receives when he or she prevails in a lawsuit against her employer. The best provisions will make an award for fees and costs mandatory rather than leaving it to the discretion of the judge.

The high cost of legal representation is a significant barrier to workers achieving redress for wage theft by means of a lawsuit. Low-wage workers are almost never able to pay for the costs, and although some lawyers accept cases on a contingency basis (where the lawyer's fee is a percentage of whatever final amount of back wages and other damages is recovered), the relatively small sums of money at issue in many claims brought by low-wage workers may not be sufficient to compensate a lawyer fully for his or her time.

In Washington state, a civil legal needs assessment performed under the direction of the state Bar Association found that only half of low-income people with employment problems were able to get advice or representation from an attorney.¹⁴

How Does the Policy Work?

This policy is most effective when payment of fees and costs to is automatic to workers who win their case. Most state minimum wage laws permit lawsuits brought directly by workers against their employers, and for attorney's fees. Most states also provide for attorney's fees in their wage payment law. Worker recovery of attorney's fees and other court costs should be incorporated into any efforts to raise the state minimum wage or to enact a new private right of action under the state minimum wage or wage payment laws. This will help to ensure that the right created is meaningful.

What Are the Challenges to Achieving This Policy?

Some legislators will argue that if attorney's fees and costs are to be awarded to a prevailing plaintiff then they should also be available to prevailing defendants. Advocates should resist this approach. Even the remote possibility that they might become liable for the fees and costs incurred by their employer is likely to dissuade many low-wage workers from bringing suit in the first place. Moreover, federal law only permits plaintiffs to recover fees, and it should set a floor for attorney's fee provisions in state law.¹⁵

Which States Provide for Attorney's Fees and Costs in Wage Litigation?

The states listed below make a specific provision for the award of attorney's fees and/or costs to a prevailing plaintiff in unpaid wage cases, on either a mandatory or discretionary basis. In addition, some states may have general laws or court rules that govern the awarding of fees or costs to prevailing parties in all lawsuits.

Forty states provide for an award of attorney's fees to a prevailing plaintiff under the state minimum wage law:

- Fees *must* be awarded in Alaska, Arizona, California, Delaware, District of Columbia, Florida, Hawaii, Indiana, Iowa, Maine, Massachusetts, Minnesota, Montana, Nebraska, New Mexico, Ohio, Oklahoma, Texas, Vermont and Wyoming.
- Fees *may* be awarded in Arkansas, Connecticut, Georgia, Idaho, Illinois, Kansas, Kentucky, Maryland, Michigan, Missouri, New Hampshire, New Jersey, North Carolina, Oregon, Pennsylvania, Rhode Island, Utah, Virginia, Washington and West Virginia.

Thirty-three states provide for an award of attorney's fees to a prevailing plaintiff in a wage payment lawsuit:

- Fees *must* be awarded in California, Delaware, District of Columbia, Hawaii, Illinois, Indiana, Iowa, Louisiana, Maine, Massachusetts, Minnesota, Montana, Nebraska, Nevada, Oregon, Pennsylvania, Utah, Vermont, Washington and Wyoming.
- Fees *may* be awarded in Colorado, Connecticut, Florida, Kentucky, Maryland, New Hampshire, New York, North Carolina, Oklahoma, South Carolina, South Dakota, West Virginia and Wisconsin.

In states that mandate or allow the award of attorney's fees to a prevailing plaintiff in wage payment suits, that provision applies under all circumstances, with the following exceptions:

- In Colorado, a fee award to the plaintiff depends on whether the plaintiff recovers a sum greater than the amount already offered by the employer.
- In Oregon a plaintiff is not entitled to fees if he or she willfully violated the employment contract or unreasonably failed to give written notice of his or her wage claim to the employer before filing the action.
- In South Dakota, fees are only available in a wage payment suit brought in small claims court which is removed to magistrate or circuit court.
- In Utah, a plaintiff is only entitled to fees if he or she made a demand for wages (not greater than the amount due) in writing at least 15 days before bringing suit.
- In Wyoming, fees are only available in a suit upon termination of employment.

Forty-three states provide for an award of costs other than attorney fees to a prevailing plaintiff in unpaid wage lawsuits. Some of these laws have unnecessary limitations. For instance:

- In Colorado, an award of costs to the plaintiff in a wage payment action depends on whether the plaintiff recovers a sum greater than the amount tendered by the employer.
- In South Dakota, costs are only available in a wage payment suit brought in small claims court which is removed to magistrate or circuit court.
- In Wyoming, fees are only available in a wage payment suit upon termination of employment.



Model Legislation Awarding Attorney's Fees and Costs

Based on New Jersey law at N.J. S.A. § 34:11-56a25

If any employee is paid by an employer less than the minimum fair wage to which such employee is entitled under the provisions of this act ... such employee may recover costs and such reasonable attorney's fees as may be allowed by the court.

6. Criminal Penalties: Use the full power of the law to crack down on wage theft

The Policy

Nonpayment of wages is stealing and many states recognize this by imposing criminal penalties, including possible jail time, for violations of wage laws. Criminal penalties are in addition to damages paid to workers or fines that companies are ordered to pay by an agency or a court.

There are two ways to implement or increase criminal penalties for errant employers: add criminal penalties to the state wage and hour laws, and amend the state's penal (criminal) code to add criminal penalties. Some proposals make criminal prosecution mandatory in some circumstances.

How Does the Policy Work?

Increasing criminal penalties, or instituting criminal penalties in a state that does not yet have them, can be an important step toward changing employer behavior.¹⁶ Criminal penalties can include fines to be paid into a public fund, restitution to victims of wage theft, and jail sentences.

Criminal penalties have been used most effectively to combat wage theft in two ways. In at least two major cities, New York and Los Angeles, criminal prosecution of employers who break wage and hour laws, coupled with press attention, has contributed to raising public awareness around wage theft as a crime.¹⁷ As a result, employers in targeted industries learn that wage theft is a real and serious crime, and compliance is increased. In other places, advocates have pushed to make wage theft (sometimes called “theft of services” in criminal laws) a routine element of general state criminal law enforcement, in order to reach small-time, chronic violators of wage laws and enlist the broader support of police departments in workers’ struggles.¹⁸ These provisions can be important elements in a larger strategy to convince law enforcement agencies that going after deceitful employers is a part of their job description.

What Are the Challenges to Achieving This Policy?

Neither one of these strategies should be pursued unless advocates are sure that (1) prosecutors are interested and available to use the criminal powers to stop wage theft in a way that helps workers, and (2) prosecutors will not use the criminal law to also go after low-wage and immigrant workers for other possible violations of immigration or tax laws. Because the second consideration is often difficult to discern, advocates may consider taking the safer route and seek to amend state wage and hour laws to provide for criminal penalties.

If it is to work, the criminal violations strategy must be pursued in parallel with efforts to encourage law enforcement agencies to pursue violations. In particular, workers and advocates must overcome a widespread belief on the part of law enforcement that wage violations are a civil matter. Advocates must also make sure that police and prosecutors understand that the immigration status of the wage theft victim is not relevant to a wage theft claim.

Workers themselves must be made aware of the complications inherent in this strategy. They must understand that criminal penalties are a tool for prosecutors and state agencies—not workers. Workers cannot recover criminal penalties on their own. Only prosecutors have discretion to file criminal complaints and seek criminal remedies. Workers and advocates should be aware that in the criminal system, proving violations of the law is more difficult than in the civil system.

In addition, it can be a challenge to convince legislators that employers who evade wage laws are criminals. Advocates will have to make forceful arguments that emphasize not just the severity of the problem but the adverse consequences for state finances, for example. Researchers in New York found that bringing employers into compliance with wage laws would bring New York state an estimated \$427 million a year in revenue by curbing employment tax avoidance.¹⁹

Which States Provide for Criminal Penalties for Wage Theft?

Thirty states and the District of Columbia have criminal penalties for unpaid wages in their state wage and hour laws: Alaska, California, Colorado, District of Columbia, Georgia, Hawaii, Illinois, Indiana, Maryland, Mississippi, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Rhode Island, South Dakota, Texas, Utah, Virginia, Washington, West Virginia and Wisconsin. In some states, a violation of any order of the labor commissioner is a misdemeanor (e.g., K.S.A. § 44-618).

Thirty-eight states and the District of Columbia already have a theft of services provision in criminal law: Alabama, Alaska, Arizona, Arkansas, California, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Maine, Maryland, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia and Wyoming.

Recent Campaigns

Many organizations have given thought to ways in which criminal penalties can be enhanced or made a routine part of the enforcement model, so that their deterrent effects can be used effectively. In New Orleans, the Congress of Day Laborers at the New Orleans

Worker Center for Racial Justice is developing city-level legislation that would require police to issue a summons against employers in wage theft cases and to protect workers from retaliatory counter-reports by employers. A broad coalition of community and legal groups in Los Angeles is working to introduce an ordinance that would require police to investigate all cases of wage theft. The Illinois Just Pay Coalition recently won passage of increased criminal penalties in the Illinois' wage and hour laws.



Model Legislation Providing for Criminal Penalties for State Wage and Hour Laws

Based on Illinois law at 820 ILCS 115/14(a-5)

In addition to the remedies provided in subsections ... any employer or any agent of an employer, who, being able to pay wages, final compensation, or wage supplements and being under a duty to pay, willfully refuses to pay... or falsely denies the amount or validity thereof or that the same is due, with intent to secure for himself or other person any underpayment of such indebtedness or with intent to annoy, harass, oppress, hinder, delay or defraud the person to whom such indebtedness is due, upon conviction, is guilty of:

1. for unpaid wages, final compensation or wage supplements in the amount of \$5,000 or less, a Class B misdemeanor; or
2. for unpaid wages, final compensation or wage supplements in the amount of more than \$5,000, a Class A misdemeanor;

Each day during which any violation ... continues shall constitute a separate and distinct offense.

Any employer or agent of an employer who violates this Section ... a subsequent time within 2 years of a prior criminal conviction under this Section is guilty, upon conviction, of a Class 4 felony.

4

Make Government Agencies Effective Enforcers of the Law

Public agencies, including federal and state departments of labor (DOLs) and state Attorneys General (AGs), can be powerful allies in efforts to enforce and improve just pay laws.²⁰ Even in times of tight budgets, public agencies have resources and are charged with ensuring that workers get paid properly. They can help create lasting change in employer behavior if the right approaches are pursued. In addition they can use the media to publicize enforcement actions and communicate to employers that breaking basic wage and hour laws will have consequences.

Because DOLs and AGs can be under-resourced, out-of-touch, or even hostile to low-wage workers, many worker advocates have not worked with these agencies. In recent years, with more aggressive state and now federal enforcement activity, advocates have begun to reach out to state DOLs and AGs and see the potential for collaboration and partnerships. This chapter lists potential reform strategies groups may want to pursue with their state enforcement agencies, including local offices of the US Department of Labor (USDOL), and provides model language from successful campaigns.

Most states have at least one public entity responsible for enforcing minimum wage, overtime and wage payment laws, and many states have several, including: state DOLs, state Attorneys General (AGs), and local USDOL offices.²¹ County and city prosecutors may also be persuaded to bring criminal actions against wage theft violators, but they are

not the focus of this chapter. Advocates should reach out to all agencies with jurisdiction or power to enforce wage theft laws in their state, because no one agency can do it alone, and because agency activity and capacity vary from state to state.

These state-based efforts can dovetail nicely with national efforts by worker advocates to revitalize the USDOL in the states. For much of the last decade workers went without an active partner in the USDOL. But with the change in administration after the 2008 election, the USDOL has begun to swing around. NELP's *Just Pay* report, developed with allies from around the country, and our just-released *Collaborating with the USDOL to Recover Unpaid Wages: An Advocate's Toolkit*, are useful resources to get a start on collaborations.²²

These campaigns may not be easy, or even possible in some jurisdictions. It is important to first assess the likelihood of a positive response from the agencies. Sometimes this takes several attempts, and sometimes it requires seeking help from the USDOL or a state legislator or governor's office if the federal or state district office is not responsive. In addition, some advocates have found that agencies may use the other agencies to elude complaints, whereby state DOLs refer workers to the USDOL and vice versa. Any worker advocate considering reaching out to the state or federal DOL or State AG to encourage strategic enforcement must be prepared for these responses and bring positive counter-solutions.

Worker advocates should urge these agencies to fulfill their mission of protecting our nation's workers, while at the same time offer to help the agencies do a good job. Doing so may require the agencies to overhaul their approaches and enforcement missions to respond to the modern economy. Efforts of private advocates, while important and often significant, are necessarily piecemeal and cannot provide the coherence needed to tackle the deeply-entrenched wage violations across too many industries. Now is the time to take action with your agencies. The USDOL and some state departments of labor have expressed a desire to place a new emphasis on strategic enforcement that squarely attacks the wage theft that now pervades low-wage industries.

1. Community Input and Collaboration: Draw on grassroots knowledge for smart enforcement



The Policy

Workers' advocates and stakeholders including worker centers, labor unions, employment lawyers and high-road employers have substantial expertise about violations in our nation's workplaces. State agencies should build and strengthen relationships with these constituents to ensure enforcement resources are being used strategically and efficiently, and to have a directed impact on the communities and employers that most need attention.

To this end, advocates should encourage state agencies to implement structural changes to their enforcement approach, including:

- Conferring regularly with advocates, state enforcement agencies, and other stakeholders to discover community needs and to work out partnerships, where groups help the agency do their job better and with more impact.
- Convening task forces on specific problem areas or industries, inviting workers' advocates and stakeholders to share information and participate in other appropriate ways.
- Designating staff to act as liaisons to immigrant worker groups, attend events and act as a resource.²³
- Implementing community-safeguarding models that designate certain stakeholders to educate the community about the agencies' priorities and policies, especially in underserved areas.

How Does the Policy Work?

Collaborative relationships with advocates can heighten the agencies' impact by reaching out to diverse communities affected by minimum wage and overtime violations, spreading awareness of the agencies' labor standards enforcement activities, and ultimately rebuilding trust in government enforcement as a viable path for workers.

The stakeholder groups become the "eyes and ears" of the agencies and can help with media attention and education, increasing employer awareness and amplifying public attention to high-impact enforcement actions.

For these inputs to work, groups and agencies must establish an ongoing series of interactions. Priorities change, staff turns over, and it is only with sustained and consistent communication between agency staff and groups that community-based enforcement feedback can be effective.

What Are the Challenges to Achieving This Policy?

Public agencies are typically under-resourced and overburdened by complaint backlogs, a myriad of laws to enforce, and pressure to show results. Attending additional meetings with outside stakeholders may seem like the last thing the agency staff wants to spend time on. In addition, if community groups have historically had no relationship or even a hostile approach to the public agency, the agency may be reluctant to open its doors and spend its time with them.

In cases where there are state or local agencies charged with enforcing minimum wage and hour laws, USDOL offices are sometimes content to refer thorny or difficult claims to those agencies. Advocates should be prepared to urge a broad-based collaboration between themselves, USDOL and state or local enforcement powers to maximize the potential for change.

Groups should promote their proposals for community input meetings as “win-win” efforts, where the agencies get assistance with fact investigations and tips for targeting violators and the groups achieve compliance assistance in the industries they care most about. Advocates may also want to point to other benefits of collaboration, such as directing positive media attention to the agency’s targeted enforcement successes, and helping the agency make the case to the state legislature and governor that it is succeeding in its job (and even needs more resources, as discussed below in Section 3).

Which Agencies Make a Practice of Community Collaboration?

The US Department of Labor has established a two-person office to act as liaisons with community and immigrant groups, to enhance community input into the enforcement decisions of the DOL.

The New York State DOL has designated the Bureau of Immigrant Workers’ Rights to more effectively communicate and collaborate with community groups in immigrant neighborhoods to enhance enforcement of labor standards.²⁴

Recent Campaigns

In 2009, the Just Pay for All coalition in Illinois (comprised of, among others, the Centro de Trabajadores Unidos, the Chicago Workers Collaborative, the Latino Union of Chicago, and the Working Hands Legal Clinic) met with the Illinois state DOL and the state Attorney General for over a year to develop an administrative and legislative set of solutions to increase enforcement of wage and hour rules. The resulting anti-wage theft law, SB 3568, was a resounding success, incorporating both increased civil and criminal penalties and creating an agency-level small claims process. These reforms will help workers resolve their wage theft claims more efficiently and effectively.

In 2010, National People’s Action (NPA) negotiated a Memorandum of Understanding (MOU) with USDOL and held five regional meetings around the country with state DOLs, state Attorneys General and USDOL to launch community-government collaborations on wage justice issues for low-wage workers.²⁵

2. Targeted and Affirmative Enforcement: Agencies should not wait for complaints

The Policy

State agencies often over-rely on individual worker complaints to drive enforcement activities, and often handle complaints only when pressured by legislators and others to handle complaints. These individual-by-individual complaint systems have come under intense scrutiny and criticism at the federal level, particularly thanks to a series of reports in 2008 and 2009 by the GAO that reviewed the WHD complaint system.²⁶ The reports can be helpful to advocates seeking better systems as a reminder to the USDOL and the state DOLs that claims processes matter.

At the federal level, the USDOL's Wage and Hour Division (WHD) receives tens of thousands of complaints each year from workers claiming unpaid wages. But its enforcement has lagged over time. In 1998, the WHD pursued claims filed by more than 35,000 workers and initiated an additional 16,262 claims of its own. In 2007, however, the agency pursued only 22,374 workers' complaints and initiated only 7,210 claims on its own.²⁷ Moreover, while the department has recently hired over 250 new investigators in the past year, there are never enough investigators to cover all workplaces.

Advocates should encourage agencies to affirmatively target and investigate high-violation industries, regardless of whether individual workers complain. Because enforcement resources are scarce, agencies should use “smart enforcement” strategies and take a multi-pronged, affirmative approach to wage theft, including unannounced audits, strategic attention to problem industries, and aggressive use of all tools available to the agency.

How Does the Policy Work?

The “smart enforcement” approach should include a review and updating of the agency's enforcement priorities, looking at both substantive problems in jobs as well as strategies for addressing those problems. By gathering information about persistent wage and hour violations, consulting with experts in the field and designing enforcement activities modeled on successes from the states and from prior USDOL activities that are aimed at changing lawbreakers' tactics, the agencies can move toward a comprehensive and coherent enforcement system that sends a strong message and gets results.

Agencies should expand or begin efforts to launch proactive investigations in top priority areas. They can do this by:

-
- Identifying substantive violation priorities (such as minimum wage violations or independent contractor abuses) by reviewing internal databases, consultants' reports, and information from national and field offices regarding persistent violators.
 - Identifying industries marked by rampant fair pay violations by consulting with workers' advocates and other labor standards enforcers and by looking at research studies, like *Broken Laws, Unprotected Workers*,²⁸ a rigorous random sample survey of violations in New York, Chicago and Los Angeles, and university-based studies that highlight industries in need of targeted enforcement efforts.²⁹
 - Conducting unannounced sweeps and investigations in priority industries and regions to uncover violations and send the message that the agency is on the lookout for abuses.

What Are the Challenges to Achieving This Policy?

Public agencies are often measured by the number of individual complaints they handle and the total amount of unpaid wages they collect in a year. Targeted auditing and investigations often do not count toward measures of effectiveness. Agencies may therefore object on grounds that they must keep their complaint-handling and recovered back wages cases up. Sometimes these cases are brought by higher-paid workers owed prevailing wages on public works projects or white-collar workers with underpaid overtime wages. Low-wage worker advocates will have to work with agencies to ensure that the measure of successful enforcement also includes the “smart enforcement” approaches outlined in this section that may not recover as many dollars of unpaid wages, but will go far to enhance compliance by employers in those industries.

Directing positive media attention to the agency's targeted enforcement successes can help, as can helping the agency make the case to the state legislature and the governor that the agency is doing its job, or supporting its case for more resources.

Which Agencies Have Used a “Smart Enforcement” Approach?

In the early 2000's, USDOL commissioned a study that identified approximately 30 high-risk industries marked by a large number of vulnerable workers, a high percentage of workers likely to be underpaid and significant underpayments in violation of the law. The intent was to use the study's results to assist USDOL in targeting its strategic enforcement efforts. The Department is currently working to upgrade its database of complaints, to provide it with better indications of where heavy violations occur. In the past, USDOL targeted the garment industry in its “No Sweat” campaign, and it has this year announced that it will target the janitorial and health care industries among other high-violation sectors.

In New York, the state Department of Labor recently targeted the car wash industry³⁰ and has conducted high-profile sweeps in the construction and racetrack sectors. In Massachusetts, the state Attorney General has targeted a number of different industries over the years, including construction, temporary service industries, and building services. These states accompanied their targeted enforcement activities with aggressive media campaigns to send the word out to employers that the agencies were watching.

Recent Campaigns

In the fall of 2006, a coalition of community groups and legal services providers in New York released a blueprint for administrative and regulatory reforms at the state Department of Labor, in anticipation of the incoming Spitzer administration and its commitment to enforcing wage and hour laws. During the next several years, the blueprint served as an agenda for the coalition, the Campaign to End Wage Theft, in advocating for specific reforms and working with state Department of Labor in implementing them.³¹

3. More Agency Funding: Beef up enforcement to match the scale of the problem



The Policy

Most state enforcement agencies are woefully under-resourced, with low budgets and insufficient numbers of investigators. As an initial part of any wage justice campaign, advocates should consider seeking more money in the state budget for agency enforcement and hiring more investigators. Advocates should also consider seeking increases in the number of dedicated investigators specifically assigned to wage and hour cases.

In addition to seeking higher budget allocations, advocates may also consider pushing for earmarking for enforcement agencies civil penalties collected in wage theft cases.

How Does the Policy Work?

Data from a number of nationwide surveys shows an astonishingly low number of investigators in state and federal enforcement of wage and hour rules. State agencies have fewer than 1,000 investigators; if these are added to the approximately 1200 wage and hour investigators at USDOL, this is a paltry number to enforce baseline workplace standards for an estimated population of approximately 87.7 million covered workers.³²

In addition, many investigators in wage and hour divisions are charged with covering a multitude of laws: not only minimum wage and overtime, but prevailing wage laws on publicly-funded projects, as well as child labor and often other laws like family and medical leave and polygraph protection laws. This means investigators are not solely enforcing minimum wage and overtime protections, and can get consumed by claims or cases under other laws.

Advocates should push for straightforward budget allocations in their state legislatures, but may also seek mandatory minimum civil penalties and mechanisms that direct the collected fines back to enforcement operations.

Advocates should consider requiring a mandatory minimum civil penalty or fine that is not tied to the amount of the claim so that even small wage violators will be deterred from violating wage theft laws again in the future. The penalties collected could be dedicated towards funding more enforcement. Some states are using these fines to help fund wage-and-hour enforcement. Of course, these fines should only be collected after workers are paid, especially if employers have limited resources.

What Are the Challenges to Achieving This Policy?

In trying economic times, demands for more funding will meet opposition. Advocates can argue that the investment in enforcement for wage theft will bring in much-needed payroll and tax revenues, citing studies showing the high costs to states of independent contractor and off-the-books treatment, among others.³³

To make the case for more investigators, and for more investigators specifically assigned to minimum wage and overtime enforcement, advocates should point to recent studies showing severe depletions in staffing over the last decades.³⁴ Researchers at Cornell University and Policy Matters Ohio are currently conducting surveys of state DOL and AG wage theft budgets and activity. Once completed, these surveys may help advocates make the case for more resources in their states.³⁵

Which States Provide for Dedicated Penalties or More Enforcement Resources?

Arizona and San Francisco's Minimum Wage ordinance have dedicated penalties that are to be applied to enforcement of the minimum wage and overtime laws.

Recent Campaigns

In 2009, Policy Matters Ohio and other advocates successfully stopped a legislative attempt to defund the state Department of Commerce's wage and hour enforcement unit, keeping much-needed resources in enforcement and complaint-handling for minimum wage workers by demonstrating the need and importance of combating wage theft in the state and raising the issue squarely in the media and with legislators.



Model Legislation Providing for Dedicated Penalties or More Enforcement Resources

Legislation earmarking collected penalties towards more enforcement

Based on Arizona law at A.R.S. § 23-364(g) (excerpted)

Any employer who fails to pay the wages required under this article shall be required to pay the employee the balance of the wages owed, including interest thereon, and an additional amount equal to twice the underpaid wages.... Civil penalties shall be retained by the agency that recovered them and used to finance activities to enforce this article.

4. Cleaning Up the Complaint Process: Set priorities, timelines and clear procedures

The Policy

Public agencies are often the front-line access point for workers seeking to recover unpaid wages—and for many workers who will not be able to get an attorney to assist them in their claims, they are often the only option.

But state agencies have limited resources and cannot fully investigate all individual complaints. Therefore they must use their resources strategically, with an eye toward engendering greater compliance with wage and hour laws. This will likely require a tiered triage system to sort worker complaints into high-, medium- and low-priority levels, based on strategic enforcement priorities.

Along with the more effective case triage, agencies will need to communicate how their process works, and make clear to the public what they can and cannot do with individual complaints.

How Does the Policy Work?

A simple “First In, First Out” approach to claims processing can have adverse consequences when enforcement resources are scarce. It can result in the elevation of low-priority cases with limited impact, to the detriment of other cases that involve critical issues or have a broader influence.

A number of measures are available for agencies to focus their enforcement activities on the most strategic targets:

- Revise intake and screening processes to ensure incoming claims are properly categorized and prioritized into high-, medium- and low-priority levels based on identified enforcement priorities.
- Treat low-value and low-impact claims with an abridged or summary process to avoid expending significant resources on them. If they cannot be resolved with minimal investigation—for example, a phone call and a letter—the worker should be informed promptly that the agency is unable to pursue the claim, and directed to other enforcement options, including small claims courts or worker clinics, in clear and understandable language.
- Improve communications with workers in the claims process by simplifying complaint procedures and explaining them clearly and publicly on the agency’s website, including by providing a downloadable claim form. The agencies should provide an emergency contact in cases of retaliation, and update workers on the

status of investigations at regular intervals. They should also clearly notify workers on complaint forms that filing a complaint does not stop the clock running on the statute of limitations for bringing a private claim (until this is changed, as discussed in Chapter 3, section 2).

- Refer claims to experienced private wage and hour attorneys via bar associations in a timely manner, when appropriate. This can free up the enforcement resources of agencies. The USDOL announced just such a program in late November.³⁶

To prioritize claims-driven enforcement activity, state agencies should regularly review and update their enforcement priorities to reflect economic and workforce trends, reports from the field and geographic differences. In this way, agencies can develop enforcement priorities that reflect, for example:

1. Whether the claim presents an opportunity for a high-profile and high-impact enforcement action in industries or geographic areas targeted for more intense enforcement. Strategic goals could include targeting specific industries such as day labor or domestic and home work, employer subcontracting or independent contractor misclassification, and whether the violation is likely to affect vulnerable populations such as immigrant workers who are concentrated in sub-par jobs and who would not otherwise complain directly.
2. The seriousness of the violation, based on: the number of workers affected, the amount of back wages and damages at stake, the establishment's history of violations (if any), whether it involves a large national employer, claims involving minors, claims involving trafficking or other egregious violations.
3. The potential to collaborate with worker centers and other stakeholders to reach out to low-wage workers, and to identify high-impact claims involving lower-dollar values or smaller employers, for example, involving day laborers, agricultural employees or domestic workers.
4. Whether retaliation has been threatened or has occurred.

Just as important as installing these procedures is the need for public agencies to clearly communicate their claims process and prioritization systems to workers and the general public. In this way, the agencies will not merely triage incoming claims, but will focus on maximizing their claims-based enforcement efforts to ensure basic labor standards are maintained. Advocates should reinforce this message to the agencies and provide direct feedback from their experiences to illustrate the need for clear communication.

What Are the Challenges to Achieving This Policy?

Worker advocates may worry that a priority-based triage system for handling complaints will exclude small claims for unpaid wages that dominate their membership needs. But smaller individual claims can still be handled by the agency, even with a triage system, if worker advocates can convince the agency that handling a number of individual claims

(even if small) from a targeted industry or occupation can send a strong enforcement message and increase compliance. Advocates should not give up on the priority system simply because their members have small individual claims. Instead they should seek to convince the agency that their industry deserves high priority because of rampant violations.

Small individual claims that do not fall into a priority industry can still be handled in a small claims process. The agencies and employers may complain that any improved worker “check-in” communication procedures and retaliation protections will sap resources away from handling the complaints. Worker advocates should hold firm and remind the agency that the clearer the process and understanding, the more efficient the claims-handling will be.

Which States Provide Simple and Clear Complaint Systems?

New York State DOL has a good three-tiered triage system for handling complaints. Illinois recently passed an innovative and tightened up complaint system that has a special treatment for smaller claims.

The USDOL is about to launch a nationwide attorney referral program for workers to access competent wage and hour attorneys when the USDOL is not going to pursue the claim. This program can be replicated at the state level.



Model Triage Guidelines

New York State Division of Labor Standards

This list identifies cases which should get (A) high priority; (B) regular priority; and (C) abridged treatment:

Supervisors are responsible for ensuring that high priority cases receive heightened and expedited attention. High priority cases will be flagged on the ... system as soon as they come to the attention of the Division. High priority cases are to be completed within six (6) months of the date when the case is docketed. Completed means that they were investigated and either (1) were found to be invalid or unable to be substantiated; (2) a monetary amount has been assessed and collected, or is the subject of a signed payment plan; or (3) a referral has been made for an Order to Comply and/or prosecution. If they are not completed within that time frame, the supervisor will inform the Director of the reason for the delay and provide an expected date for completion. A quarterly report for this purpose is being developed.

It is expected that district staff will contact claimants as necessary to obtain additional information or to inform them of the status of their case. If a high priority case is still under investigation nine (9) months after docketing, the Supervisor will be responsible for ensuring that all workers who have actually filed claims and any organization that referred them are notified of the current case status. A form letter for this purpose will be developed.

Cases identified as high priority cases should be handled in an expedited fashion and should not be treated in a first-in, first-out chronological order.

A. High Priority

1. Case in which the violation affects a group of workers (ten or more).
2. Case in which (a) the employer appears to have widespread violations (affecting much of most of the workforce), *and* (b) the employer falls within a targeted industry (low wage industries with high rates of violations and/or particularly vulnerable workforces such as immigrants). Statewide, such industries include restaurants, supermarkets, car washes, laundry/dry cleaning, agriculture, nail salons, day labor, domestic work, cleaning services/janitorial, tourism, carnivals/county fairs.
3. Case involving one or more minors or trafficking victims.
4. Case involving very large (>100 employees), high profile, or national employer with resources to have personnel/human resources department and which therefore should have been in full compliance.
5. Case involving repeat violators.
6. Case in which some kind of time exigency exists (example: farm workers or county fair workers about to depart; some plant closings).
7. Case in which retaliation occurs against a worker who has given information to the DOL.
8. Case in which the facts of violation are egregious or shocking—case rises to a level that surprises or is striking to the supervising investigator, relative to the majority of cases handled by the Division. (To be used sparingly)

B. Regular Priority—everything else (including commission cases)

C. Abridged Treatment

Wage claims in which:

- a. the total amount of money involved is less than \$250;
- b. the employer has no prior history of violation; and
- c. no additional issues are presented (minimum wage, tip appropriation, etc.).

Such claims will be handled solely in Albany Central Investigation Unit. They will not be sent to the Districts. If they cannot be resolved with two letters and two phone calls to the employer, then either: (a) if the claim is between \$100–\$250 and Central Investigations has enough information to issue an Order to Comply, then Central Investigations will do so; OR (b) the worker will be referred by letter to Small Claims Court.

5. Limited English Proficient Workers: Ensure access to enforcement agencies

The Policy

Immigrant workers are particularly vulnerable to employer abuse across a broad spectrum of industries: foreign-born workers are more than twice as likely as their US-born counterparts to suffer minimum wage violations. Immigrant workers often find their access to agency enforcement mechanisms blocked by their inability to navigate these systems in English. Passing laws that require agencies to accommodate limited-English proficiency (LEP) persons will help guarantee that a state's most vulnerable workers are able to effectively assert their workplace rights. Workers who know that they will receive services in a language that they understand are much more likely to come forward with complaints.

Most state and federal agencies are woefully unprepared to accommodate LEP workers. Most have few staff members who speak other languages and rarely print forms in languages other than English. Federal law protects LEP workers' right to access public services and benefits in any federally-funded activity, yet many agencies are unaware of their obligations and unprepared to meet them. Thus, immigrant workers frequently lack access to the very agencies charged with assisting them in enforcing their rights.

The best solution is to enact a state law that mandates state agencies to take affirmative steps to provide services to LEP persons. As an alternative, good agency LEP practices can be implemented through the issuance of administrative policies and plans.

How Does the Policy Work?

The most effective remedy to address LEP access to agency enforcement is a comprehensive state law explicitly requiring a range of affirmative policies for immigrant worker access. The state law should create an office specifically tasked with ensuring agency compliance with immigrant access. To further ensure compliance, the state law should include a private right of action to sue to enforce individual agency violations of LEP access programs.

If state legislation seems infeasible or the state DOL is approachable, an agency strategy can be pursued. Effective LEP administrative policies lay out a comprehensive plan that identifies language needs in the community, and requires the agency to adequately meet those needs through training and deploying bilingual interpreters and distributing translated written materials. Such plans require that either existing staff or hired interpreters be immediately available for the most commonly-encountered languages.

Although administrative policies are not easily challenged, state laws protecting workers against discrimination on the basis of national origin can be enforced in court. Denying non-English speaking workers access to agency services can be a form of national origin discrimination. The threat of legal action based on anti-discrimination laws can be an effective tool in negotiating with agencies that have failed to provide LEP access to services.

The key to either strategy is for groups to urge a permanent and ongoing collaboration between the agency and affected community groups, providing feedback and communication to the public.

What Are The Challenges to Achieving This Policy?

The most likely argument against passing LEP access legislation or enacting agency reforms will be that it will cost too much. To create an LEP access plan, train staff and potentially hire outside interpreters and translators will undoubtedly cost agencies extra money. The cost, however, is not exorbitant. In 2001, for example, California's Department of Social Services spent a total of \$648,312 to staff an internal team of 13 employees to translate documents into various languages. This is a very small cost relative to an \$18 billion budget. LEP access offices and policies can save agency resources by enabling it to more efficiently handle worker complaints and queries. Furthermore, language access is already federally mandated; if an organization receives public funding, it must make its services available to all of the public. These reforms serve to ensure that state agencies are complying with federal law.

Which States Provide for LEP Access?

In California, the amended Bilingual Services Act requires all state agencies and departments to establish a bilingual services program that develops, implements, coordinates, and monitors a departmental plan, including a procedure for accepting and resolving complaints (Cal Gov. Code §§ 7290-7299.8).

Hawaii's LEP access law created the Office of Language Access, charged with overseeing state agencies' development of a language access plan. The plans must reasonably accommodate non-English speakers, providing for oral interpretation and translation of vital documents when reasonably necessary (HRS §§ 371.31-371.37).

In Massachusetts, the unemployment compensation law requires that all notices and materials be available in English, Spanish, Chinese, Haitian Creole, Italian, Portuguese, Vietnamese, Laotian, Khmer, Russian, and any other language that is the primary language of at least 10,000 or 0.5 percent of all residents of the commonwealth (M.G.L.A. 151A § 62A).

Maryland requires all state agencies to provide services to LEP individuals, and all vital documents to be translated into any language spoken by at least 3 percent of the population within a geographic service area (MD Code State Government §§ 10-1101-1105).

Texas and New Jersey statutes explicitly address bilingual services for Spanish-speaking claimants only (V.T.C.A., Labor Code § 301.064; N.J.S.A. § 34:9A-7.2).



Model Legislation Providing for LEP Access

Based on Hawaii law at HRS § 371.31-31.37

Oral and written language services

- a. Each state agency and all covered entities shall take reasonable steps to ensure meaningful access to services, programs, and activities by limited English proficient persons, which will be determined by a totality of circumstances, including the following factors:
 1. The number or proportion of limited English proficient persons served or encountered in the eligible service population;
 2. The frequency with which limited English proficient persons come in contact with the services, programs, or activities;
 3. The nature and importance of the services, programs, or activities; and
 4. The resources available to the State or covered entity and the costs.
- b. Subject to subsection (a), each state agency and covered entity provide competent, timely oral language services to limited English proficient persons who seek to access services, programs, or activities.
- c. Subject to subsection (a), each state agency and covered entity shall provide written translations of vital documents to limited English proficient persons who seek to access services, programs, or activities, as follows:
 1. Written translations of vital documents for each eligible limited English proficient group that constitutes five per cent or one thousand, whichever is less, of the population of persons eligible to be served or likely to be affected or encountered; or
 2. If there are fewer than fifty persons in a limited English proficient group that reaches the five per cent threshold in paragraph (1), written notice in the primary language to the limited English proficient language group of the right to receive competent oral interpretation of those written materials, free of cost.
- d. To the extent that the State requires additional personnel to provide language services based on the determination set forth in this section, the State shall hire qualified personnel who are bilingual to fill existing, budgeted vacant public contact positions.

Additional obligations

- a. Each state agency and covered entity shall establish a plan for language access....
- b. Each state agency shall designate a language access coordinator who shall establish and implement the plan for language access in consultation with the executive director of the office of language access and the language access advisory council.

6. Enhanced Enforcement Tools: Tap the full power of government agencies

The Policy

Employers who fail to pay proper wages must be held accountable for all back wages and damages available under the law. When administrative settlements by DOLs do not impose double or triple the amount of unpaid wages as damages (also called “liquidated damages”), when available, and other damages at their disposal, they give employers little incentive for future compliance. Instead, employers can rationally gamble that, if they are caught, the only cost they will incur for breaking the law is to pay the wages they would have owed in the first place.

State agencies often have a multitude of tools they are able to use to combat wage theft and to deter employers from doing it again, in addition to simply collecting the back wages already owed. Encouraging agencies to use the full range of tools to both punish and deter violators can assist both workers and the agencies, which do not wish to continuously return to the same employers and the same industries over and over. It can also create a culture of compliance in industries where the employers fear a shutdown of their business, an audit or another time-consuming and expensive investigation.

How Does the Policy Work?

Examples of enhanced tools to punish and deter violators include:

1. seeking liquidated (sometimes double or triple) damages, interest and other penalties to deter future violations;
2. treating individual worker complaints as covering the entire workplace so that other workers who fear coming forward will benefit from the agency’s investigation; and
3. entering into forward-looking monitoring agreements so that the agency can inspect and re-investigate the violator for a number of years after the violations were found.

DOLs initially should pursue all back wages and damages available to all workers present in a worksite where there are violations, and:

1. calculate the maximum back wages and liquidated damages available in a case from the beginning, including all available liquidated damages in every case and the full years of back wages permitted by the statute of limitations, for all impacted workers;
2. take a negotiation position that the employer is liable for all of the back wages and liquidated damages required by law; and
3. seek injunctive relief, with monitoring for future compliance, in all high-priority cases.

When state agencies use creative strategies like requiring ongoing monitoring of payroll and workplace practices and investigating entire workplaces, they send a message to employers that the

agency means business, and that there are consequences to violating the law. Workers, too, may have more incentive to come forward and file a complaint if they think their colleagues will benefit from an investigation, and if they see that the agency will monitor the employer's future compliance, if even just for a few years. Many workers get discouraged and law-breaking employers get emboldened when agency enforcement actions do not “pack a punch.”

What Are the Challenges to Achieving This Policy?

The most effective use of these tools will come after the advocates and the agency have a well-established relationship and have collaborated on a number of “bread and butter” cases, where unpaid wages and basic damages and penalties were collected. It is important for advocates to make the case to the agency that if it does not use all or most of the available tools, employers will continue to violate the law.

Employers and some agencies will argue that these “enhanced” enforcement tools are too harsh, especially for first-time violators, and should only be used when the agency confronts repeat offenders. Some agencies will assert they do not have the power to use these enforcement tools without explicit statutory authorization. Advocates can counter these concerns by pointing to the benefits these tools can achieve in terms of efficiency in enforcement and deterrence across a number of employers. They can also remind the agency that these tools can garner positive publicity and good will in the public's eye.

When the agency is receptive to using or exploring the use of these tools, advocates should assist the agency's “bounce” from the tool, by helping to generate press attention to the liquidated damages or penalties, or offering to assist with ongoing monitoring compliance going forward. In this way, the agency sees that leveraging some of its more creative enforcement tools can have wide-ranging impacts on a category of jobs, a neighborhood, or an industry. It can also bring public appreciation and more budgetary resources to agencies that are showing they can do their job effectively.

Which States Provide for a Broad Use of Available Enforcement Tools?

State Attorneys General have almost unlimited power to enforce their state laws with a broad range of tools deemed necessary by the AG.³⁷ Many states, among them Maryland and Illinois, grant stop-work order powers to enforcement agencies in their independent contractor misclassification laws.³⁸ Compliance has also been sought via codes of conduct.³⁹



Model Legislation Providing Liquidated Damages

Based on the Fair Labor Standards Act, 29 U.S.C. § 216(b)

Any employer who violates the provisions of ... this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.

5

Better Protect Workers from Retaliation

Worker complaints are virtually the only way violations of wage and hour laws are brought to the attention of enforcement agencies or the courts. Therefore workers need strong protection to ensure that when they do come forward to complain about their wages and working conditions or bring a legal action for wage theft, they will not be vulnerable to employer harassment and retaliation.

Retaliation is a common occurrence. A national survey found that 43 percent of workers who complained to their employer about their wages or working conditions experienced retaliation.⁴⁰ Retaliation tactics vary from calling, or threatening to call, Immigration and Customs Enforcement (ICE) to reducing work hours to outright termination. Some workers are harassed, assaulted or have their passports confiscated. Employers report workers to the police on trumped-up charges of theft, or file frivolous lawsuits. The national survey also showed that about 20 percent of surveyed workers never made complaints in the first place, often because they fear retaliation or because they do not think it will make a difference.⁴¹

Undocumented immigrant workers are particularly vulnerable to retaliation and harassment and are legitimately fearful of pursuing wage and hour claims. Undocumented workers experience higher rates of workplace violations than both documented and U.S.-born workers.⁴² Yet because an employer's retaliatory call to ICE may leave a worker facing detention or deportation, an employer's tactics coerce workers into silence and accepting wage theft.

Some forms of retaliatory action are more subtle, making it difficult to hold the employer accountable for the illegal conduct. For example, when an employer reduces the complaining worker's work hours and justifies the conduct on a claim that business is slow, it is harder to pierce through the pretext to prove the true retaliatory motive.

Employer retaliation heightens a chilling effect on the entire workplace. If one worker gets fired as a result of complaining to the employer, it sends a powerful message to other employees in the workplace that they complain at their own peril. The writing is on the wall: stay silent or risk losing your job.

This chapter outlines different policies to shield workers from employer harassment and retaliation, paving the way to create safer conditions for them to assert their workplace rights. These policies may be implemented by passing new state laws or by requiring enforcement agencies to adopt them as written policy.

1. Anonymous, Confidential, or Third-Party Claims: Protect the identity of workers

The Policy

Workers commonly face harassment and retaliation soon after they bring unpaid wage claims against their employers. To shield workers from employer retaliation, there are several ways to protect their identities whenever they file administrative wage claims with state departments of labor or bring private lawsuits:

- Allow anonymous complaints, or allow third parties, such as worker centers, to file complaints.
- Allow one worker to file claims on behalf of the rest of the workers affected by wage theft.
- Require the state enforcement agency to keep the identities of complaining workers confidential as long as possible during its investigation.

These protections may be achieved by passing state legislation or by advocating that the state enforcement agency adopt them as a matter of policy.

How Does the Policy Work?

This strategy can be particularly helpful to workers who are complaining against their current employers, as well as to undocumented immigrant workers. Because worker complaints are essential to effective enforcement, protecting workers' identity can contribute towards increased employer compliance. Moreover, allowing an individual or a worker center to represent the interest of workers in administrative or court proceedings can be an effective way to shield workers from employer harassment and retaliation. Even where an employer is able to find out which workers are being represented by a third party or a fellow worker, the fact that there is a collective effort to assert their workplace rights instead of a complaint by just one worker can minimize the threat of harassment and retaliation.

What Are the Challenges to Achieving This Policy?

Although workers may feel more comfortable filing anonymous complaints, there are several limitations to keeping the identity of the complaining worker completely anonymous or confidential. While the agency may be able to keep confidential the identity of complaining worker through the investigation process, it often has to disclose the identity of the workers to employers when it issues a statement of wages due. When the identities of complaining workers are disclosed, workers often experience retaliation.

Moreover, the enforcement agency may be hindered in its ability to investigate and resolve the unpaid wage claim if it does not know the identity of affected workers. Therefore an anonymity policy for complaints can lead to a trade-off between the frequency and effectiveness of enforcement efforts. In addition, the strategy of allowing one worker to represent the interests of other workers in administrative complaints or lawsuits still subjects that named worker to employer retaliation and thus is less effective than other policies.

Which States Provide for Anonymous or Confidential Complaints?

Anonymous Complaints: six states (Colorado, New Jersey, California, Connecticut, Illinois, and New York) permit workers to file anonymous claims with labor agencies.

Confidential Complaints: nine states (Arizona, Arkansas, Kentucky, Ohio, Illinois, Nebraska, New Jersey, North Carolina, and New York) keep the identity of a complaining worker confidential to the extent possible during the investigation/resolution process via state law or agency policy.

Third Party Representation: seven states (Arizona, Arkansas, California, Colorado, New York, Ohio, and Rhode Island) allow organizations or individuals, including fellow workers in the same workplace, to file administrative complaints on behalf of affected workers. In 16 states (Alaska, District of Columbia, Hawaii, Illinois, Nebraska, Indiana, Massachusetts, Nebraska, New Mexico, New Hampshire, New Jersey, New Mexico, Ohio, Oklahoma, Pennsylvania, and Texas) workers can designate another person to bring an unpaid wage lawsuit on their behalf and/or other workers who have similar claims.

Recent Campaigns

Make the Road New York's wage theft bill, which was signed into New York law in 2010, includes a provision that allows a third party (both a person or an organization) to file an administrative unpaid wage claim on behalf of a worker; it also requires the department of labor to keep confidential the identity of the complaining worker until the disclosure of the worker's identity is necessary for the resolution of an investigation.



Model Agency Policy Allowing Anonymous Complaints

Drafted by NELP based on model language in state agency policies

A worker may file an anonymous claim for unpaid wages with the agency. To file an anonymous claim, the worker should write "ANONYMOUS" in the name section of the claim form, and leave the address blank. When the agency is investigating anonymous claims, it shall review records regarding all employees at the workplace. It will not provide any information to the anonymous claimant unless a resolution is reached with the employer that includes payment of the wages due.



Model Legislation Allowing Confidential Complaints

Based on Arizona law at A.R.S. § 23-364(C)

When the agency receives a complaint of underpayment of wages, the agency shall review records regarding all employees at the employer's worksite in order to protect the identity of complaining employee and to determine whether a pattern of violations has occurred. The name of any employee identified in a complaint to the agency shall be kept confidential until disclosure is necessary for the adjudication of the claims. The agency shall disclose the identity only with the complainant's consent.



Model Legislation for Third-party Representation in Administrative Complaints

Based on Arizona law at A.R.S. § 23-364(C)

Any person or organization may file an administrative complaint with the agency charging that an employer has violated the minimum wage law as to any employee or other person.



Model Legislation for Third-party Representation in Court Actions

Based on Pennsylvania law at 43 P.S. § 260.9a(b)

Actions by an employee, labor organization, or other party to whom wages are payable to recover unpaid wages and liquidated damages may be maintained in any court of competent jurisdiction, by such labor organization, party to whom wages are payable or any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action or on behalf of all employees similarly situated. Any such employee, labor organization, party, or his representative shall have the power to settle or adjust his claim for unpaid wages.



Model Legislation for Representation by One Worker on Behalf of the Group in Administrative Complaints

Based on Arkansas law at A.C.A. § 11-4-220(a)

Any employee or other person may file an administrative complaint charging that an employer has violated [relevant chapters in state labor law] to any employee.



Model Legislation for Representation by One Worker on Behalf of the Group in Court Actions

Based on New Jersey law at N.J. S.A. § 34:11-56a25

If any employee is paid less than the wage to which such employee is entitled under [state labor law] such employee may recover in a civil action the full amount of such wage less any amount actually paid to him or her by the employer. An employee shall be entitled to maintain such action for and on behalf of himself or other employees similarly situated, and such employee and employees may designate an agent or representative to maintain such action for and on behalf of all employees similarly situated.

2. Presumption of Employer Retaliation: Detering employer backlash against workers



The Policy

One way to minimize the harm workers experience from employer retaliation is to amend the state anti-retaliation law to create a legal protection that *any* adverse or discriminatory action taken by an employer against the worker within a certain period of time after the worker complains will be presumed to be retaliatory. This proposed amendment to the anti-retaliation law makes it easier for workers who were retaliated against to bring a retaliation case against the employer. It also empowers enforcement agencies (state department of labor or attorney general's office) to investigate the claim of retaliation.

With the protection of legal presumption, it is the employers and not the workers who carry the burden of proof. Workers do not need to prove that the consequences they suffered, such as being terminated, were the result of actions taken by their employers in retaliation for complaints about wages or working conditions. Instead the employers carry the burden of proving that the action taken against the workers was other than retaliatory. If the employers cannot prove that their actions were lawful, workers can get remedy for the harm they suffered. The remedy can take the form of reinstatement in their jobs or lost wages. In amending the anti-retaliation law, advocates must make sure to define the actions taken by the employer very broadly to capture the various subtle ways employers retaliate against workers.

How Does the Policy Work?

Establishing the presumption of employer retaliation in state law can help to create safer conditions for workers to come forward to inquire or complain about their wages and other working conditions. Without it, there is too much at risk for workers to speak up about sub-standard wages or working conditions. Including a presumption of retaliation in state law provides both workers and enforcement agencies with tools to aggressively prosecute against retaliation, and may give employers pause before they engage in retaliatory action.

What Are the Challenges to Achieving This Policy?

Employers will vigorously oppose efforts to amend the state wage and hour law to include a presumption of retaliation. Because many states allow employers to fire their employees at will at any time with few exceptions, employers will argue that the presumption will unduly interfere their exercise of sound business decision and will force them to continue to employ workers who should be fired for legitimate reasons.

To counter these arguments, it will be crucial to remind legislators that all employers will have the opportunity to show that any adverse action taken against the complaining worker was for legitimate reasons; and that the presumption will be used to hold accountable those unscrupulous employers who are violating the law. Advocates can further argue that those who benefit most from this strategy will be law-abiding employers who are put at an unfair disadvantage by competitors who routinely flout workplace protections.

Legislators may oppose this strategy on grounds that it will open the floodgates to litigation by workers claiming retaliation. Again, the core message from advocates should be that the legal presumption is one of the critical ways to enable workers to come forward to complain, making robust wage and hour enforcement possible. Without it, workers will continue to work under exploitative working conditions, silently accepting wage theft.

Which States Provide for a Presumption of Retaliation?

Currently, only Arizona provides for a presumption of retaliation in its labor law. It states that any adverse action taken by both employer and other person against any person within 90 days of asserting their wage and hour rights, for assisting any other person in asserting their rights, or for informing any person about their rights shall be presumed to be retaliatory. The person engaged in retaliation has the right to rebut the presumption that such action was taken for permissible reasons (A.R.S. § 23-364(B)).

San Francisco and Santa Fe have included a presumption of retaliation in their local minimum wage ordinance (San Francisco Admin. Code Ch. 12R § 6; Santa Fe Municipal Ordinance 28-1.6(B)).

Recent Campaigns

In 2010, the New York State legislature successfully passed Make the Road New York's omnibus wage theft bill. When the bill was first introduced, it contained presumption language that is similar to the language found in the Arizona law. Any adverse action taken by an employer against a worker within 90 days of the worker engaging in a protected activity is presumed to be a retaliatory action and the employer has the burden to prove otherwise. The presumption of retaliation was not included in the final bill that was signed into law in December 2010.

In Los Angeles, a coalition of community and legal groups is working to introduce a wage theft ordinance that includes presumption of employer retaliation. The ordinance provides a similar protection to that found in the Arizona law, presuming that any adverse action taken by an employer against the worker within 90 days of the worker engaging in a protected activity is retaliatory.



Model Legislation on Presumption of Retaliation for Adverse Actions after a Worker Complaint

Based on Arizona law at A.R.S. § 23-364(B)

No employer or other person shall discharge or take any other adverse action against any person in retaliation for asserting any claim or right under this article, for assisting any other person in doing so, or for informing any person about their rights. Taking adverse action against a person within ninety days of a person's engaging in the foregoing activities shall raise a presumption that such action was retaliation, which may be rebutted by clear and convincing evidence that such action was taken for other permissible reasons.

3. Equal Rights and Equal Recourse: Uphold undocumented workers' rights under state law

The Policy

Undocumented workers are justifiably fearful of complaining or pursuing unpaid wage claims because of employer reprisal by calling Immigration and Customs Enforcement (ICE). They are generally reluctant to draw any public attention to themselves and hesitant in pursuing their workplace rights for fear of being asked for information that may lead to disclosure of their immigration status. With states and localities across the country participating in immigration enforcement programs such as Secure Communities that require local police to share data with ICE, and 287(g) agreements that empower local and state police to enforce immigration law, workers are also fearful of employers calling the police in retaliation, for it could lead to their arrest and deportation.

States can pass laws and enforcement agencies can adopt written policies to provide workers full protection and recourse available under state labor law regardless of their immigration status whenever workers bring claims to assert their workplace rights. States can also enact and enforcement agencies can adopt additional written policies stating that they will not share any information with immigration authorities regarding the immigration status of workers who file complaints.

How Does the Policy Work?

When there is assurance, as a matter of law or policy, that workers' immigration status will not be disclosed to immigration authorities, undocumented workers may be less fearful and more willing to come forward to pursue wage and hour claims. Without such protection, employers who commit wage theft do so with impunity; this incentivizes wage theft as an unchecked business practice. When unscrupulous employers exploit undocumented workers' immigration status as a shield to evade responsibility for wage payment, they gain an unfair advantage over law-abiding employers and their abusive workplace practices create a larger underground economy, hurting all workers.

What Are the Challenges to Achieving This Policy?

With the passage of SB 1070 in Arizona and the increased anti-immigrant fervor across the country in support of copycat bills, legislators and agencies may be hesitant to push a measure that may appear in the eyes of the public to condone illegal immigration. Advocates will need to argue forcefully that providing protection and making different forms of compensation for the harm suffered available to undocumented workers does not amount to granting them special rights. Rather, it is reaffirming the rights they

already have under federal law. Moreover, advocates may argue that wage theft hurts not just the workers but also the communities and local economies of which they are part. Low-wage workers and their families spend the large majority of their income on basic necessities, such as food, clothing and housing. This spending helps local economies, supporting businesses and jobs. Wage theft ultimately limits economic growth.

Which States Provide Laws and Policies Protecting Immigrant Workers?

California provides in its state labor code that immigration status is not relevant to pursuing wage and hour claims, and that regardless of immigration status, workers are entitled to all rights and remedies available under state law, except any reinstatement remedy prohibited by federal law (see Cal. Labor Code § 1171.5). It further provides that information regarding immigration status should not be inquired into during litigation.

After the Supreme Court decision in *Hoffman Plastics Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) that denied undocumented workers the right to reinstatement and lost wages a worker would have earned had he or she not been wrongfully terminated for exercising his or her rights under the National Labor Relations Act, the Washington State Departments of Labor and Industries and Human Rights Commission issued statements that undocumented immigrants continue to have access to full remedies under Washington State law. In New York, the State Attorney General issued a formal opinion stating that *Hoffman Plastics* does not preclude enforcement of State wage payment laws on behalf of undocumented immigrants.

As a way to minimize employers' misuse of the federal E-Verify program, a voluntary program that allows employers to verify an employee's immigration status eligibility using federal government records, Illinois imposes additional statutory obligations on employers that use the program. Employers must complete the E-Verify tutorial, post E-Verify notices at the workplace, cannot use E-Verify to prescreen employment applicants, and cannot fire employees until they receive final non-confirmation from E-Verify (see 820 ILCS § 55/12). Furthermore, the Illinois law allows workers injured by an employer's failure to follow these procedures to file a claim against the employer (see 775 ILCS § 5).



Model Policy Protecting Immigrant Workers

Drafted by NELP based on model language in state agency policies

All workers, regardless of immigration status, are covered by state labor law, and are entitled to all remedies under the law unless explicitly prohibited by federal law.

1. The Agency will:
 - a. Investigate complaints of underpayments of wages entitled under the state labor law and bring any legal action necessary, including administrative action, to recover such claim and all other remedies available under state law without regard to the employee's immigration status, unless explicitly prohibited by federal law.
 - b. Investigate an employee's complaints of retaliation vigorously and seek all remedies available under state law, including lost wages and reinstatement, regardless of immigration status.
2. The Agency will not inquire any person, including the complainant or witness, concerning immigration status or any other information that might lead to disclosing a person's immigration status. In the event that the Agency becomes aware of any person's immigration status, such information must be kept confidential. The Agency will neither disclose any person's information related to immigration status with any local, state and federal agencies, including law enforcement agencies nor maintain such information in their files. In the event any person or any local, state and federal agencies request a complainant's file, the Agency will provide notice of such request to the complainant and will not release the files without the consent of the complainant.
3. In all proceedings on behalf of any employee, the Agency will vigorously oppose any efforts of any party seeking discovery of a complainant's or any other person's immigration status or any other information that will lead to the discovery of immigration status.
4. The Agency will train its staff (including intake officers, investigators, attorneys, and other relevant staff) on this policy and will work closely with community-based organizations to conduct this training.
5. Agency will make reasonable efforts to work closely with community-based organizations to conduct outreach and education to the immigrant community on this policy.



Model State Legislation Protecting Immigrant Workers

Based on California law at Cal. Labor Code § 1171.5

The Legislature finds and declares the following:

- a. All protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who have applied for employment, or who are or who have been employed, in this state.
- b. For purposes of enforcing state labor and employment laws, a person's immigration status is irrelevant to the issue of liability, and in proceedings or discovery undertaken to enforce those state laws no inquiry shall be permitted into a person's immigration status except where the person seeking to make this inquiry has shown by clear and convincing evidence that the inquiry is necessary in order to comply with federal immigration law.
- c. The provisions of this section are declaratory of existing law.
- d. The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

4. Leverage U Visas: Protect immigrant workers who bring wage theft claims

The Policy

Employers often exploit undocumented workers' immigration status to keep them silent and coerce them into accepting wage theft and substandard working conditions. Immigrant victims of wage theft are often also victims of other related crimes under state laws. For example, an employer may assault a worker when he asks for his check, lie about wage rates on government forms, commit perjury or engage in witness tampering or obstruction of justice by threatening workers' witnesses in civil actions.

Federal legislation called the Trafficking Victims Protection Act (TVPA) provides undocumented victims of crimes listed in the legislation with immigration relief in the form of a visa called "U" visa. The U visa aims to encourage immigrant victims to report and assist in the investigation or prosecution of crimes, providing them an opportunity to adjust their immigration status at a later time, including getting a work authorization card and applying for a green card. Qualifying criminal activities include crimes that are commonly committed by employers in workplaces, such as abusive sexual contact, blackmail, false imprisonment, assault, involuntary servitude, obstruction of justice, peonage, perjury, trafficking, witness tampering, unlawful criminal restraint, or other substantially similar criminal activity. In addition to these listed qualifying crimes, wage theft, which is often characterized as "theft of services" under state criminal law, can arguably be considered a criminal activity that is substantially similar to involuntary servitude and thus should be advocated as a qualifying crime for a U visa.

The legislation provides that in addition to federal law enforcement agencies and prosecutors, state and local law enforcement agencies and prosecutors can certify victims of crimes as eligible for U visas. Recently, the U.S. Department of Labor announced that it would certify applications for U visas. In pursuing state wage and hour claims, advocates should urge state departments of labor and the attorney general offices to issue certifications for U visas as part of their investigation process.

For example, in the course of investigating a worker's unpaid wage claims, it is common to discover that an employer has committed process-related crimes, such as perjury by falsifying documents filed with government agencies (e.g., unemployment insurance taxes) or manufactured payroll records or commit obstruction of justice by harassing a complaining worker's witnesses to unpaid wage claims. Because a complaining worker is a victim of these crimes committed by the employer, the state enforcement agencies can certify the worker in the course of their investigation.

How Does the Policy Work?

Certification is one of the significant ways to break down the barriers for undocumented workers to come forward to report crimes, prosecute their workplace rights, and assist law enforcement in investigation and prosecution of a serious crime that has reached an epidemic level. Without assurance of protection, workers will not come forward and crimes will go unreported.

Employers often commit crimes of perjury or obstruction of justice while they are committing wage theft against workers. U visa certifications should be integrated into the investigation process at the state Department of Labor or the state Attorney General's office and should be accessible and streamlined.

What Are The Challenges to Achieving This Policy?

State departments of labor may not readily see the connection between unpaid wage claims that are entirely a civil matter and crimes that make one eligible for a U visa. The agencies may want to refer the cases to law enforcement agencies instead. It will be critical to reaffirm that the department of labor is empowered to certify U visa applications under the federal law and that the underlying case in which an enumerated crime is detected involves workers whose workplace rights are violated. The federal regulations defines "investigation or prosecution" of a qualifying crime broadly to include not just "prosecution, conviction or sentencing of the perpetrator of the qualifying crime" but also "detection" of a qualifying crime. (See 8 C.F.R. § 214.14 (a)(5)). Thus detecting a qualifying crime, such as perjury, in the course of investigating an unpaid wage claim is sufficient basis to certify an aggrieved worker for a U visa application. Additionally, the certification of U visas is one of the few ways to break down the barriers for workers to come forward to complain and prosecute their unpaid wage claims.

Which States Provide That State Law Enforcement Agencies Must Certify Immigrant Victims of Crime as Eligible for U Visas?

California's Department of Fair Employment and Housing issued a directive to certify U visas to undocumented complainants in May 2010. The New York Attorney General's Office has provided U visa certifications to workers in wage theft cases, where workers were victims of perjury and obstruction of justice.



Model Protocols for U Visa Certifications

Based on protocols developed for the USDOL by NELP and the Just Pay Working Group

- **Certification authority must be broadly shared within state enforcement agencies:** Authority to certify should be decentralized and broadly delegated to front-line staff at the agencies.
- **Certifications should be integrated into investigations with an accessible, streamlined process:** Enforcement agencies should have a short timeline within which to respond to workers' need for visa certification. Delays in issuing U visa certification to a cooperating victim of qualifying criminal activity severely undermine the effectiveness of the U visa mechanism as a means of ensuring that a victim is available to fully cooperate and create substantial additional stress and hardship for victims and witnesses.
- **The issuance of certification should be based on preliminary showing of eligibility:** The certification authority conferred by the U visa regulations is both broad and preliminary. Because certification is simply a preliminary finding of victimization, state agencies should require only minimal evidence in support of certification.
- **Confidentiality rules must be observed:** All information provided to state agencies by a U visa eligible worker in relation to an investigation and/or U visa certification request must remain confidential.

6

End the Exclusions in Minimum Wage and Overtime Standards

Many states' labor laws exempt key groups of low-wage workers from minimum wage and overtime protections. Gaps in state law protections place these workers at a significant disadvantage because the state law is often more favorable to workers than the federal standard. Many state minimum wage rates are higher than the federal rate, for example, and some states' Departments of Labor are more accessible to workers and more effective than the federal Department of Labor.

This chapter focuses on exemptions for agricultural workers, domestic workers, and home care workers; the impact of these exemptions on workers; and strategies for extending minimum wage and overtime protections to the exempted groups. (Outside the scope of this chapter, but also of concern, are exemptions for taxi drivers, restaurant, and other workers who receive tips and are often only entitled to a reduced "tipped worker" minimum wage rate.)

The problems of agricultural workers, domestic workers, and home care workers are compounded by inadequate protection at the federal level and exclusion from other key state workplace laws. The Fair Labor Standards Act (FLSA) exempts home care workers from both minimum wage and overtime protections, exempts agricultural workers from overtime, and subjects domestic workers to a lower level of standards. The National Labor Relations Act (NLRA), which protects workers' rights to organize, exempts agricultural workers and domestic workers. And state workers' compensation and health and safety laws also commonly exempt these groups of workers.

Exclusions come in a variety of forms, not all apparent at first glance or easy to interpret:

- The state's wage and hour laws may contain an "exemptions" section, or define "employee" to exclude certain categories of workers based on industry or occupation.
- The state's wage and hour laws may apply only to employers with more than a certain number of employees (generally between 2 and 4), which results in the exclusion of domestic workers and some home care workers.

An exemption may cover an entire category of workers, such as "agricultural workers", or may apply only to a subset, such as "casual babysitters" or "domestic workers *who live in an employer's home.*"

Further complicating the issue, states use different terminology to describe these groups of workers. For the purposes of this guide, we use the term "agricultural workers" to refer to hired farmworkers as opposed to self-employed farmers and their unpaid family members. We use the term "domestic worker" to refer to nannies, babysitters, housekeepers and other workers employed to cook, clean and care for children and the elderly in private homes. "Home care workers," called "companions" in many states' laws and in the FLSA, work in private homes as caregivers for the elderly, sick and disabled. Home care workers may be employed directly by private households, home care agencies, public entities, or jointly by some combination of these.

Enforcement and advocacy efforts are hampered by a lack of clarity over the scope of exemptions. While some state wage and hour laws delineate who falls within or outside of an exempted category, courts and/or the state DOL may not interpret the exclusion in a consistent way. The state law may provide no guidance, or it may simply adopt the FLSA exemptions. Advocates may be unsure as to which workers are entitled to what rights under state law. For these reasons, workers who want to enforce their rights under state law may face the obstacle of proving to the court or state DOL that they are covered by the law before getting to the substance of their claim.

Extending wage and hour protections to agricultural, domestic and home care workers signals to employers and workers that these workers are entitled to basic workplace standards; arms workers with enforcement remedies; and can help raise low wages in these industries.

1. Extend Minimum Wage and Overtime Protections to Agricultural Workers

NELP
Top Pick



The Policy

Repealing or narrowing exemptions for agricultural workers would improve working conditions for one of the most vulnerable groups of working poor in the United States. Agricultural workers, many of whom are undocumented immigrants with limited English speaking abilities, live on the fringes of society. The poverty rate among the over 1 million hired farm hands in the country is more than double that of other wage and salary workers, with weekly incomes averaging only 59 percent of the national median income.⁴³

Employers regularly violate the few laws that do apply to agricultural workers. A 1999 USDOL investigative survey found that compliance with the FLSA and a specialized agricultural law called the Agricultural Workers Protection Act was between 50 and 65 percent among lettuce, tomato and onion producers, while 70 percent of forestry employers were out of compliance with workplace laws.⁴⁴

The most direct result of inclusion in minimum wage and overtime laws would be to boost workers' income. State overtime coverage could also discourage agricultural employers from overworking workers in the busy season, push them to hire more workers, or even encourage them to adopt modern farming techniques that allow employment to be spread more evenly throughout the year.

How Does the Policy Work?

A complete repeal of an existing exemption is the best solution. In addition, making coverage of agricultural workers explicit, as opposed to simply removing the exemption, makes the scope of coverage clear to the Department of Labor and courts, and signals to both workers and employers that workers are protected. Ideally, the law would specify that workers paid a piece rate are entitled to be paid the minimum wage.

If coverage of all agricultural workers under both minimum wage and overtime is not possible, advocates may consider working for a narrowing of the exemption, or achieving minimum wage protection first and focusing on overtime later. Another strategy is to close exceptions in the state overtime law that subject agricultural workers to a lower level of overtime protection—premium pay after 48 or 60 hours a week, for example—while other workers in the state are entitled to overtime after 40 hours.

What Are the Challenges to Achieving This Policy?

Strong opposition is likely from agricultural employers, who will argue that the unique demands of agricultural work make increased standards unworkable and necessitate more flexible employment arrangements. The agriculture industry may warn that increased labor costs will force them to reduce the workforce or shorten workdays, leaving produce unpicked in the fields, or that farmers will simply pass added costs to the public.

Advocates may be able to deflect the opposition's arguments by showing that expanded coverage would have only a negligible impact on the price of produce, even assuming that all price increases were passed along to consumers.⁴⁵ As increasing attention is paid towards food safety and the source of our food, consumers may be sympathetic to—or even allies in—the fight to improve conditions for agricultural workers.

Expanded minimum wage and overtime protections may not result in immediate improvements for workers. Agricultural workers' physical isolation, working on farms and living in camps outside of major cities or towns, may make it difficult for them to access government resources and legal services. Language barriers or immigration status may make workers hesitant to claim their rights.

Which States Provide Wage and Hour Protections to Agricultural Workers?

Fourteen states extend state minimum wage protections to agricultural workers: Michigan, New York, Montana, Connecticut, Minnesota, Rhode Island, South Dakota, North Dakota, Texas, Hawaii, New Jersey, California, Arizona and Colorado.

Minnesota, California, Maryland and the District of Columbia provide overtime compensation to agricultural workers. However, Minnesota only provides time and a half for each hour worked over 48 hours in any workweek, while California and Maryland only provide overtime for hours worked beyond 60 hours.

Recent Campaigns

In 2010 the California legislature passed a bill extending overtime protection to agricultural workers after 8 hours per day or 40 hours per week, instead of the current standard that requires overtime pay only after 10 hours per day or 60 hours per week. However, the bill was vetoed by Governor Schwarzenegger.

In New York, the Justice for Farmworkers Campaign has worked on extending overtime protection to agricultural workers, and there have been several bills pending in the New York State legislature over the years though none have passed as yet. The most recent legislative effort in 2010 required overtime pay after 10 hours a day and 60 hours a week. If a worker worked the seventh day of any calendar week, the bill required the worker to be

paid overtime at the rate of one and one-half times the regular rate for the first 8 hours of work and two times the regular rate for any hours worked in excess of 8 hours.



Model Legislation Extending Minimum Wage Protection to Agricultural Workers

Based on Texas law at V.T.C.A., Labor Code § 62.102

Any person employed as an agricultural worker, whether paid hourly or by piece rate, is entitled to receive not less than the minimum hourly wage established under ...



Model Legislation Narrowing Exemption for Agricultural Workers

Drafted by NELP based on model language in state law

“Employee” includes any individual employed by an employer, but shall not include any individual employed:

In agriculture for any workweek in which the employer of the individual employs less than twenty employees.

2. Extend Minimum Wage and Overtime Protections to Domestic Workers



The Policy

Repealing or narrowing exemptions for domestic workers would improve conditions for this vital but often unseen and isolated group of workers. Domestic work is marked by low wages, weak labor standards, and workers' physical isolation in private homes. Wages for the roughly 1.8 million domestic workers in this country are only one-half the national median income, as measured by a 2005 study.⁴⁶ Minimum wage and overtime violations are common. *Broken Laws, Unprotected Workers*, the 2008 survey of low-wage workers in three major U.S. cities (New York, Chicago and Los Angeles), found that 41 percent of workers in private households had suffered violations of the minimum wage law in the week prior to the survey.⁴⁷ These workers also suffered high rates of overtime violations, with over 90 percent of child care workers and 82.7 percent of home health care workers experiencing violations.⁴⁸

Coverage under state wage and hour laws can go a long way towards improving conditions for domestic workers, for example, by filling in the gaps in federal law, providing minimum wage protection for companions and overtime for live-in workers. Extending protections, especially through a campaign that garners public attention, will advertise to both employers and workers that workers are entitled to minimum wage and overtime and have a remedy for violations. And state-level coverage can be helpful where the state DOL is active and willing to engage in targeted outreach to workers in this sector—or targeted enforcement of employers.

How Does the Policy Work?

Where the state wage and hour law exempts domestic workers, the most direct approach is to pass legislation repealing the exemption. In recent years, advocates in some states have successfully narrowed or eliminated exclusions for domestic workers—in several cases as part of a broader effort to win across-the-board increases in the state minimum wage rate for all workers. For example, in 2007 the Maine State Legislature amended the State Minimum Wage Act to make minimum wage and overtime provisions applicable to domestic workers.⁴⁹ If the state has no minimum wage law, any proposed new law should cover all workers without exemptions.

If a complete repeal is not feasible, the exemption can be amended to limit its impact. The remaining exemption might be limited to casual workers, or to workers who are family members of the employer. For example, the New York Domestic Worker Bill of Rights, passed in 2010, narrows the exemption for part-time babysitters to “part-time

babysitters *employed on a casual basis*” (see NY Lab Law § 651(5)). Similarly, if the statute contains an exemption for domestic workers but no definition of the term, the state DOL may be able to issue a regulation defining “domestic worker” narrowly so as to not include some key groups of workers, such as companions; or it can issue guidance explaining who is exempted and who is covered.

What Are the Challenges to Achieving This Policy?

Advocates are likely to face opposition or reluctance from state legislators, many of whom may be domestic employers themselves. Some domestic employers, however, may actually welcome improved standards that make clear their legal responsibilities towards a worker, and leave less to guesswork or individual negotiation. Legislators and the public may also be sympathetic to an argument that frames the extension of coverage as a human rights issue: closing the exemption is a step towards remedying decades of substandard treatment of this overwhelmingly female, and disproportionately women of color, workforce.⁵⁰

Merely closing an explicit exemption may not address the problem in some states, where the minimum wage and/or overtime law applies only to employers with multiple employees. Nearly all nannies and housekeepers and many home care workers will be excluded by such restrictions. Also, the state law may exempt domestic workers through a provision that adopts the FLSA exemptions or that defines employee to exclude any workers exempted from FLSA (live-in domestic workers are exempt from federal overtime; companions and part-time babysitters are exempt from both federal minimum wage and overtime). A strategy to expand coverage should address these two types of provision, where they exist.

Expanded minimum wage and overtime protections may not result in immediate improvements for workers. Due to their physical isolation, domestic workers may not know their rights, and seldom have coworkers who can back them up in discussions with their employer. Workers may hesitate to press for their rights when they feel that doing so will introduce tension in the home where they work. Language barriers and/or immigration status also present barriers to enforcement.

Which States Provide Minimum Wage or Overtime Protections to Domestic Workers?

Massachusetts is the only state that provides full minimum wage and overtime coverage to all categories of domestic workers (M.G.L.A. 151 § 1A(1)).

California and Maryland provide minimum wage coverage to all domestic workers but exclude certain categories of domestic workers from overtime protections. (Cal. Wage Order 15-2001 § 1(b), § 2(I), § 3(A)-(C); MD Code, Labor and Employment, § 3-415).⁵¹ About half of the states provide at least some domestic workers either minimum wage protections, overtime protections, or both.

About half of the states provide neither minimum wage nor overtime protections to *any* domestic workers. Of these states, Alabama, Louisiana, Mississippi, South Carolina, and Tennessee have no state minimum wage law or overtime pay requirements for any workers. Alaska, Arkansas, Delaware, Georgia, Hawaii, Idaho, Kansas, Montana, New Hampshire, New Mexico, North Carolina, Oklahoma, Pennsylvania, Rhode Island, Texas, Utah, Virginia, and West Virginia have a state minimum wage but exclude *all* domestic workers from coverage.

Recent Campaigns

In 2010 New York passed the nation's first Domestic Worker Bill of Rights, marking the culmination of a 6-year organizing campaign led by Domestic Workers United and the New York Domestic Workers Justice Coalition. The new law extends minimum wage coverage to part-time babysitters, except those employed on a casual basis, and to live-in companions; neither group was covered before. The law also raises the overtime rate to one-and-a-half times the regular rate of pay for some groups of domestic workers who were previously only entitled to a reduced overtime rate of one-and-a-half times the minimum wage.



Model Legislation Providing Overtime Coverage for Domestic Workers

Based on New York law at NY Labor Law § 170

No person or corporation employing a domestic worker... shall require any domestic worker to work more than forty hours in a week... unless they receive compensation for overtime work at a rate which is at least one and one-half times the worker's normal wage rate.



Model Legislation Narrowing an Exemption for Domestic Workers

Based on New York law at NY Labor Law § 651(5)

The section is amended to read as follows:

“Employee” includes any individual employed or permitted to work by an employer in any occupation, but shall not include any individual who is employed or permitted to work: (a) ON A CASUAL BASIS in service as a part time baby sitter in the home of the employer [; or someone who lives in the home of an employer for the purpose of serving as a companion to a sick, convalescing or elderly person, and whose principal duties do not include housekeeping]; ...

(Note: Capitalized text is new text added by the law, bracketed text is text deleted by the law.)

3. Extend Minimum Wage and Overtime Protections to Home Care Workers



The Policy

Repealing or narrowing the exemption of home care workers from state wage and hour laws can help raise standards in this crucial and rapidly expanding sector. A lack of federal minimum wage and overtime protections combined with no or inadequate coverage at the state level has suppressed wages for the home care workforce. With median wages for home care workers at just \$9.34 an hour in 2009,⁵² many home care workers earn less than self-sufficiency income for a single adult, and far less than the income needed to support a family. As a result, many home care workers must turn to state and public assistance programs to meet their basic household needs.

The exclusion of home care workers from minimum wage requirements means that employers are not required to pay them for work time spent traveling from one client's home to another, or for gas or other transportation costs when these reduce workers' net pay to below the minimum wage (see 29 U.S.C. § 203(m); 29 C.F.R. § 785.38 (2010)). Minimum wage coverage would help workers combat both practices.

The lack of overtime coverage also means that home care employers can schedule workers for extremely long shifts without having to comply with overtime requirements. Extending overtime protections would encourage home care employers to spread work more evenly, employing more workers to care for patients who require round-the-clock services, or at least require extra compensation when workers do work long hours.

How Does the Policy Work?

Where the state minimum wage law explicitly exempts home care workers, the most direct approach is to pass legislation repealing the exemption. Note that the exemption may not be immediately apparent. Most states consider home care workers to be a subset of "domestic workers," even those home care workers who are employed by commercial home care agencies. The law may or may not specify that home care workers are included under the definition of domestic worker. Also, many states use the term "companion" rather than the term home care worker, reflecting the language used in the federal law. If the statute contains an exemption for "domestic worker" but does not specify that companions are included within this category, an alternative remedy is to narrow the definition through an amendment, or add a new narrow definition that does not encompass home care workers.

If complete repeal of an exemption is not attainable, a compromise option is to leave in a partial exemption that achieves at least some expansion in worker protection. Preferably,

the exemption would apply only to overtime and not minimum wage, and could be limited to specified overnight hours worked by companions, or, less helpfully, to family members of the home care client, live-in workers, or companions employed solely by the private household. Advocates should be aware that home care workers paid by public money through an “independent provider” program are often considered to be employed by the home care client and may fall within exemptions for employees of the private household.

What Are the Challenges to Achieving This Policy?

The home care industry, recipients of home care services and even some state governments may argue that an increase in hourly wages will require a cutback in services. They may warn that because funding for home care services is limited, or even set at a fixed level in the state budget, employers will respond to requirements that they increase workers' hourly rate and pay for all work hours (not just service hours) by reducing patient care hours or eliminating services altogether for some recipients. Reduced services put patients at risk of injury and, some may argue, even force them into institutional care as they are no longer able to continue living in their homes with reduced services. Workers will be no better off, according to this argument, because even if they earn more per hour, their work hours will fall and their weekly salary will therefore not increase.

Advocates can counter these warnings with reminders that neither limited funding for publicly-financed jobs nor the importance of a particular job has ever provided legal justification for failure to pay minimum wage and overtime. Just as teachers, firefighters and hospital workers are entitled to basic wage and hours protections despite the societal importance of their job and the scarcity of funding, so should home care workers be as well. Home care workers should not bear the burden of making up for limited funding by accepting substandard wages.

Additionally, substandard labor conditions have created recruitment and retention problems, fueling a labor shortage that is expected to worsen significantly in coming years as the number of elderly requiring home care rises dramatically. Improving wage and working conditions for home care workers is not only fair; it is also crucial to ensuring a sufficient workforce to care for the elderly and disabled in the future.

The appropriate solution is to increase funding where possible, and for private home employers to help shoulder the burden for meeting minimum wage and overtime requirements by directing a greater percentage of each home care dollar to workers as opposed to administrative overhead and profits. Given that budget problems present real and difficult barriers to funding wage increases, however, advocates should be prepared to campaign for additional state spending on the state home care programs to finance wage increases. Agencies can also ease the cost impact by adopting better scheduling practices: for example, reducing travel time by assigning workers to patients who are

close to one another, and reducing overtime hours and costs by spreading hours more evenly among workers and maintaining substitute pools.

Merely closing an explicit exemption may not address the problem in some states, particularly those where the minimum wage or overtime law applies only to employers with multiple employees. Many home care workers—both those employed directly by a private household using its own funds and those whose services are paid through publicly-financed programs but who are considered solely employed of the household—will be exempted by such restrictions. In addition, the law in some states may exempt home care workers through a provision that adopts the FLSA exemptions or defines employee to exclude any workers exempted from FLSA. A strategy to expand coverage should address these two types of provision, where they exist.

Even in states where workers are protected, home care employers may try to evade compliance by calling workers “independent contractors.” For more information on this problem, see Chapter 7.

Which States Provide Minimum Wage or Overtime Protections to Home Care Workers?

Six states require that home care workers be paid the state minimum wage: Arizona, California, District of Columbia, Nebraska, Ohio and South Dakota.

Sixteen states also guarantee some or all home care workers overtime pay for work over forty hours in a workweek: Colorado, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Jersey, New York, North Dakota, Pennsylvania, Washington and Wisconsin.

Recent Campaigns

Advocates in several states have won expanded minimum wage and overtime coverage for home care workers as part of broader state campaigns to raise the minimum wage. In Missouri, for example, in the course of a 2006 state ballot initiative to raise the state minimum wage, the AFL-CIO, ACORN, Jobs with Justice and other partners won minimum wage coverage for home care and domestic workers. Similarly, in Ohio, as a result of a ballot initiative process in 2006, the AFL-CIO and ACORN pushed the state to close an exclusion for home care workers from its minimum wage law. In Arizona, the AFL-CIO led the charge in enacting the state’s first-ever minimum wage law in 2006; the new law contains only very limited exemptions and provides coverage for home care workers.



Model Legislation Removing an Exemption for Home Care Workers

Based on Missouri law at V.A.M.S. 290.500.3 (h)

“Employee”, [an] any individual employed by an employer, except that the term “employee” shall not include:

Any person employed on a casual basis [in domestic service employment] to provide baby-sitting services[, any person employed in the domestic service of any family or person at his home, and any employee employed in domestic service employment to provide companionship services for individuals who because of age or infirmity are unable to care for themselves]

(Note: Brackets indicate text deleted by the law.)



Model Legislation Extending Minimum Wage Coverage to Home Care Workers

Drafted by NELP based on model language in state law

“Employee” includes any individual employed or permitted to work by an employer in any occupation, INCLUDING DOMESTIC WORKERS. ... “DOMESTIC WORKER” SHALL MEAN A PERSON EMPLOYED IN A HOME OR RESIDENCE FOR THE PURPOSE OF CARING FOR A CHILD, SERVING AS A COMPANION FOR A SICK, CONVALESCING OR ELDERLY PERSON, HOUSEKEEPING, OR FOR ANY OTHER DOMESTIC SERVICE PURPOSE.

(Note: Capitalized text is new text added by the law.)



Model Legislation Narrowing an Exemption for Home Care Workers

Based on Michigan law at M.C.L.A. 408.394.14.2(a)

This Act does not apply to an employee who is exempt from the minimum wage requirements of the Fair Labor Standards Act of 1939, 29 USC 201 to 219.

AN EMPLOYEE SHALL BE PAID IN ACCORDANCE WITH THE MINIMUM WAGE AND OVERTIME COMPENSATION REQUIREMENTS OF SECTIONS 4 AND 4A IF THE EMPLOYEE MEETS EITHER OF THE FOLLOWING CONDITIONS:

(A) IS EMPLOYED IN DOMESTIC SERVICE EMPLOYMENT TO PROVIDE COMPANIONSHIP SERVICES AS DEFINED IN 29 CFR 552.6 FOR INDIVIDUALS WHO, BECAUSE OF AGE OR INFIRMITY, ARE UNABLE TO CARE FOR THEMSELVES AND IS NOT A LIVE-IN DOMESTIC SERVICE EMPLOYEE AS DESCRIBED IN 29 CFR 552.102.

(Note: Capitalized text is new text added by the law.)

7

Stop Independent Contractor Misclassification and Hold Subcontracting Employers Accountable

Employers use non-standard structures with increasing frequency in a number of leading industries. These are convoluted arrangements that classify workers in ways that can bar them from receiving wage and hour protections that protect employees only. In some cases, these arrangements can create confusion among enforcement agencies and even workers themselves as to who is the responsible employer or employers.

Designating workers “independent contractors” or “consultants,” or treating them as non-employees by paying them off-the-books with no tax withholdings, are ways for employers to evade basic minimum wage and overtime rules. Companies also outsource their workers to separate middlemen entities, and use temporary help or leasing firms to “payroll” their existing staff, who then become the “employees” of another business. This subcontracting-out of the labor-intensive parts of a company’s business allows the company to try to shift responsibility for fair pay rules to other employers.

In low-wage sectors especially, subcontracted workers and misclassified independent contractors are often immigrants and are often paid in cash, making the responsible employers difficult to track down. Inserting a temporary, leasing, or other labor broker between employees and the firm can enable worksite employers to claim that the direct subcontractor is the workers’ sole employer. Workers who sign “independent contractor” agreements as a condition of getting a job are led to believe that they have no rights to wage and hour and other workplace protections.

These business arrangements can save the companies billions of dollars of payroll and other taxes paid for employees. Employers stand to save up to 30 percent of payroll and other taxes, and state and federal tax revenue losses from this practice quickly reach billions of dollars.⁵³ Thus there is a strong incentive for firms to misclassify workers as independent contractors, or to insert subcontracting entities such as temp or leasing firms or labor agents between them and the workers. These structures save companies money, but hurt workers and their families, local and state governments, and law-abiding employers who play by the rules and do not mischaracterize the employment status of their employees.

These contingent structures appear frequently in lower-wage janitorial, garment, agricultural, hospitality, day labor, trucking, security, home health care, and construction jobs. They are also increasingly common in a range of higher-paying sectors, including technology, media and broadcasting, and the public sector.

Despite increasing independent contractor misclassification⁵⁴ and a surge in outsourcing or contracting-out of jobs to undercapitalized middlemen, many states do not possess sufficient protections or devote adequate resources to ensure that all employees are treated as such and thus receive the wages and other protections to which they are entitled. There is much that state agencies can do with existing laws and tools to cut through these job structures and hold employers accountable for all workers in their business. This chapter highlights several effective such tools, including (1) ensuring that investigators scrutinize employer claims that employees are really independent contractors and claims that another entity is solely responsible for fair pay rules; (2) targeting industries known for using these job structures to evade labor standards, and (3) creating task forces or inter-agency commissions to strategically combat independent contractor abuses and subcontracting-out of responsibility for basic minimum wage and overtime laws.

1. Task Forces and Commissions: Vehicles to document and fight the problem

The Policy

In recent years advocates have encouraged state legislatures and agencies to create task forces or commissions to study and document the prevalence and impact of independent contractor misclassification.⁵⁵ In addition, some organizations have completed their own or collaborated on studies of the misclassification problem. This research can help to draw greater public attention to the problem and to build a consensus in favor of substantial reform of labor standards and enforcement practices. Data that emphasize the revenue consequences for the state can be particularly useful because they vividly demonstrate how the abuse experienced by misclassified workers is related to tax evasion by unscrupulous employers.

A 2000 study commissioned by the US Department of Labor found that up to 30% of firms misclassify their employees as independent contractors.⁵⁶ State-level studies have estimated that the number of misclassified employees exceeds 700,000 workers in New York, 550,000 workers in Pennsylvania, and 350,000 workers in Illinois.⁵⁷ Because misclassified employees do not get minimum wage and overtime protections, this means that many millions of workers are not being paid properly. For example, the enforcement and data-sharing activities of New York's Joint Employment Task Force on Employee Misclassification have uncovered over \$12 million in unpaid wages.⁵⁸

How Does the Policy Work?

Efforts to combat independent contractor misclassification will have the greatest effect on those industries where the problem is most rampant—the low-wage, immigrant-dominated sectors such as agriculture, day labor, home health care, construction, delivery services and janitorial. Studies and task forces can be particularly effective where a state's labor enforcement agency is interested in undertaking efforts to address contingent work structures but lacks resources, information-sharing capabilities, or willing counterparts in other state agencies.

A related problem is employers' increasing use of subcontracting to under-capitalized firms that in turn underpay and mistreat workers. To document subcontracting abuses, states have over the years held hearings and developed targeted enforcement aimed at outsourcing used to evade fair pay laws. They have based their targeting on agency audits and studies of industries with heavy labor subcontracting, including garment and agriculture, and more recently janitorial.⁵⁹ Following these initiatives, states and federal agencies have responded with unemployment tax evasion (so-called "SUTA dumping") prevention rules that tighten oversight on unemployment insurance evasion. Many states

already regulate temporary agencies and employment agencies, where employers often seek to evade laws by inserting the agency between themselves and their employees.⁶⁰

In addition, several states have formed task forces among various state agencies whose enforcement work relates in some way to identifying and remedying independent contractor misclassification and “who’s the employer” questions. Forming a multi-agency task force enables each state enforcement agency to leverage its own scarce resources, share data, and be more strategic. These task forces have come up with innovative and effective strategies. Some are very simple: for instance, changing the claim form so that employees can list more than one responsible employer, and creating checklists to determine whether a worker designated as an “independent contractor” really is one. Others are more involved: for instance, multi-agency enforcement sweeps to recover unpaid wages and fines for wage and hour violations in high-violation jobs where contingent structures predominate.

What Are the Challenges to Achieving This Policy?

State legislators may not know or appreciate the scope of the misclassification problem, and may need to be convinced. Though a growing body of research substantiates that misclassification is a widespread problem that both deprives workers of important protections and deprives the government of fiscal resources, much of the in-depth research is specific to one sector, the construction industry. Advocates may find it more politically feasible to pursue reforms aimed at specific sectors than to achieve reforms that broaden the definition of employee or enact a presumption for all workers.

State legislators and agencies may be receptive to employer arguments that these reforms attack legitimate independent contractors and small business entrepreneurs. Advocates should be prepared to frame the reforms as aimed at employers that require low-wage workers to sign independent contractor agreements as a condition of getting a job, and at jobs where the workers are truly not running an independent business. Many of the jobs highlighted above, like home care, building services, day labor, hospitality and delivery services are not performed by individuals who own and run their own business.

Similarly, subcontracting-out the labor-intensive aspects of a job is not in and of itself illegal, and companies do it all the time. Advocates should be sure to explain to policy-makers such as agency staff and legislators that they are targeting only the abuses that occur when companies use the subcontractors to hide behind their responsibility to the workers. If a company outsources its workers to a temp firm or another company, it cannot by that action also delegate its responsibility to its workers. As long as the subcontracting company is following all the rules, there will be no intervention.

Enforcement agencies may resist a mandate to collaborate with other agencies by arguing that state and federal privacy laws restrict their ability to share information. To avoid this

potential hurdle, the task force can be accompanied by a specific legislative authorization for the participating state agencies to share pertinent information.

Which States Have Studies, Commissions or Task Forces to Combat the Problem?

Government officials, advocacy organizations, or academics in the following states have undertaken research studies to document the prevalence and cost of independent contractor misclassification⁶¹:

- Illinois: Department of Economics, University of Missouri-Kansas City, *The Economic Costs of Employee Misclassification in the State of Illinois* (2006)
- Massachusetts: Construction Policy Research Center, Labor and Worklife Program, Harvard Law School and Harvard School of Public Health, *The Social and Economic Costs of Employee Misclassification in the Construction Industry* (2004)
- Minnesota: Office of the Legislative Auditor, *Misclassification of Employees as Independent Contractors* (November 2007)
- New York: Cornell University School of Industrial Labor Relations, *The Cost of Worker Misclassification in New York State* (February 2007)
- Ohio: *Report of the Ohio Attorney General on the Economic Impact of Misclassified Workers for State and Local Governments in Ohio* (February 18, 2009)
- Texas: Workers Defense Project in collaboration with the Division of Diversity and Community Engagement at the University of Texas at Austin, *Building Austin, Building Injustice: Working Conditions in Austin's Construction Industry* (June 2009)

The following states have established task forces or commissions to coordinate the investigation and enforcement efforts of state agencies, publicize the issue of misclassification, and recommend further legislative reforms:

- California (Cal. Unemp. Ins. Code § 329): Joint Enforcement Strike Force on the Underground Economy
- Connecticut (Public Act 08-156): Joint Enforcement Commission on Employee Misclassification
- Iowa (Exec. Order No. 8): Independent Contractor Reform Task Force
- Maine (Exec. Order No. 23 FY 08/09): Joint Enforcement Task Force on Employee Misclassification
- Maryland (Exec. Order No. 01.01.2009.09): Joint Enforcement Task Force on Workplace Fraud
- Massachusetts (Exec. Order No. 499): Joint Enforcement Task Force on the Underground Economy and Employee Misclassification

- Michigan (Exec. Order No. 2008-1): Interagency Task Force on Employee Misclassification
- Nevada (2009 Nev. Stat. 100): Interim Committee to Study Employee Misclassification
- New Hampshire (2008 N.H. Laws 378): Task Force to Study Employee Misclassification
- New York (Exec. Order No. 17): Joint Enforcement Task Force on Employee Misclassification
- Oregon (Chapter 845 Oregon Laws 2009): Interagency Compliance Network
- Rhode Island (2008 R.I. Pub. Laws 372): Special Joint Commission to Study the Underground Economy and Employee Misclassification
- Utah (U.C.A. § 13-46-201): Independent Contractor Enforcement Council
- Washington (2009 Wash. Laws. 432): Joint Legislative Task Force on the Underground Economy



Model Legislation Providing for Independent Contractor Task Forces or Commissions

Massachusetts Executive Order No. 499 creating the Massachusetts Joint Enforcement Task Force on the Underground Economy and Employee Misclassification (excerpted)

1. There is hereby established the Joint Enforcement Task Force on the Underground Economy and Employee Misclassification (the “Task Force”).
2. The Task Force shall consist of the following members or their designees: the Director of Labor, the Commissioner of Revenue, the Commissioner of the Department of Industrial Accidents, the Chief of the Attorney General’s Fair Labor Division, the Commissioner of the Division of Occupational Safety, the Commissioner of the Department of Public Safety, the Director of the Division of Professional Licensure, the Director of Apprenticeship Training and the Director of the Division of Unemployment Assistance. The Director of Labor shall chair the Task Force.
3. The Task Force shall coordinate joint efforts to combat the underground economy and employee misclassification, including efforts to: (a) foster compliance with the law by educating business owners and employees about applicable requirements; (b) conduct joint, targeted investigations and enforcement actions against violators; (c) protect the health, safety and benefit rights of workers; and (d) restore competitive equality for law-abiding businesses.

In fulfilling its mission, the Task Force shall:

- a. Facilitate timely information sharing between and among Task Force members, including through the establishment of protocols by which participating agencies will advise or refer to other agencies matters of potential investigative interest;

- b. Identify those industries and sectors where the underground economy and employee misclassification are most prevalent and target Task Force members' investigative and enforcement resources against those sectors, including through the formation of joint investigative and enforcement teams;
 - c. Assess existing investigative and enforcement methods, both in Massachusetts and in other jurisdictions, and develop and recommend strategies to improve those methods;
 - d. Encourage businesses and individuals to identify violators by soliciting information from the public, facilitating the filing of complaints, and enhancing the available mechanisms by which workers can report suspected violations;
 - e. Solicit the cooperation and participation of district attorneys and other relevant enforcement agencies, including the Insurance Fraud Bureau, and establish procedures for referring cases to prosecuting authorities as appropriate;
 - f. Work cooperatively with employers, labor, and community groups to diminish the size of the underground economy and reduce the number of employee misclassifications by, among other means, disseminating educational materials regarding the applicable laws, including the legal distinctions between independent contractors and employees, and increasing public awareness of the harm caused by the underground economy and employee misclassification;
 - g. Work cooperatively with federal, commonwealth, and local social services agencies to provide assistance to vulnerable populations that have been exploited by the underground economy and employee misclassification, including but not limited to immigrant workers;
 - h. Identify potential regulatory or statutory changes that would strengthen enforcement efforts, including any changes needed to resolve existing legal ambiguities or inconsistencies, as well as potential legal procedures for facilitating individual enforcement efforts; and
 - i. Consult with representatives of business and organized labor, members of the General Court, community groups and other agencies concerning the activities of the Task Force and its members and ways of improving its effectiveness, including consideration of whether to establish an advisory panel under the secretary of labor and workforce development.
4. The Task Force shall transmit an annual report to the Governor summarizing the Task Force's activities during the preceding year. The report shall, without limitation: (a) describe the Task Force's efforts and accomplishments during the year; (b) identify any administrative or legal barriers impeding the more effective operation of the Task Force, including any barriers to information sharing or joint action; (c) propose, after consultation with representatives of business and organized labor, members of the legislature and other agencies, appropriate administrative, legislative, or regulatory changes to strengthen the Task Force's operations and enforcement efforts and reduce or eliminate any barriers to those efforts; and (d) identify successful preventative mechanisms for reducing the extent of the underground economy and employee misclassification, thereby reducing the need for greater enforcement. The Task Force also shall take appropriate steps to publicize its activities.

2. A Broad Definition of the Employment Relationship: The key to holding employers accountable



The Policy

Subcontracting-out workers to a temp agency or to another labor broker or company is not in itself illegal. In many industries, however, employers use this practice to confuse workers about who the responsible employer is, and evade responsibility for basic wage and hour standards by hiding behind the intermediary, claiming that it is the sole responsible employer.

Most state minimum wage and overtime laws and the federal Fair Labor Standards Act (FLSA) have very broad definitions of employer, employee, and employ, and are meant to capture most work relationships, except for those that are legitimately between independent businesses. The striking breadth of the FLSA definitions covers work relationships that go beyond the employer-employee definition under more traditional common-law rules,⁶² so employer attempts to evade the broad FLSA coverage often fail as long as the law is enforced properly. Almost all state minimum wage acts mirror this broad language (see below for those that do not), and advocates should ensure that their state's wage payment laws have similar definitions, in order to have an equally broad reach.

Advocates should remind agencies and courts enforcing this broad language that the laws are intended to look at the “economic reality” of a worker's relationships with purported employers and de-emphasize contractual labels and structures developed by the employers. Worker advocates and agencies should clearly enforce these broad definitions in the industries where the problems persist.

If enforcement of the existing law is not working, or is not enough to deter violations, advocates can consider amending their state laws or proposing good agency regulations to include stronger and clear “joint employer” language that holds more than one employer responsible for basic wage and hour laws. These regulations should have clear examples of cases where labor subcontracting is most typically used to evade wage and hour laws, including in the agriculture, garment, janitorial and home health care industries, and by use of temporary or employment referral firms.

In addition, because many industries have persistent independent contractor misclassification and subcontracting schemes accompanied by frequent violations of wage laws, some states have begun to create automatic coverage under their laws for certain workers, regardless of the label attached to them, and regardless of which entity claims to be the employer. Just as many state wage and hour laws have exclusions for certain types of workers, so they can have inclusions for others. For example, taxi drivers are covered under some state workers compensation laws regardless of how their

employers categorize them; in some states, construction workers are also covered under workers comp regardless of who is the purported employer. This approach can be adapted for wage theft laws in the states. A variation on these automatic inclusion laws is to create a presumption that a worker is an employee. The employer can rebut the presumption with facts that show that the worker is really an independent businessperson; absent that proof, the worker is deemed to be covered.

How Does the Policy Work?

Advocates should encourage the public agencies to enforce the laws already on the books. The broadly-defined scope of who is an employee and who is the employer under wage and hour laws allows the agencies to target employers that call their employees “independent contractors,” and to hold more than one employer (a worksite employer AND a temp agency, or a janitorial subcontractor AND the office building or retail store where the work is performed, for instance) responsible for unpaid wages.

Agencies should also use their “hot goods” powers to seize goods produced under substandard working conditions, holding the goods until all employers pay up. This hot goods power is most effective in agriculture, trucking, and garment claims, where the end-user employers (the growers, retailers, and the garment retailers) need the goods quickly. This is a powerful tool that has been used to deter unscrupulous contractors who resort to multiple layers of under-capitalized subcontractors and engage in unfair competition. Advocates in the states could propose hot goods remedies in their state laws, making sure to include a private right to invoke hot goods, which is currently not included in the federal law.

Sometimes enforcing the already-broad definition of responsible covered employers (including individual employers) under the state law is not possible or has been thwarted by narrowing case law or agency interpretation. In this situation, advocates may want to promote clarifying and more explicit language in their state law and agency regulations. This can include regulations or law that:

- Clarify that more than one employer can be held responsible for unpaid wages as a “joint employer,” with concrete examples.
- Make explicit the presumption in state minimum wage and wage payment laws that a worker is an employee rather than an independent contractor unless certain specified factors are met. For a presumption of employee status, this puts the burden on the employer to overcome the presumption by showing that: (a) an individual is free in fact from control or direction over performance of the work; (b) the service provided is outside the usual course of the business for which it is performed; and (c) an individual is customarily engaged in an independently established trade, occupation or business. This “ABC” test, found in a majority of state unemployment insurance acts and a handful of state wage laws, is preferable because it adopts factors that are objective and thus very difficult for employers to manipulate.

Finally, a number of states regulate temporary help agencies and employment referral agencies directly. These provisions are often ignored, but sometimes have included useful requirements that advocates can use to encourage accountability of these intermediaries. The better models use the “joint employer” concept to make worksite and temp and employment agencies jointly responsible for compliance with wage and hour laws. We do not promote reforms that focus solely on regulating the intermediaries, because they typically get the worksite or subcontracting employer off the hook, but mention these laws only for advocates to use if they are already on the books and if they have useful provisions.⁶³

What Are the Challenges to Achieving This Policy?

Despite the broad definitions of covered employees and employers under fair pay laws, some state courts have substituted narrower and more complicated definitions of employees or independent contractors that involve multiple factors that are easy for an employer to manipulate. When the agencies have not used their laws in this way, they sometimes do not believe that the laws are quite so broad. If they do not have regulations that flesh out the breadth of the definitions or have not used their state laws to go after subcontracting firms in “joint employer” cases, the courts in turn may not apply the law broadly.

Simply because an employer claims that a worker is an independent contractor rather than an employee, that the worker is solely employed by another entity, does not make it legally so. Labels do not matter. Businesses that try to shield themselves from the responsibility that comes with employing workers by subcontracting cannot escape liability for workplace violations if they legally “employ” the workers. Slapping a name on a worker—calling the worker an “independent contractor” and having the worker sign an agreement that states he or she is an “independent contractor,” does not change that worker’s status as a covered “employee” under labor and employment laws. Neither does inserting a leasing or temp agency in between the worksite employer and the worker, and having the temp agency cut the payroll checks and withhold taxes.

Which States Provide for Broad Employment Enforcement and Language?

Most states already use broad definitions of employee and employer that are either identical or very close to the FLSA definitions in their fair pay laws. Fewer, however, have the explicit definitions in their wage payment laws. Most states with minimum wage acts have the basic definition of “employ” found in the FLSA (“includes to suffer or permit to work,”) or some close and broad variation of that language, except for: California, Colorado, Georgia, and Missouri.

It is critical for advocates to ensure that any new wage and hour protections that are enacted refer back to and incorporate these broad definitions. For states that do not have

the broad definitions, advocates can either refer simply to the FLSA definitions, or craft their own very explicit and broad language to cover most work and workers.

It may be most feasible for advocates to argue for inclusion of an “ABC” presumption test in the state’s minimum wage and wage payment laws where the state already has enacted this presumption in its unemployment insurance law.⁶⁴

The following states have adopted a presumption of employee status (often using the “ABC” test described above) in their minimum wage, independent contractor, and/or wage payment laws:

- Massachusetts (M.G.L.A. 149 § 148B)
- New Hampshire (N.H. Rev. Stat. §§ 275:42(II) and 279:1(X))
- Indiana (IC § 22-2-2-3) (limited version)
- Minnesota (M.S.A. § 181.723), New Jersey (N.J.S.A. 34:20-4), Maryland, Delaware (construction-specific)

California, New York and New Jersey hold businesses in the garment and agricultural sectors that have an entrenched subcontracting structure accountable for any wage and hour and other workplace violations that occur in their business.⁶⁵ California recently passed a more sweeping contractor accountability law covering janitorial services as well. Several states have regulated day labor agencies (that act as middleman entities) to curb such abuses as over-charging for transportation to work and check-cashing schemes.

A USDOL regulation under FLSA defines joint employment as follows: “Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer” (29 C.F.R. § 791.2). While this by itself is too narrow to fully encompass the types of relationships covered by the broad definition of “employer,” advocates could urge their state agencies to include some of this interpretive language in rules or regulations, and could suggest concrete examples where subcontracting relationships clearly define more than one responsible employer, including in most janitorial, agricultural, and temp agency jobs.

Recent Campaigns

In 2008 the Illinois Foundation for Fair Contracting and allied groups lobbied for and won passage of a law in Illinois to combat independent contractor abuses in the construction industry. The new law presumes that a worker is an “employee,” and establishes a strict test that employers must meet in order to treat their workers as independent contractors. Since this law was passed, several other states including Maryland, Delaware, and New York have followed suit.



Model Legislation Providing For Broad Definition of Employment Relationships

Example 1

Based on Fair Labor Standards Act 29 U.S.C. § 203(d)

Employer includes any person acting directly or indirectly in the interest of an employer in relation to an employee....

... [T]he term ‘employee’ means any individual employed by an employer....

‘Employ’ includes to suffer or permit to work.”

Example 2

Based on Illinois Labor Code 820 ILCS 115/2

As used in this Act, the term “employer” shall include any individual, partnership, association, corporation, limited liability company, business trust, employment and labor placement agencies where wage payments are made directly or indirectly by the agency or business for work undertaken by employees under hire to a third party pursuant to a contract between the business or agency with the third party, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee, for which one or more persons is gainfully employed.



Model Legislation Creating an Employee Presumption

Based on Massachusetts law at M.G.L.A. 149, § 148B

- a. For the purpose of the minimum wage law and the wage payment law, an individual performing any service shall be considered to be an employee under those laws unless:
 1. the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and
 2. the service is performed outside the usual course of the business of the employer; and,
 3. the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.
- b. The failure to withhold federal or state income taxes or to pay unemployment compensation contributions or workers compensation premiums with respect to an individual’s wages shall not be considered in making a determination under this section.
- c. An individual’s exercise of the option to secure workers’ compensation insurance with a carrier as a sole proprietor or partnership shall not be considered in making a determination under this section.



Model Legislation Providing for Strong Joint Employment Language

Based on California law at Cal. Labor Code § 2810

- a. A person or entity may not enter into a contract or agreement for labor or services with a construction, farm labor, garment, janitorial, or security guard contractor, where the person or entity knows or should know that the contract or agreement does not include funds sufficient to allow the contractor to comply with all applicable local, state, and federal laws or regulations governing the labor or services to be provided
- b. There is a rebuttable presumption affecting the burden of proof that there has been no violation of subdivision (a) where the contract or agreement with a construction, farm labor, garment, janitorial, or security guard contractor meets all of the requirements in...



Model Legislation Providing for Hot Goods Powers

Based on Fair Labor Standards Act 29 U.S.C. § 215(a)(1)

It shall be unlawful for any person to transport. . . ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of [the minimum wage or overtime sections] of this title. . .”

3. Written Disclosure of Employment Status: Arm workers with the information they need

The Policy

Many employers misclassify their employees as independent contractors or insert labor intermediaries between themselves and their workers in the hope that the employees will not seek to enforce their labor and employment rights. For this reason, many advocates have begun to push for written disclosures by employers to workers. These disclosures would explain the worker's status as "employee" or "Independent contractor," and identify the employer(s) responsible for the employee. The disclosures should be provided upon hire and the information workers need to contest their employment status if they think it is incorrect.

How Does the Policy Work?

Worker advocates may decide to amend the state law or agency regulations to clarify that:

1. The state wage and hour laws encompass many of the workers who are designated as independent contractors.
2. Workers need to be told upon hire of their employment status (employee v. independent contractor) and who or what entities are their employer(s).

What Are the Challenges to Achieving This Policy?

Employers will argue that the agreements they reach with workers are legitimate, and the papers they sign upon hire are used as evidence of this agreement. Sometimes employees themselves may argue that they do not want to lose the freedom that comes with being an "independent" contractor. Advocates can address these concerns by explaining that simply having labor and employment protections does not change the flexibility or independence of a job.

Small businesses and other employers will likely argue that providing workers upon hire with written disclosures of their employment status will cause undue paperwork burdens on the employer. Advocates should be prepared to argue that many firms already require screening applications and require workers to sign independent contractor agreements, so that the written disclosures informing workers of the legal implications of an independent contractor status and informing workers of the nature of their employer(s) should not be any more onerous.



Model Legislation for the Disclosure of Employment Status

Based on California Senate Bill 1490 (2008) (excerpted)

- a. A person employing labor in this state shall provide to an individual hired as an independent contractor, when the individual is hired, a form developed by the Employment Development Department which includes all of the following: (1) A notice that the individual has been hired as an independent contractor; (2) The factors the Employment Development Department uses to determine whether a person is an employee or an independent contractor; (3) A statement explaining the impact that the individual's status as an independent contractor has on his or her tax obligations and his or her eligibility for labor and employment protections. (4) A notice of the individual's ability under subdivision (c) to request a written determination from the Employment Development Department as to whether the individual is an independent contractor or employee.
- b. (1) A person employing labor in this state shall maintain, for not less than two years, records of all independent contractors hired by that person. The records shall include the name of each independent contractor, and his or her address, social security number, and, if applicable, federal tax identification number.

(2) A person employing labor in this state shall make the records described in paragraph (1) available for inspection, upon request, by a member of the commission or an employee of the Department of Industrial Relations or the Employment Development Department.
- c. An individual hired as an independent contractor may request a written determination from the Employment Development Department, in the form of a letter ruling, as to whether he or she is an independent contractor or employee.

8

Ensure Workers are Paid for All Hours Worked

State labor laws seldom provide the full complement of protections that *should* constitute the baseline standard for all workers, creating loopholes that employers easily manipulate to deny workers pay for all hours worked. This chapter focuses on three major sets of protections that should be present in all states but frequently are not: Meal and Rest Break Requirements, Daily Overtime Requirements, and Notice and Wage Statement Requirements. These laws grant rights that are valuable on their own, and that also provide workers with crucial protection against employers' efforts to avoid paying them for all hours they work.

Paid meal and rest breaks, for example, give workers the time they need to eat, rest and take care of personal needs—basic rights that workers are too often denied. The 2009 survey *Broken Laws, Unprotected Workers* found that 58.3 percent of low-wage workers in three major cities had experienced a meal break violation in the previous week. These violations take multiple forms: 18 percent of workers were denied a meal break altogether; while 11.3 percent had their meal break interrupted by the employer; 12 percent worked through a meal break and 43.3 percent reported that their meal break was shorter than legally required.⁶⁶ Many low-wage workers suffer a double injury when the employer requires them to work through a scheduled break *and* deducts the missed break time from the workers' compensable time. When this happens, workers miss out on much-needed rest time *and* are robbed of pay.

Similarly, daily overtime laws discourage employers from overworking employees or creating unbalanced weekly schedules with workdays of very different lengths. Many low-wage workers are required to work more than 8 hours a day, and some as long as 10 or 12 hours, all at their straight rate of pay. Long work days take a physical and mental toll on workers, who are more likely to experience workplace injuries and who miss out on spending time with family when their shifts exceed the standard 8-hour work day. Too often employers fail to pay workers at all for extra hours beyond their scheduled shift, taking advantage of lax standards to trim from workers' pay.

Workers also frequently face difficulties protecting their right to be paid for all hours worked because they lack basic information about their hours and wages that would help them to verify that they are being paid correctly or establish a claim if they haven't. Many workers in low-wage industries have no written statement from their employer at the time of hire that establishes the hours they are expected to work, their rate of pay, whether they will receive overtime, and information on deductions and benefits. Compounding the problem, many employers fail to provide regular wage statements that provide a clear and accurate breakdown of the hours worked and wages paid. According to *Broken Laws*, almost 57 percent of workers surveyed did not receive a paystub in the prior week. The lack of transparency diminishes workers' ability to consider a job offer and negotiate with their employer; hurts workers' chances of proving a claim for unpaid wages; and hinders attempts to collect on a claim.

The inclusion of basic provisions such as paid rest and meal breaks, daily overtime, and notice and wage statements helps ensure all workers, and especially low-wage workers, receive fair treatment on the job and facilitates better enforcement of fundamental workplace protections.

1. Paid Meal and Rest Breaks: Hold the line on workers' time

The Policy

Requiring employers to provide paid rest and meal breaks ensures that workers have sufficient time each workday to eat, rest and take care of personal needs. There is no federal requirement that employers provide meal or rest breaks, only that workers must be paid if they work through a break, so state legislation protecting this right is vital for workers. Requiring that all breaks be paid is particularly important because it prevents employers from reducing workers' compensable time for breaks they purport to provide but often deny. If state law specifies that breaks be counted as paid time, employers cannot use scheduled but missed breaks as a way to trim workers' paychecks.

Studies show a correlation between meal and rest break violations and other wage claims, suggesting that strong protections in this area may help guard against a wider range of workplace abuses. A recent California study, for example, found that the vast majority of workers who came to worker centers and legal services groups with wage claims also reported meal and rest break violations.⁶⁷ Not only were workers denied proper breaks; many faced suspensions, reassignments, threats and firings for complaining about inadequate breaks.⁶⁸ Stronger protections in this area will help increase employers' liability for denying workers full pay for time worked and for penalizing workers who attempt to protect their rights.

How Does the Policy Work?

Workers are best protected when state law makes provisions for a dedicated lunch period as well as periodic rest breaks; specifies the intervals at which breaks be provided; and requires that breaks be counted as compensable time.⁶⁹

Paid meal and rest breaks are most vital for low-wage workers in physically demanding jobs and in caregiver jobs, where breaks can be vital to workers' health but are not always provided on a consistent basis. Meal and rest break laws should apply broadly to the workforce, exempting as few groups as possible, and allow only minimal exceptions for true public emergencies.⁷⁰

In order to provide full protection for workers, state meal and rest break legislation should also provide for a private right of action and penalties for violations to prevent employers from ignoring this important right.

What Are the Challenges to Achieving This Policy?

Employers will oppose meal and rest break laws on the grounds that these requirements are too costly and cumbersome, and may minimize the importance of breaks for their workers' welfare. Regular breaks are crucial for worker health and safety, however, especially for low-wage workers in physically demanding and care-giving jobs that require constant attention. Workers who are denied sufficient breaks are at higher risk of repetitive stress injuries, incontinence and urinary problems, and for those working in high-temperature environments, heat illness and even death.⁷¹ Any expense incurred in providing this right will pay off in increased productivity, reduced turnover, and a drop in working time lost to injury and illness.

Even when they claim to provide breaks, employers may structure the workday or worksite to make it practically impossible for workers to take a break. Workers may not be able to use restrooms that are far from the job site or kept locked, or may not take a lunch break away from their assigned site if there is no breakroom. Alternatively, employers may attempt to count the time that a worker spends on bathroom breaks against a worker's mandated rest break periods, meaning that workers are left with no breaks at all.

Some workers may be reluctant to take breaks even when their right to do so is protected by law. Workers paid a piece rate (for garment production or agricultural work) may skip breaks to complete as many assignments as possible to maximize their earnings. Breaks are crucial but hard to enforce for occupations in which workers do not control the pace and order of production. In factories or car washes, for example, workers often cannot leave their post even momentarily unless the employer has a structured break system in place, and either shuts down production or assigns replacements to relieve workers. Employers may also under-staff workplaces so that workers forgo breaks for fear of burdening other workers or, in the case of some child care or health service workers, threatening the safety of patients or children.

Compliance may require a major shift in thinking for employers and workers about the structure and culture of their workplace and needs of workers.

Which States Provide Rest and/or Meal Breaks

Nine states (California, Colorado, Illinois, Kentucky, Minnesota, Nevada, Oregon, Vermont, and Washington) currently require some form of paid rest breaks.⁷² Minnesota requires an "adequate rest period," and Vermont requires that employees be given "reasonable opportunities" to eat and use the restroom during work periods, without specifying an amount of time. Oregon and Kentucky require employers to provide rest time in addition to meal periods.

Twenty states (California, Colorado, Connecticut, Delaware, Illinois, Kentucky, Maine, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New York, North

Dakota, Oregon, Rhode Island, Tennessee, Vermont, Washington, and West Virginia) require employers to provide a meal period. California, Colorado, Oregon and Washington require employers to count meal breaks as time worked. In California and Washington, employers must count breaks as time worked only if the worker is on-duty or required to remain on the premises.

In addition, a number of states have provisions for a day of rest. Thirteen states (Alabama, California, Connecticut, Illinois, Maryland, Massachusetts, New Hampshire, New York, North Dakota, Oklahoma, South Carolina (Sabbath-breaking law), Texas (retail employers), and Wisconsin) require a day of rest for certain jobs. Kentucky and Rhode Island do not require a day of rest but do require employers to pay workers time and a half on Sunday.



Model Legislation Providing for Meal Periods

Based on California law at Cal. Labor Code § 512

An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee.

An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.



Model Legislation Providing for Rest Breaks

Based on California law at 8 CCR § 11050(12)

Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (minutes) net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3¹/₂) hours. Authorized rest period time shall be counted, as hours worked, for which there shall be no deduction from wages.



Model Legislation Providing for Penalty for Violations

Based on California law at Cal. Labor Code § 226.7(b)

If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided.

2. Daily Overtime: Safeguard the eight-hour day

The Policy

Daily overtime requirements provide additional protection beyond the weekly overtime requirements that the FLSA and by many state labor laws mandate. Weekly overtime laws require employers to pay a premium rate of pay—usually one-and-a-half times the employee’s regular hourly rate—for hours worked over 40 in a week, but do not penalize employers for requiring an employee to work very long shifts on any given day so long as the total weekly hours fall below 40. Daily overtime rules discourage employers from imposing unbalanced schedules, with excessive hours on some work days and, and from making last-minute demands that workers stay late past the end of their shift. With only weekly overtime rules in place, employers can avoid paying premium pay by scheduling workers for fewer than five work days or by canceling or shortening shifts later in the week if they ask workers to stay late earlier in the week.

Daily overtime laws are also crucial because they impose an additional disincentive to employers to make employees work “off the clock” at the end of their shift without paying them at all. Strong daily overtime requirements provide workers with the basis for another violation in addition to a minimum wage violation or an unpaid wages claim, increasing the liability for this practice.

How Does the Policy Work?

Daily overtime laws should require employers to pay workers at least one-and-a-half times their regular rate of pay for hours worked in excess of 8 in a day, and double-time for hours over 12 in a day. Requiring employers to pay time-and-a-half or double-time for work performed on a seventh consecutive day provides additional protection to workers who are vulnerable to excessive workloads.

Daily overtime laws that cover the greatest number of workers are the best; they should include only minimal, if any, exemptions. They should not subject any groups to a lower overtime standard: applying a lower rate of premium pay, or requiring that some workers meet a higher hours threshold before premium rates apply.

Daily overtime laws in some states include loopholes that allow employers to skirt daily overtime requirements through use of “flexible” or fluctuating work week arrangements with employees. Others allow for exceptions in times of emergencies. These exceptions should be limited to the greatest extent feasible.

What Are the Challenges to Achieving This Policy?

Employers will argue that daily overtime laws impose excessive costs and restrict their flexibility in assigning workers, particularly in industries where emergencies are common, such as public services or heavy industry, or in caregiving fields, such as homecare, where employers often rely on only one or two workers to care for a client. Even in these fields, however, employers should be able to minimize costs by adjusting scheduling practices and assignments. In addition, scheduling adjustments will generate long-term cost-savings in the form of greater worker productivity and a reduced risk of burn-out and injury, even if employers incur some initial administrative costs when a daily overtime law first goes into effect. For example, assigning 3 rather than 2 workers to care for a patient who require 24-hour care is a relatively simple adjustment that will eliminate the employer's need to pay daily overtime, and will ensure that workers get the necessary time off to perform at their best ability, avoid accidents, and provide better services.

Opponents may also claim that businesses will flee to states with fewer overtime protections if daily overtime rules are adopted. The experience of California after the introduction of daily overtime rules there indicates that a strong overtime regime will not result in an exodus of business in response to stronger overtime laws.

Which States Provide Daily Overtime?

Currently five states plus Puerto Rico provide for daily overtime: Alaska, California, Colorado, Nevada, New York, Puerto Rico.

Recent Campaigns

In New York, the Domestic Workers United and the New York Domestic Workers Justice Coalition campaigned for the passage of the Domestic Worker Bill of Rights, which contained a daily overtime provision. Unfortunately, the New York State legislature did not include this provision in the final bill that was enacted in 2010.



Model Legislation Providing for Daily Overtime

Based on California law at Cal. Labor Code § 510(a)

Eight hours of labor constitutes a day's work. Any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work in any one workweek shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee. Any work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the regular rate of pay for an employee. In addition, any work in excess of eight hours on any seventh day of a workweek shall be compensated at the rate of no less than twice the regular rate of pay of an employee. Nothing in this section requires an employer to combine more than one rate of overtime compensation in order to calculate the amount to be paid to an employee for any hour of overtime work.

3. Written Notice and Wage Statements: Ensure workers' right to know



The Policy

Requiring employers to produce written notice at the time of hire and a wage statement at each pay period, in the employees' primary language, with critical information about the employer, wages and benefits, enables workers to hold employers to the promises that they have made and seek timely action if they break their commitments. Notice at the time of hire, in particular, helps workers carefully consider a job offer and gives them more certainty about their wage rate and benefits before they commit their time to an employer. Wage statements help workers ensure that they are being paid correctly for all the hours they have worked because they can double-check the employer's calculations against their own, and use the statements as support for a claim if they find a discrepancy. Requiring employers to provide contact information in both types of statements enables workers to locate their employer and collect on judgments if a dispute arises.

Notice and wage statement requirements also help guard against a routine practice by employers of fabricating documents in order to coerce low-wage, immigrant workers into performing work at below-minimum wages and without overtime. Similarly, many employers will misclassify their employees as independent contractors without notifying the employee when he or she is hired, as discussed earlier in Chapter 7. Workers who lack long-term employers and permanent workplaces, such as day laborers, and workers who are paid off the books, in cash, or by personal check are particularly vulnerable to these practices and stand to benefit the most from strong protections.

How Does the Policy Work?

States should require both notice at the time of hire and wage statements at each pay period, and should require employers to provide both types of disclosures in writing to workers. Employers should be required to provide bilingual statements if their workers' primary language is not English. Notice and wage statements are much less helpful to workers if the disclosures are not in a language the worker understands.

Although a good number of states already have notice and wage statement provisions, many do not require enough specification, only requiring that the employer provide a list of deductions. States that already require some form of notice and wage statement should increase the information that is required of employers, detailing the mandatory information in a comprehensive list. Whether the law heightens existing requirements or establishes new standards, the list of required information should include, at time of hire:

-
- the employer(s) name(s) and contact information;
 - the work location, the nature of the work and expected period of employment;
 - the wage rate and when worker will be paid overtime or other premium pay;
 - benefits to be provided and at what cost; and
 - for each pay period: name(s) of employer(s), the base wage rate, hours worked, overtime, gross and net pay, and information on deductions.

Making the failure to provide notice a *per se* violation gives advocacy organizations another tool with which to pursue abusive employers even before wage theft occurs.

What are the Challenges to Achieving This Policy?

Some employers may try to argue that notice and wage statements requirements are too costly and burdensome. With the rise of computerized payroll systems, however, most employers should be able to generate wage statements with little difficulty. Even employers who do not use computerized payrolls (most likely small businesses) should be able to easily generate a form document with the relevant information provided. Moreover, 18 states already require employers to provide notice at the time of hire, and 38 states already require wage statements. Any additions to those requirements would not be overly burdensome to employers in those states.

Similarly, the cost of translating notice and wage statements into another language should be minimal. Because notice statements do not vary significantly among employees and wage statements are substantially similar for all workers and between pay periods, the employer could most likely use a standard form produced in both languages. The State Department of Labor may be able to address this issue by creating a basic template for wage statements in the most common languages in the state. The model is more likely to be accurate and is a cost effective way to counter such arguments.

Workers who are eager to find employment may be reluctant to demand written notice or a wage statement if the employer does not offer it. Practically speaking, the right may be of use only after a worker has ended his or her employment, lessening its primary intended goal. Pursuing and publicizing cases that include this claim may encourage other employers to comply with the law.

Which States Provide Notice or Wage Statement Requirements?

Currently 18 states require that an employer disclose some terms and conditions of work to the employee at time of hire: Alabama, Alaska, Connecticut, Delaware, Hawaii, Illinois, Iowa, Louisiana, Maryland, Michigan, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, South Carolina, Utah, and West Virginia.

Iowa, Minnesota, and Nebraska have provisions that apply specifically to migrant workers, and Nebraska has an additional provision for independent contractors.

The following 38 states require an employer to provide a wage statement every pay period: Alaska, California, Colorado, Connecticut, Delaware, Hawaii, Idaho (statement of deductions only), Illinois (deductions only), Indiana, Iowa, Kansas (only upon request, statement of deductions only), Kentucky (pay “by check or otherwise,” deductions only), Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri (at least once a month, deductions only), Montana (deductions only), Nevada (deductions only, more information provided at employees’ request), New Hampshire (deductions only), New Jersey (deductions only), New Mexico, New York, North Carolina (deductions only), North Dakota, Oklahoma (deductions only), Oregon (deductions only), Pennsylvania, Rhode Island, South Carolina, Texas, Utah, Vermont, Washington, West Virginia (deductions only), Wisconsin, and Wyoming.

Recent Campaigns

In 2010, Make the Road New York passed an omnibus bill that includes a provision strengthening New York’s notice requirement to workers. The bill requires employers to provide workers with more detailed written information regarding their wages (rates of pay, any food, lodging or tips allowances claimed by the employer) and the employer’s contact information. Employers are required to update the written notice if any information changes (including employer contact information or business names). The bill further requires employers to provide such written notice in English and in the language identified by the employee as his or her primary language. As a way to ensure accuracy of translation and as a cost-effective measure, the bill requires the New York State Department of Labor to develop the template for the notice. The NY DOL has the discretion to set the number of languages into which the notice template will be translated, and employers are only required to provide the non-English notice if the NY DOL provides it. Damages are available to workers if employers violate the written notice requirement.



Model Legislation Providing for Notice

Drafted by NELP based on model language in state and federal law

- I. An employer must provide each of its employees, prior to the time such employee commences employment, and on or before January 1 of each subsequent year, with a written statement, in English and in the principal language of the employee, setting forth the terms and conditions of his/her employment, including but not limited to:
 - A. The full name, mailing address, and phone number of the employer or employers as defined herein, including each individual employer as defined herein; and the federal and state tax identification number of each employer who is not a natural person.
 - B. The place or places of employment.
 - C. The hours of work per day and number of days per week to be worked.
 - D. The wages to be paid (per hour, day, week, or other measure) and the frequency and nature of payment of such wages.
 - E. The circumstances under which the employee will be paid a premium for working in excess of an established number of hours per day, week, or month, or for working on designated nights, weekends, or holidays.
 - F. The anticipated period of employment.
 - G. Any provision to the employee, and how long they will be provided by the employer, and any costs to the employee associated with the provision, including but not limited to:
 1. transportation to and from work;
 2. housing;
 3. health insurance or health care;
 4. paid sick or annual leave and holiday(s);
 5. pension or retirement benefits;
 6. personal protective equipment required for the work;
 7. workers' compensation and information about the insurance policy and rules regarding reporting of accidents or injuries;
 8. unemployment compensation.
 - H. The nature of the work to be performed by the employee.
 - I. Information regarding any existing strike, lockout or concerted work stoppage, slowdown or interruption of operations at the place of employment.
 - J. Information regarding any known local, state or federal investigations into the employer's health or safety practices over the prior five years, and the outcome of such investigations, if known.

continued on page 110

- II. An employer who fails to provide an employee with the written disclosures required hereunder has violated this law, as has an employer who fails to abide by the terms of employment disclosed in Subsections A through H of Section III. An employer may modify the terms and conditions of employment disclosed in Subsections A through G of Section III to the extent permitted by other federal, state, and local laws, but must provide a statement of such new terms and conditions to each employee at least seven days prior to such modification.
- III. The rights or obligations established under this Act may not be waived by either the employer or employee.

Upon a finding of a violation of this Act, the court shall award:

1. Actual damages, including, but not limited to, lost wages and benefits plus interest; and/ or,
2. Statutory damages of up to \$50 for each working day that violations have occurred or continue to occur;
3. Mandatory attorney's fees and costs; and
4. Other appropriate relief, including injunctive and/or declaratory relief, that the court in its discretion deems necessary or appropriate.



Model Legislation Providing for Wage Statement

Drafted by NELP based on model language in state and federal law

Model wage statement legislation would require that the wage statement:

1. Be in written form, in English and the principal language of the employee;
2. List total hours worked, the gross and net wages;
3. Include the rate of pay for that pay period, with an explanation for the basis of pay;
4. Include overtime hours and compensation;
5. Identify the pay period for which the payment is being made;
6. List a separate itemization of deductions with an explanation for each deduction;
7. Name of employers and the employer contact and phone number.

9

Guarantee that Workers Can Collect From Their Employers

Many workers—even after overcoming the fear of asserting their right to be paid, filing a wage claim or suit, gathering evidence, and receiving a winning judgment—are never able to collect their unpaid wage judgments. This result both demoralizes workers and undermines state labor protections. Employers file bankruptcy. They hide their assets. They shut down operations and reorganize as a “new” entity. Some simply cannot be found. In 2009, the California Division of Labor Standards Enforcement assessed nearly \$22.4 million in wages due but was only able to collect for workers about \$13 million, or just 58 percent of those wages.⁷³ The remaining wages were left unpaid.

In a precarious economy, where short-term, subcontracted jobs are becoming the “new normal” for many workers, it is common for workers to be employed by someone whose full name and address they have never heard. Workers and their advocates are left searching for wages from “a guy named Joe who drove a white pickup.” Where Joe cannot be found, workers are left without remedies and at the mercy of the next Joe to come along.

When employers have disappeared or hidden assets, a court judgment can easily become a meaningless piece of paper. Similarly, state labor agencies are commonly without the necessary resources to efficiently track down employer assets and force payment. While

some collection agencies will enforce judgments, this often comes at the price of a hefty piece of the recovery. Employers are able to slip away far too easily, leaving workers with empty pockets. Workers need a security blanket early in the claim process that will hold employer assets and allow for future payment.

State policies that respond to collection problems include several methods:

- Most states have lien statutes that allow workers to make a claim on property on which they have worked. A lien makes it difficult or impossible for a property owner to sell until it is paid off.
- Wage bonds require employers to put up money to cover potential wage claims as a condition of doing business.
- States have established pools where workers can recover in the event that the responsible party cannot be found or is judgment-proof.

This chapter outlines some of these practices, explores the pros and cons of each one, and makes recommendations for sound policies to make sure there is money to compensate unpaid workers.

1. Wage Liens: A strong incentive for employers to pay unpaid wages

The Policy

A lien is claim made directly on property. Liens tie up the property so that, at least temporarily, it cannot be sold without the amount of the lien being paid by the property owner. Liens can often be used even if there is no employment relationship between the workers and the owner of the property. Because they make property unsellable, they can create an incentive for owners to pay up.

A wage lien can be an effective tool to recover wages quickly, especially if the owner needs to sell property or use it to guarantee a loan. All states have some form of a “mechanic’s lien,” which covers work performed or materials furnished in connection with the construction or repair of structures or land improvements. Such liens, also sometimes called “laborers’ liens,” “suppliers’ liens,” or “materialmen’s liens,” are available to those workers whose work involves improvements to real property, such as construction workers. Some states also have crop liens, which allow farmworkers to tie up the crop that they have picked for an agricultural employer. Limitations on the availability of the mechanic’s lien to specific types of work and workers vary from state to state, as does the duration of the lien.

A wage lien is a broader type of lien available to workers in a handful of states. When a wage lien is filed for non-payment of wages, it gives the worker a claim against property, including real estate and bank accounts. The lien prevents the owner from selling property, creating pressure to pay the wages in order to erase the lien.

How Does the Policy Work?

In addition to increasing collection rates for individual cases, a strong wage lien statute forces employers from a broad spectrum of industries to comply with wage payment laws. Wage liens specifically target offenders (and sometimes others who control payment to them), inducing them to pay as quickly as possible in order to free up frozen bank accounts and other property.

An ideal wage lien statute would provide for a lien against the property of an employer or property owner as soon as a wage claim is filed. In some states, the worker may file a wage lien prior to filing an agency or court claim. In others the lien goes into effect only after the state agency or court has found that the employer is liable. In many places, the lien lasts for a limited amount of time. This means that if the owner is able to avoid paying during that period, the worker has to foreclose on the property in a separate lawsuit in order to collect.

What Are the Challenges to Achieving This Policy?

Because all states already have some form of a mechanic's lien on the books, the further step of including a wage lien provision is not a giant leap. There are, however, some challenges that advocates may encounter.

By filing a wage lien, workers would have access to a potentially powerful collection tool. Advocates should be aware, however, that liens are not a “silver bullet.” A complex lien statute may simply push workers' claims into lien foreclosure, a lawsuit in which the worker has to prove his or her wage claim but can force the sale of the property to pay off the claim. Such litigation can be as time-consuming and complex as any wage claim litigation. Lien statutes should be written simply so that workers can file them with limited assistance. Remedies against the filing of fraudulent liens should be carefully written to protect workers who have good faith claims.

Some states unnecessarily limit the amount of recovery to a specific dollar amount or the wages earned during a specific window of time, while others impose no such limitations. Another important question concerns the priority of a wage lien over other debts of the employer. The lien may come first in line against other debts of the property owner, or it may follow behind other creditors whose claims may use up all of the value of the property. Some states do not allow the filing of a lien at all unless the employer has gone bankrupt.

The business community may oppose any provision that would allow a worker to file a wage lien prior to a formal wage claim. In order to maximize the lien's effectiveness and avoid duplicate actions, the lien option should be available early in the claim process.

There may also be resistance to a provision that provides for recovery of the full amount of wages owed. Recent proposed amendments to Wisconsin's wage lien statute, including the removal of a \$3,000 cap on wage recovery, were rejected due in large part to intense opposition by the banking industry. Lenders contended that without a reasonable cap on awarded wages, creditors would have to assume that all of an ailing company's assets would be absorbed by the lien.

An ideal statute would not impose any limitation on the recovery amount, and would prioritize the lien over all other debts, regardless of an employer's insolvency.⁷⁴ Unpaid workers of solvent or insolvent companies or individuals should take priority over other debtors who are more effectively able to cover their losses.

Which States Provide for Wage Liens?

- Alaska's wage lien statute has no money cap or time limit, and allows an unpaid worker to file a first priority lien within 90 days of the nonpayment of wages (AS § 35:35.440)

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- Idaho requires workers to go through administrative channels before unpaid wages become a lien on employer property; the Idaho Department of Labor may only file a lien after issuing a determination (IC § 45-620)
 - New Hampshire grants the state Department of Labor with the power to file a wage lien only after a decision and order have been issued after a hearing (N.H. rev. Stat. 275:51)
 - Texas's wage lien statute provides that an unpaid final order from the Texas Workforce Commission becomes a lien on *all the property* belonging to the employer, and is superior to any other lien on the same property, with some exceptions (V.T.C.A., Labor Code § 61-081)
 - Washington's wage lien statute provides that after issuing a final order, the Department of Labor and Industries may file a warrant that becomes a lien on all real and personal property of the employer (RWCA 49.48.086)
 - In Wisconsin, the Department of Workforce Development or an employee who brings a wage claim action has a lien on all the real and personal property of an employer for up to 6 months of wages, but not for more than \$3,000 (W.S.A. § 109.09).

Recent Campaigns

In New York, Make the Road New York introduced an omnibus bill addressing various issues related to wage theft in 2010. When the bill was first introduced, it included a wage lien provision, addressing some of the pitfalls of the Wisconsin law. The wage lien did not make it into the final bill that was signed into New York State law. The initial bill provided a wage lien for the full amount of the unpaid wages and required that the wage liens have priority over all other claims in bankruptcy proceedings, except liens held by banking institutions that were filed before the wage lien was filed. However, the bill also stipulated that the first \$10,000 of the unpaid wages under the wage lien shall have priority over liens held by banking institutions.

A coalition of community and legal groups in Los Angeles is working to introduce a wage theft ordinance that includes a wage lien provision to ensure better collection of unpaid wages. Similar to the Make the Road New York proposal, the Los Angeles ordinance provides a wage lien for the full amount of a worker's unpaid wages. The ordinance further provides that the wage lien shall have priority over all other claims by any purchasers, debts, judgments or liens.



Model Legislation Providing for Wage Lien

Example 1

Based on Alaska law at AS § 34.35.400

When a person or an agent, receiver, or trustee of the person, fails or refuses to make wage payments as prescribed by law or agreement between the parties, the employee who has performed the service shall make an account of service, showing the amount due the employee for the service, and present to the employer or an agent, receiver, or trustee of the employer one of the duplicate accounts within 30 days after the indebtedness accrues.

1. Within 90 days after termination of the performance of services the claimant shall record with the recorder of the recording district in which the services were performed a lien notice verified by the claimant.
2. The lien notice shall be indexed in a book or computer-readable medium kept for that purpose.
3. The lien claim must contain a description of the property charged with the lien sufficient for identification, and shall be verified by the oath of the lien claimant or of some other person having knowledge of the facts.
4. The liens of different persons of the same class have equal priority with each other.
5. A [claimant] has six months from the date of recording the lien within which to bring suit to foreclose the lien, or, if a credit is given, then six months after the expiration of the credit.

Example 2

Based on Wisconsin law at W.S.A. § 109.09

The department of workforce development, under its authority under ... to maintain actions for the benefit of employees, or an employee who brings an action under ... shall have a lien upon all property of the employer, real or personal, located in this state for the full amount of any wage claim or wage deficiency.

A lien ... upon real property takes effect when the department of workforce development or employee files a notice of the lien with the clerk of the circuit court of the county in which the services or some part of the services were performed, pays the fee specified in ... to that clerk of circuit court and serves a copy of that petition on the employer by personal service in the same manner as a summons is served under ... or by certified mail with a return receipt requested. The clerk of circuit court shall enter the notice of the lien on the judgment and lien docket kept under

A lien ... upon personal property takes effect when the department of workforce development or employee files a notice of the lien in the same manner, form, and place as financing statements are filed under ... regarding debtors who are located in this state, pays the same fee provided in ... for filing financing statements, and serves a copy of the notice on the employer by personal service in the same manner as a summons is served under ... or by certified mail with a return receipt requested. The department of financial institutions shall place the notice of the lien in the same file as financing statements are filed under ...

The department of workforce development or employee must file the notice under ... or within 2 years after the date on which the wages were due. The notice shall specify the nature of the claim and the amount claimed, describe the property upon which the claim is made and state that the person filing the notice claims a lien on that property.

2. Wage Bonds: Secure unpaid wage payments from shaky businesses



The Policy

Low-wage workers who find themselves unpaid may also find that their employer has either disappeared or is without funds to cover their wages. Employers may also file unwarranted appeals of wage judgments, and available funds may disappear during the appeal. Requiring employers to post a wage bond—that is, to put up money into a state agency fund or with a bonding company—to cover potential claims ensures that the employer has sufficient capital up front to responsibly engage in business and that if it fails to pay workers, there exists a pool of money against which they may claim their wages.

How Does the Policy Work?

Bonds are most useful for workers employed in industries that are typically undercapitalized or heavily subcontracted such as agriculture, garment, construction and janitorial work. They are routine in most states for public works and construction projects and are also commonly imposed on employment agencies. To be most effective, a bond has to be large enough to cover wages owed to workers with potential claims.

In order to ensure that all covered businesses have a bond, it should be tied to a license or registration that the business needs in order to operate, as are most farm labor contractor bonds. The process for claiming against the bond should be straightforward.

What Are the Challenges to Achieving This Policy?

One of the challenges of proposing a wage bond statute is resistance by legislators who may see it as discouraging entrepreneurs from getting into business. However wage bonds typically cost only around 10 percent of the amount they are guaranteeing, so a wage bond for \$100,000 would cost \$10,000. In businesses where wage theft is rampant, those who would employ large numbers of workers should be required to show some level of financial solvency. In addition, wage bonds should be sufficiently high and the statutory language sufficiently broad to cover not only wages owed, but penalties in the event of non-payment.

Which States Provide for Wage Bonds to Ensure Payment Of Wages?

Thirty-eight states require that employers post bonds for at least some jobs, most typically for public works, or in some industries, most typically construction. Nine states require bonds for employment agencies: Arizona, Arkansas, Colorado, the District of Columbia,

Nebraska, Nevada, New Mexico, North Dakota and Utah. Six states require farm labor contractors to post bonds as a condition of licensing: California, Idaho, Maryland, Nebraska, Oregon and Washington. A few states require bonds in other industries, including garment (California), entertainment (Nevada), door to door sales (California) or mining (Illinois).

Kentucky's construction bond requires that the bond cover the gross payroll of a construction firm operating at full capacity for four weeks, while Michigan's construction bond must cover 25 percent of the total contract value (KRS § 337.200; M.C.L.A. § 129.203).

Three states require bonds in certain circumstances for all industries. In California, the Labor Commissioner can require an employer to post a bond after a judgment has been entered. On a second offense, the court can be petitioned to prevent the employer from doing business unless it posts a bond. In Washington and Oregon, the labor commissioners may require an employer to post a bond when there is some indication that employers will not pay wages that are due.

Recent Campaigns

In 2010, the California Rural Legal Assistance Foundation and allies won improvements to the California wage bond statute. According to advocates, Governor Schwarzenegger signed the bill because he was persuaded that a recent appellate court decision undermined the integrity of state labor commissioner wage judgments by allowing unscrupulous employers to appeal the wage judgments without posting a bond equal to the amount of the judgment as a pre-condition of the appeal.



Model Legislation Providing for Wage Bonds

Based on Washington law at R.C.W. 49.48.060

If, upon investigation by the Director, after taking assignments of any wage claim under ... or after receiving a wage complaint as defined in ... from an employee, it appears to the director that the employer is representing to his employees that he is able to pay wages for their services and that the employees are not being paid for their services, the director may require the employer to give a bond in such sum as the director deems reasonable and adequate in the circumstances, with sufficient surety, conditioned that the employer will for a definite future period not exceeding six months conduct his business and pay his employees in accordance with the laws of the State of Washington.

If within ten days after demand for such bond the employer fails to provide the same, the director may commence a suit against the employer in the superior court of appropriate jurisdiction to compel him to furnish such bond or cease doing business until he has done so. The employer shall have the burden of proving the amount thereof to be excessive.



Model Legislation Providing for Wage Bonds Pending Appeal

Based on California law at Cal. Labor Code § 240

If any employer has been convicted of a violation of any provision of this article, or if any judgment against an employer for nonpayment of wages remains unsatisfied for a period of 10 days after the time to appeal therefrom has expired, and no appeal therefrom is then pending, the Labor Commissioner may require the employer to deposit a bond in such sum as the Labor Commissioner may deem sufficient and adequate in the circumstances, to be approved by the Labor Commissioner. The bond shall be payable to the Labor Commissioner and shall be conditioned that the employer shall, for a definite future period, not exceeding six months, pay the employees in accordance with the provisions of this article, and shall be further conditioned upon the payment by the employer of any judgment which may be recovered against the employer pursuant to the provisions of this article.

If within 10 days after demand for the bond, which demand may be made by mail, the employer fails to deposit the bond, the Labor Commissioner may bring an action in the name and on behalf of the people of the State ... against the employer in a court of competent jurisdiction to compel the employer to furnish the bond or to cease doing business until the employer has done so.

If, within 10 years of either a conviction for a violation of this article or of failing to satisfy a judgment for nonpayment of wages, or both, it is alleged that an employer on a second occasion has been convicted of again violating this article or is failing to satisfy a judgment for nonpayment of wages, an employee or the employee's legal representative, an attorney licensed to practice law in this state, may, on behalf of himself or herself and others, bring an action in a court of competent jurisdiction for a temporary restraining order prohibiting the employer from doing business in this state unless the employer deposits with the court a bond to secure compliance by the employer with this article or to satisfy the judgment for nonpayment of wages.

3. Wage Pools: Ensure (and insure) unpaid wage payments

The Policy

The state can help workers who are left without remedies by creating a wage fund for workers to collect their wage claim judgments. A wage fund can help solve collections challenges because workers can recover their money from an already existing pool of money. Wage funds are often funded by employer taxes, employer license, registration, or annual fees, as well as by civil fines and penalties, and can operate as a kind of wage insurance.

How Does the Policy Work?

A wage fund provides cheated workers the remedies they have fought for and won but were unable to collect. A wage fund is useful for workers who do not know their employer's contact information or identification, or whose employer has no assets, hides its assets, files for bankruptcy, disappears, or re-incorporates as a new successor business.

The potential revenue that could be put toward establishing a wage fund is substantial, providing many more workers with uncollectible judgments the opportunity to be paid the wages they are owed.

What Are The Challenges to Achieving This Policy?

While a wage fund may be effective in helping workers collect back wages, it is less useful in holding individual violating employers accountable for wage theft because it imposes the burden on all employers instead. The wage fund strategy does not meet deterrence or accountability goals, but instead aims to provide the most monetary relief possible for affected workers.

It may be challenging to get such legislation passed because a general wage fund imposes costs on all employers as well as the state. Employers may argue that it is unfair for all employers or industries (depending on the legislation) to have to contribute to a wage fund, not simply those guilty of wage theft. Advocates should be prepared to make the case that although the wage pool strategy spreads the costs of wage theft among all businesses, businesses are better equipped to bear those costs than individual workers, and the cost per business is negligible.

Some existing wage pools have been rendered inaccessible because of the high burden placed on workers to prove that their wages are unpaid. Wage pools should have adequate funds to ensure that all workers with uncollectible judgments can collect their

unpaid wages. Existing wage pools often run out of funds because of the sheer amount of wage claim cases with collection-proof judgments. Wage funds should achieve a balance between garnering sufficient funds to pay all wages, and reserving the strategy for cases where the guilty employer cannot be held accountable.

Which States Provide for Wage Pools to Ensure Payment of Wages?

Oregon's Wage Security Fund is administered by the Commissioner of the Bureau of Labor and Industries and funded by a diversion of employer taxes from the unemployment insurance trust fund (Or. Rev. Stat. § 652.409). This wage pool is a fund of last resort. Employees can recover their wage claim judgments from the fund only when the employer has ceased doing business and does not have sufficient assets to pay the wage claim, and the claim cannot otherwise be fully and promptly paid. Employees can only recover a maximum of \$4,000 from the fund, as such funds are available. The law further provides that Commissioner can file suit against the employer or put a lien on the employer's property in order to recover the unpaid wages paid out to the employee from the fund. Maine's Wage Assurance Fund follows a similar model as a fund of last resort, except that recovery from the fund is limited to wages for a maximum of two weeks of work performed.

Recent Campaigns

In California, advocates for workers in several industries characterized by subcontracting out jobs to fly-by-night contractors have won several industry-specific wage pools.

The Car Wash Worker's Restitution Fund is administered by the California Department of Industrial Relations and funded by car wash employer registration and annual fees for each branch location, and by civil fines levied for failing to register. The fund is not a fund of last resort: car wash workers can recover from the fund when they are not paid their wages and incur related damages by the employer. Further, the statute does not specify a limit on the amount an employee can recover from the fund. The law also provides that any funds disbursed and later recovered from the employer by the commissioner must be put back into the fund.

The Garment Worker's Restitution Fund follows the same model except that it is a fund of last resort where garment workers can only recover from the fund after exhausting recovery against wage bonds.

The Farmworker Remedial Account uses a similar model except that farmworkers can recover from the fund to satisfy claims against licensed or unlicensed farm labor contractors. Additionally, funds may also be disbursed to farm labor contractors to pay farmworkers where the contractor cannot do so because the grower or packer has not paid the contractor.



Model Legislation on Wage Security Funds

Example 1: Maine Wage Assurance Fund

Based on Maine law at 26 M.R.S.A. § 632

1. Fund established. There is established ... Fund to be used by the Bureau of Labor Standards within the Department of Labor for the purpose of assuring that all former employees of employers within the State receive payment for wages for a maximum of 2 weeks for the work they have performed. The Legislature intends that payment of earned wages from the fund be limited to those cases when the employer has terminated his business and there are no assets of the employer from which earned wages may be paid, or when the employer has filed under any provision of the Federal Bankruptcy Act. No officer or director in the case of a corporation, no partner in the case of a partnership and no owner in the case of a sole proprietorship may be considered an employee for purposes of this section.
2. Administration. The fund shall be administered by the Director of the Bureau of Labor Standards. Applications for payment from the fund and disbursements from the fund shall be in accordance with regulations promulgated by the director. The State shall be subrogated to any claims against an employer for unpaid wages by an employee who has received payment from the fund. Subrogation to these claims shall be to the extent of payment from the fund to the employee.
3. Amount in fund. The ... Fund is a non-lapsing, revolving fund limited to a maximum of \$200,000. All money collected from an employer pursuant to a claim for unpaid wages by an employee who has received payment from the fund, or by the State as the employee's subrogee, is credited to the fund.

The fund must be established and augmented periodically as necessary.

Money in the fund not needed currently to meet claims against the fund must be deposited with the Treasurer of State to be credited to the fund and may be invested in such manner as is provided for by statute. Interest received on that investment must be credited to the Maine Wage Assurance Fund.

Example 2: California Garment Workers Restitution Fund

Cal. Labor Code § 2675.5

Labor—Employment Regulation and Supervision—Garment Manufacturing—Registration

- a. The commissioner shall deposit seventy-five dollars (\$75) of each registrant's annual registration fee, required pursuant to ..., into one separate account. Funds from the separate account shall be disbursed by the commissioner only to persons determined by the commissioner to have been damaged by the failure to pay wages and benefits by any garment manufacturer, jobber, contractor, or subcontractor after exhausting a bond, if any, to ensure the payment of wages and benefits. Any disbursed funds subsequently recovered by the commissioner shall be returned to the separate account.
- b. The remainder of each registrant's annual registration fee not deposited into the special account pursuant to subdivision (a) shall be deposited in a subaccount and applied to costs incurred by the commissioner in administering the ... upon appropriation by the Legislature.

Crime Victims Compensation & Wage Theft

In cases of wage theft where workers are also victims of violent crimes, advocates should consider crime victims compensation programs as an alternative source of financial assistance for the worker, or as a policy that can be broadened to provide additional protection to workers. Wage theft victims who suffer physical injury or emotional trauma as a result of a violent crime related to their wage claim, including assault and rape, may be eligible for victim compensation. Each state program covers crimes within its jurisdiction. Thus, victims should apply in the state where the crime occurred, regardless of their residency.⁷⁵

Eligibility for compensation varies from state to state, but most states have the same general criteria. The victim must: (1) Report the crime promptly to law enforcement (often a 72-hour standard with exceptions for good cause), (2) Cooperate with police and prosecutors in the investigation and prosecution of the case, (3) File a timely application to the compensation program (generally one year from the date of the crime), (4) Have an expense or loss not covered by insurance or some other public benefit program, and (5) Be innocent of criminal activity or significant misconduct that caused or contributed to the victim's injury or death.

Crime victim compensation programs pay primarily for medical care, mental health counseling, lost wages for victims unable to work because of the crime-related injury, lost support for dependents of homicide victims, and funeral expenses. Depending on the state, other miscellaneous expenses may also be covered. In addition, each state sets limits on the amount of compensation available, capped typically around \$25,000.

Endnotes

- 1 Donna Goodman, “Staples to Pay \$42M to Settle Wage Claims,” January 30, 2010, http://news.bostonherald.com/business/general/view/20100130staples_to_pay_42m_to_settle_wage_claims, accessed December 10, 2010; Eric Ortiz, “Raymour & Flanigan Drivers get \$2M for OT,” July 8, 2009, http://www.pressofatlanticcity.com/business/article_394857c2-233c-517c-gdd2-fcf148daac8c.html, accessed December 10, 2010; Gene Johnson “Wal-Mart Settles Lawsuit by Washington Workers for \$35M,” July 22, 2009, http://www.usatoday.com/money/industries/retail/2009-07-22-wal-mart-settlement_N.htm, accessed December 10, 2010; Libby Nelson, “Car Wash Chain to Pay \$3.4 Million in Back Wages,” June 30, 2009, <http://cityroom.blogs.nytimes.com/2009/06/30/car-wash-chain-will-pay-34-million-in-back-wages/>, accessed December 10, 2010.
- 2 Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America’s Cities* (New York: Center for Urban Economic Development at UIC, National Employment Law Project and UCLA Institute for Research on Labor and Employment, 2008). The report is available at www.nelp.org/page/-/brokenlaws/BrokenLawsReport2009.pdf.
- 3 See for example: Asian American Legal Defense and Education Fund and YKASEC, “Forgotten Workers”: A Study of Low-Wage Korean Immigrant Workers in the Metropolitan New York Area (New York: AALDEF and YKASEC, 2006); Domestic Workers United & DataCenter, *Home Is Where The Work Is: Inside New York’s Domestic Work Industry* (New York: Domestic Workers United & DataCenter, 2006); Make the Road by Walking and Retail, Wholesale and Department Store Union, *Street of Shame: Retail Stores on Knickerbocker Avenue* (New York: Department Store Union (RWDSU/UFCW) and Make the Road by Walking, 2005); Restaurant Opportunities Center of New York and New York City Restaurant Industry Coalition, *Behind the Kitchen Door: Pervasive Inequality in New York City’s Thriving Restaurant Industry* (New York: Restaurant Opportunities Center of New York and New York City

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- Restaurant Industry Coalition, 2005); Abel Valenzuela, et al., *On the Corner: Day Labor in the United States* (Los Angeles: Center for the Study of Urban Poverty, 2006).
- 4 US Department of Labor, *1999–2000 Report on Low-Wage Initiatives* (Washington, DC: Employment Standards Administration, Wage and Hour Division, 2001).
 - 5 Bernhardt et al., *Broken Laws, Unprotected Workers*.
 - 6 A few cities have their own minimum wage laws, in which case the city government has enforcement authority.
 - 7 U. S. Department of Labor, Bureau of Labor Statistics, “Union Members Summary” (press release), <http://www.bls.gov/news.release/union2.nro.htm>, accessed October 30, 2010.
 - 8 U.S. Government Accountability Office, *Department of Labor: Wage and Hour Division’s Complaint Intake and Investigative Processes Leave Low Wage Workers Vulnerable to Wage Theft*, GAO-09-458T, March 25, 2009, <http://www.gao.gov/new.items/d09458t.pdf>, p. 23; *Washington State Senate Bill Report SB 6456*, p. 3, (Feb. 1, 2010), <http://apps.leg.wa.gov/documents/billdocs/2009-10/Pdf/Bill%20Reports/Senate/6456%20SBA%20LCCP%2010.pdf>. Washington State Department of Labor and Industries currently averages about 60 days to resolve a complaint.
 - 9 U.S. Government Accountability Office, *Department of Labor: Wage and Hour Division’s Complaint Intake...*, 8.
 - 10 *Id.* at 23; *Washington State Senate Bill Report SB 6456*, (Feb. 1, 2010), p. 3.
 - 11 To find out individual state statute of limitations for wage and hour cases, go to <http://www.workplacefairness.org/complaintpay>.
 - 12 Paul Post, “Trainers license revoked for underpaying workers,” *Thoroughbred Times*, July 29, 2010, <http://www.thoroughbredtimes.com/national-news/2010/July/29/Trainers-license-revoked-for-underpaying-workers.aspx>.
 - 13 46 U.S.C. § 10313; Kim Bobo, *Wage Theft in America, Why Millions of Working Americans Are Not Getting Paid—And What We Can Do About It* (New York: The New Press, 2009): 181.
 - 14 Task Force on Civil Equal Justice Funding, *The Washington State Civil Legal Needs Study*, (Olympia, WA: Washington State Supreme Court, 2003). The report is available at <http://www.wsba.org/atj>. Although workers can typically bring claims for unpaid wages in small claims courts, which are set up to make it easier for individuals to represent themselves, in many states the dollar limit on the size of a claim that may be pursued in small claims court is only a few thousand dollars (see Nolo, “How Much Can I Sue for in Small Claims Court?” <http://www.nolo.com/legal-encyclopedia/article-30031.html>). This may leave a substantial gap between those claims a worker can reasonably pursue in small claims court and those large enough to appeal to a lawyer who will take the case on a contingency fee basis.

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- 15 For example, in a suit under Nebraska’s wage payment law, if the court finds that no reasonable dispute ever existed as to the fact that wages were owed or as to the amount of unpaid wages, then the court may order the plaintiff to pay the employer’s attorney’s fees and cost (Neb. Rev. Stat. § 48-1231).
 - 16 See Rita J. Verga, “An Advocate’s Toolkit: Using Criminal ‘Theft of Service’ Laws To Enforce Workers’ Right to be Paid,” 8 N.Y. City L. Rev. 283 (2005).
 - 17 “Two Los Angeles car wash owners sentenced to jail for labor law violations,” August 16, 2010, <http://latimesblogs.latimes.com/lanow/2010/08/two-los-angeles-car-wash-owners-sentenced-to-jail-for-labor-law-violations.html>, accessed December 10, 2010; “Attorney General Cuomo Announces Arrest Of Saigon Grill Owners For Scheme To Cheat Workers And Cover Up Millions In Illegally Withheld Wages” (press release), New York State Attorney General’s Office, December 3, 2008, http://www.ag.ny.gov/media_center/2008/dec/dec3a_08.html, accessed December 10, 2010.
 - 18 Daniel González, “Phoenix treats cheating laborers as a criminal act,” *The Arizona Republic*, February 11, 2006, <http://www.azcentral.com/arizonarepublic/news/articles/0211wagetheft0211.html>, accessed December 10, 2010.
 - 19 Amy Traub and Andrew Friedman, “Workers Deserved to be Paid,” *Albany Times Union*, April 5, 2010, available at <http://www.drummajorinstitute.org/library/article.php?ID=7387>, accessed December 10, 2010.
 - 20 The names of state departments of labor vary from state to state; some states call them Department of Labor and Industry, others Department of Commerce, etc. For the purposes of this chapter, we will refer to them as state DOLs. Five states (Alabama, Louisiana, Mississippi, South Carolina and Tennessee) have no state minimum wage act, and therefore no state agency charged with enforcement of minimum wage and overtime rules.
 - 21 See NELP, *Justice for Workers: State Agencies can Combat Wage Theft* (2006), which describes overlapping and concurrent jurisdictions and powers of state agencies. Available at http://nelp.3cdn.net/d20511d535f7713bd2_ejm6iyxkl.pdf.
 - 22 NELP, *Just Pay: Improving Wage and Hour Enforcement at the United States Department of Labor* (2010), available at <http://www.nelp.org/page/-/Justice/2010/JustPayReport2010.pdf?nocdn=1>; Toolkit available at http://nelp.3cdn.net/a404465193bfe92264_ym6bvaz2.pdf.
 - 23 For example, in 2007, the New York State Department of Labor launched a Bureau of Immigrant Workers’ Rights to conduct outreach to community groups, legislators, non-profit organizations and employers to build relationships, inform them of their rights and responsibilities and accept incoming claims. The bureau also participates in internal agency policymaking, often with input from advocates, to ensure the agency’s programs are accessible to immigrants and persons with limited English proficiency.
 - 24 For example, in 2009, the New York State Department of Labor launched the New York Wage Watch program by entering into a formal partnership with community

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- groups to fight against wage theft. The NYSDOL press release about the formation of the program is available at http://www.labor.ny.gov/pressreleases/2009/Jan26_2009.htm.
- 25 For more information on the NPA's field meeting with the USDOL, see their website at http://www.npa.us.org/index.php?option=com_content&task=view&id=287&Itemid=1.
 - 26 See for example U.S. GAO, *Wage and Hour Division's Complaint Intake...*; U.S. GAO, *Fair Labor Standards Act: Better Use of Available Resources and Consistent Reporting Could Improve Compliance*, GAO-08-962T, July 15, 2008.
 - 27 U.S. Government Accountability Office, *Fair Labor Standards Act: Better Use of Available Resources...*
 - 28 Bernhardt et al., *Broken Laws, Unprotected Workers*. See also Workers Defense Project, *Building Austin, Building Injustice*, 2009, www.buildaustin.org/Building%20Austin_Report.pdf; Annette Bernhardt, Siobhán McGrath and James DeFilippis, *Unregulated Work in the Global City*, 2007 (New York: Brennan Center for Justice), www.nelp.org/globalcity/; Abel Valenzuela Jr. and Edward Meléndez, *Day Labor in New York: Findings from the New York Day Labor Survey, Technical Report 03-01*, 2003 (Center for the Study of Urban Poverty, Institute for Social Science Research, UCLA, Los Angeles, California and Community Development Research Center, Milano Graduate School of Management and Urban Policy, New School University, NY); Domestic Workers United & DataCenter, *Home is Where the Work Is; Make the Road by Walking and Retail, Wholesale, and Department Store Union, Street of Shame; Restaurant Opportunities Center of New York and the New York City Restaurant Coalition, Behind the Kitchen Door*. For more information, see Siobhán McGrath, *A Survey of Literature Estimating the Prevalence of Employment and Labor Law Violations in the U.S.*, 2005, www.nelp.org/page/-/EJP/Lit%20Survey%20of%20Violations.pdf.
 - 29 See David Weil, *Improving Workplace Conditions Through Strategic Enforcement*, Report to the Wage and Hour Division, May 2010; <http://management.bu.edu/academics/departments/documents/strategic-enforcement.pdf>. In addition, the U.S. DOL's 2001 report on targeting different sectors such as poultry, garment and health care provides useful models of industry targeting (U.S. Department of Labor, *1999–2000 Report on Initiatives*, 2001; on file with NELP).
 - 30 See New York State Department of Labor, "Labor Department Investigation of New York's Car Wash Industry Uncovers Nearly \$6.6 Million in Unpaid Wages" (press release), Aug. 15, 2008, www.labor.state.ny.us/pressreleases/2008/August15_2008.htm.
 - 31 The blueprint is available from NELP's web site at <http://www.nelp.org/page/-/EJP/NYSDOL%20Report%20-%20Summary.pdf>.
 - 32 Calculations by the National Employment Law Project based on estimates drawing on the Bureau of Labor Statistics' Current Employment Statistics series; contact the authors for more details.

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- 33 See Sarah Leberstein, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries* (NELP, 2010), available at <http://www.nelp.org/page/-/Justice/2010/IndependentContractorCosts.pdf?nocdn=1>.
- 34 See, Annette Bernhardt and Siobhán McGrath, *Trends in Wage and Hour Enforcement by the U.S. Department of Labor, 1975–2004*, September 2005, available at <http://www.nelp.org/page/-/EJP/TrendsInEnforcement2005.pdf>, which shows an increase in covered employers and a decrease in WHD staffing since the 1970's. See also Weil, *Improving Workplace Conditions*.
- 35 Policy Matters Ohio, *Investigating Wage Theft: A Survey of the States*, 2010, <http://www.policymattersohio.org/WageTheft2010.htm>.
- 36 See the U.S. Department of Labor's description of its referral system at <http://www.dol.gov/whd/resources/ABAReferralPolicy.htm>.
- 37 For a listing of state Attorneys General powers to enforce labor and employment standards, see NELP, *State Agencies Can Combat Wage Theft*, 2006, http://nelp.3cdn.net/d20511d535f7713bd2_ejm6iyxkl.pdf. See also the web site of the Massachusetts Attorney General's office for recent press releases that illustrate an attorney general's power to enforce labor standards: http://www.mass.gov/?pageID=cagopressrelease&L=1&Lo=Home&sid=Cago&b=pressrelease&f=2009_02_25_avalonbay_citations&csid=Cago.
- 38 See also: California Labor Code § 3710.1, Connecticut PA 7-89 (2007), Delaware 230 (2009), Florida § 440-107, Massachusetts GL 152§ 25C, New Jersey A4009 (2007) A 3569.S 2498 (2009), New York A 6163 (2007), Washington HB 1554/SB 5613.
- 39 See the text of the Green Grocer Code of Conduct, negotiated by the New York State Attorney General, available at http://www.ag.ny.gov/bureaus/labor/pdfs/final_ggcode_english_short.pdf.
- 40 Bernhardt et al., *Broken Laws, Unprotected Workers*, 25.
- 41 Bernhardt et al., *Broken Laws, Unprotected Workers*, 24.
- 42 Bernhardt et al., *Broken Laws, Unprotected Workers*.
- 43 Kandel, *Profile of Hired Farmworkers*, iii–iv.
- 44 U.S. Department of Labor, Wage and Hour Division, *Compliance Highlights: 1999 Salad Bowl Report*, November 1999.
- 45 For an example of a campaign that linked labor standards to prices paid for produce, see the website of the Coalition of Immokalee Workers at: <http://www.ciw-online.org/>.
- 46 Laura Dresser, Center on Wisconsin Strategy, "Cleaning and Caring in the Home Shared Problems? Shared Possibilities?," in *The Gloves-Off Economy: Workplace Standards at the Bottom of America's Labor Market*, ed. Annette Bernhardt et al. (Champaign, IL: Labor and Employment Relations Association, 2008), p. 114.

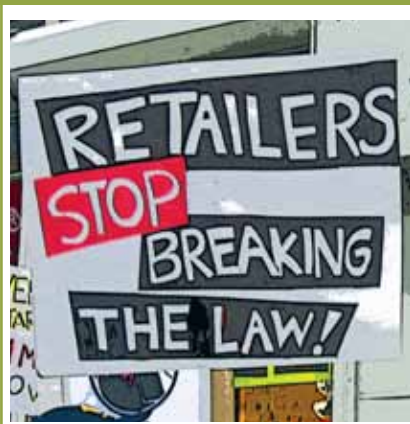
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- 47 Bernhardt et al., *Broken Laws, Unprotected Workers*.
- 48 Bernhardt et al., *Broken Laws, Unprotected Workers*, 34.
- 49 2008 Me. Legis. Serv. Ch. 640 (S.P. 604) (L.D. 1697) (WEST).
- 50 Domestic Workers United & DataCenter, *Home Is Where The Work Is*.
- 51 Maryland exempts from overtime nonprofits engaged in providing temporary at-home care services, such as companionship to aged, disabled, or sick individuals. California exempts from overtime “personal attendants” who care for children, seniors, or patients.
- 52 In 2009, the national median hourly wages for home health aides and personal and home care aides in the “Home Health Services” industry were \$9.49 and \$8.55 respectively. Within the “Services for Elderly and Persons with Disabilities” industry group, the figures were \$9.36 for home health aides and \$9.78 for personal and home care aides. The weighted average for these groups of workers was \$9.34 an hour (“2009 BLS/OES Industry/Occupation Matrix Data,” analysis prepared by PHI based on 2009 Bureau of Labor Statistics data; analysis on file with NELP).
- 53 Catherine K. Ruckelshaus, *Leveling the Playing Field: Protecting Workers and Businesses Affected by Misclassification*, Testimony before the U.S. Senate Committee on Health, Education, Labor & Pensions (June 17, 2010), <http://www.nelp.org/page/-/Justice/2010/MisclassTestimonyJune2010.pdf>; Sarah Leberstein, *Independent Contractor Misclassification*.
- 54 For example, from 2000 to 2007 the number of misclassified workers uncovered by state unemployment insurance program audits increased by more than 40 percent. U.S. Government Accountability Office, *Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention* (August 2009), available at <http://www.gao.gov/products/GAO-09-717>.
- 55 For a compendium of various state studies and commissions, see Leberstein, *Independent Contractor Misclassification*.
- 56 Planmatics, Inc., *Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs* (February 2000).
- 57 Leberstein, *Independent Contractor Misclassification*.
- 58 New York State Department of Labor, *Annual Report of the Joint Enforcement Task Force on Employee Misclassification*, (2009), available at http://www.labor.state.ny.us/agencyinfo/PDFs/Misclassification_TaskForce_AnnualRpt_2008.pdf, accessed December 12, 2010.
- 59 See for example, Employment Standards Administration, U.S. Department of Labor, *Nursing Home 2000 Compliance Fact Sheet*, <http://www.dol.gov/esa/healthcare/surveys/nursing2000.htm>; U.S. Department of Labor, *FY 2000 Poultry Processing Compliance Report* (2000); “Labor Department: Close to Half of Garment Contractors

Violating Fair Labor Standards Act,” U.S. DOL Bureau of National Affairs Daily Labor Report 87, May 6, 1996.

- 60 See, NELP, *State SUTA Dumping Proposals: Many bills falling short at protecting state trust funds, workers and employers* (2005), available at http://nelp.3cdn.net/4800e032c5014592ad_aqm6bn3e6.pdf.
- 61 For a more complete state-by-state summary of research studies undertaken to document the impact of independent contractor misclassification, see Leberstein, *Independent Contractor Misclassification*.
- 62 *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947). See generally Goldstein, Linder, Norton & Ruckelshaus, “Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment”, 46 *UCLA Law Review* 983 (April 1999).
- 63 For an example of such laws, see Massachusetts Employment Agency Law, available online at: http://www.mass.gov/?pageID=elwdmodulechunk&L=4&Lo=Home&L1=Businesses&L2=Wage+and+Employment+Related+Programs&L3=Employment+Agency+Program&sid=Elwd&b=terminalcontent&f=dos_ea_ea_law_brochure_ea_law&csid=Elwd.
- 64 See for example NELP, *Mending the Unemployment Compensation Safety Net for Contingent Workers* (1997), available at http://nelp.3cdn.net/36ec3b0332f754a030_ovm6iy99.pdf.
- 65 For a list of model state and local laws relating to subcontracted and other contingent workers, and NELP’s periodic state legislative round-ups with proposed and recently-enacted independent contractor legislative provisions, see http://www.nelp.org/site/issues/category/independent_contractor_misclassification_and_subcontracting.
- 66 Bernhardt et al., *Broken Laws, Unprotected Workers*, 22–23.
- 67 Daniel Ballon et al., *Voices from the Underground Economy: The Experiences of Workers and Advocates Seeking Meal and Rest Breaks in Low-Wage Industries* (USC Gould School of Law Access to Justice Practicum and Bet Tzedek Legal Services, August 2009), 14–16. Available at <http://www.bettzedek.org/PDF/voicesfromtheunderground.pdf>.
- 68 Ballon et al., *Voices from the Underground Economy*, 21–23.
- 69 Marc Linder and Ingrid Nygaard, *Void Where Prohibited: Rest Breaks and the Right to Urinate on Company Time* (Ithaca, NY: Cornell University Press, 1998).
- 70 Break provisions that are too limited in their geographic or industry scope, on the other hand, may face challenges on the grounds that such state laws are preempted by federal law. In 2009, the Seventh Circuit struck down the Illinois Room Attendant Rest Break law, which required that employers provide two rest breaks and one meal break to hotel room attendants working in counties with a population of greater than three million, finding that it was preempted by the National Labor Relations Act. 520

South Michigan Avenue Associates, Ltd. v. Shannon, 549 F.3d 1119 (7th Cir. 2008). Advocates argued that the law was not preempted because it was a “minimum labor standard.” The Court disagreed, reasoning that the requirement was too narrow to be deemed a minimum labor standard: it was not a law of general applicability but only applied to one occupation, in one industry, in one single county.

- 71 Ballon et al., *Voices from the Underground Economy*, 11–12.
- 72 U.S. Department of Labor, Wage and Hour Division, “Minimum Paid Rest Period Requirements Under State Law for Adult Employees in Private Sector—January 1, 2010,” <http://www.dol.gov/whd/state/rest.htm>.
- 73 Angela Bradstreet, State Labor Commissioner, *Annual Report on the Effectiveness of Bureau Field Enforcement* (Sacramento, State of California Department of Industrial Relations, 2009), 3.
- 74 Lora Jo Foo, *The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 Yale L.J. 2179, 2203 (1994). Foo notes that since banks are able to assess the financial solvency of an employer-company before making loans in a way that workers cannot before taking jobs, the risk of an employer’s default on debts should fall on the bank, as the entity most able to anticipate and to bear the loss.
- 75 Data source for this section: National Association of Crime Victim Compensation Boards, “Crime Victim Compensation: An Overview,” <http://www.nacvcb.org/index.asp?bid=14>. Links to individual state programs and eligibility criteria are available at <http://www.nacvcb.org/index.asp?sid=5>.



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