

Day Laborers' Rights under Federal Law: Waiting Time and Deductions from Wages

NELP

Fact Sheet for Organizers

Advocating for the working poor and the unemployed

National
Employment
Law Project

55 John St., 7th Floor
New York, NY 10038
(212) 285-3025
(212) 285-3044 fax
nelp@nelp.org
www.nelp.org

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Summary

- This fact sheet covers rights under federal law. Stronger rights for workers can sometimes be found under state laws.
- If workers are **waiting** at a designated place at the employer's request, they should generally be paid for the waiting time. Otherwise, a worker who is "waiting to be engaged" in a job is not paid for waiting, while a worker who is "engaged to be waiting" for a job to start should be paid for the waiting time.
- Generally, **deductions** that do not bring the hourly wage below the federal minimum wage are permissible.
- Deduction of fees for **transportation** to the work site is generally allowed. However, if the transportation is part of and necessary to the employment, deductions may not bring the hourly wage below the federal minimum.
- The cost of **safety equipment** or **tools** required for a job generally should not be deducted from wages if the deduction reduces the wage below the minimum level.
- If accepting **meals** is voluntary, the meals are generally considered to be for the benefit or convenience of the employee and the reasonable cost can therefore be deducted from the employee's wage whether or not it reduces the wage below the minimum.
- If a **check cashing** service is voluntary, it could be considered primarily for the benefit of employees and therefore a fee could be deducted from the wages even if that deduction reduces the wage below the minimum.

Background

"Day laborers" are people employed on a temporary, day-to-day basis, normally working in construction, light manufacturing, landscaping and other similar jobs. Day laborers find work either through a temporary day labor agency (or labor hall) or by waiting on a designated street for an employer to arrive and hire workers as needed. Workers often do not know from day to day whether they will get work. Problems for day laborers stem from a number of factors including:

- Employers wishing to minimize costs and increase flexibility
- One "employer" (the day labor agent) hiring and paying the worker and another "employer" (at the work site) directing the work
- Lack of union representation
- Workers' immigration status and lack of work authorization

These factors result in low wages, unpaid time spent waiting for a job to start, and improper deductions from wages.

However, despite the non-standard nature of the day labor employment relationship, day laborers are entitled to the benefit of minimum wage and overtime laws.

Day Laborers' Rights Regarding Wages and Hours

Employers take advantage of day laborers in numerous ways, including payment of low wages and requiring workers to wait without any promise of work at all. This fact sheet will be limited to an examination of day laborers' rights under federal law relating to the following¹:

1. failure to pay wages for waiting time;
2. deductions made from wages for transportation, tools and safety equipment, meals and check cashing.

First, after workers at a day labor agency (or labor hall) are assigned jobs for the day, it may take some time for them to be transported to the work site and begin working. Day laborers often receive no pay for this time spent waiting after they receive a job assignment and for the time spent in transit from the work hall to the job site. The two key issues are: a) whether day laborers are entitled to be paid for time spent waiting between their arrival at the work hall, or pick-up site, and receiving a work assignment ; and b) whether they are entitled to be paid for time spent waiting between receiving a work assignment and beginning to work.

Second, employers often make deductions from day laborers' pay for the cost of transportation between the work hall, or pick-up location, and the work site and for other expenses including safety equipment, meals, and cashing of checks. The key issues are whether such deductions are legal and, if so, what are reasonable deductions.

Payment for Waiting Time

Waiting time issues usually appear because a day laborer has to wait (1) before being assigned to a job; and (2) after being assigned to a job but before being transported to the work site. An employer must pay an employee for time spent waiting if the employee is required to be at the employer's disposal at either the day labor agency or the work site. That is, if the employee is not free to leave the premises and use the time for his or her own purposes. This means that an employee should be paid wages at least from the time that a job is assigned. The employer responsible for these wages could be either the day labor agency or the work site employer.

¹ State and local laws can provide more rights for day laborers. For more information, see *Drafting Day Labor Legislation: A Guide for Organizers and Advocates*. <http://www.nelp.org/pub39.pdf>. For information about the Building and Construction Trades Department's use of state law in their campaign against Labor Ready, see <http://www.bctd.org/raiseroof/roof.temp.html>.

Labor Ready is currently being sued under a number of state laws for illegal payroll deductions. It is being sued in Georgia for deductions made for transportation, safety equipment and charges made for paying workers in cash. The company is also being sued in Massachusetts where the Attorney General ordered Labor ready to stop charging workers for paying them in cash. A class action has also been brought against Labor Ready in Oakland, California where workers are claiming payment for waiting time.

Because workers are usually free to stay or go as they wish prior to getting an assignment, courts typically do not find an employment relationship before a job is assigned. It is therefore more difficult to get wages paid for the period between arriving at the labor hall, or job pick-up site, and the time the job is assigned.

But, if a worker is required to report for work at a specified time, either at the day labor agency or at the worksite, the workday commences at that point even if the worker has to wait until a later time for the actual work activities to begin. If the worker has to report and wait each day for the same job over a number of days, it is easier to recover waiting-time pay.

The employer does not have to pay the employee for time spent by the employee on preliminary (before work) or postliminary (after work) activities that are undertaken at the worksite solely for the employee's convenience and are not integral to the employee's job. In determining whether this restriction applies to waiting time, the central issue is whether the waiting was primarily for the benefit of the employer or the employee.

According to some federal courts, a worker who is "waiting to be engaged" in a job should not be paid for waiting while a worker who is "engaged to be waiting" for a job to start should be paid for the waiting time.

Deductions from Wages

A worker's pay can be made up of a combination of wages and other benefits. In some circumstances, an employer can legally make deductions from a worker's wages.

The general rule under federal law is that deductions are generally permitted as long as they do not bring the hourly cash pay below the federal minimum wage. Federal law only regulates deductions that bring the "cash" component of a worker's wages below the minimum wage.

In addition, federal law allows deductions that do cut into the minimum wage provided the following six requirements are met:

1. the employee actually and voluntarily received the benefit;²
2. the benefit was not furnished primarily for the benefit or convenience of the employer;
3. the benefit was not furnished in violation of any federal or state law;
4. the deduction is provided at a reasonable cost;³
5. the payment of non-cash wages is not prohibited by a union agreement;

² The federal regulations state, "Not only must the employee receive the benefits of the facility for which he is charged, but it is essential that his acceptance of the facility be voluntary and uncoerced." However, the Courts of Appeals for both the 5th and 11th Circuits (covering the states of Texas, Louisiana, Mississippi, Alabama, Georgia and Florida) have found that, under federal law, benefits can be deducted from wages even when they are not voluntarily accepted.

State and local laws may also regulate paycheck deductions. In relation to deductions for meals for instance, Florida state law prohibits operators of labor halls from making the purchase of lunch a condition of employment, providing greater protection to workers than the federal law in that state.

³ This means that the benefit is not provided at a profit to the employer and is provided at no greater than market cost, whichever is the lower. Such a deduction is lawful, even if the employer makes a profit, if the deduction does not reduce the cash component of the wage below the minimum level.

6. the benefit is customarily provided to employees. That is, the items must be provided regularly or similar items must be provided by other employers in similar businesses in comparable geographic locations.

When the employee works more than 40 hours in a week and is entitled to receive overtime the employer cannot deduct any more than it could have deducted had the employee only worked a 40 hour week. Thus, if an employee is paid \$5.30 per hour, i.e. \$0.15 per hour over the minimum, the maximum that can be deducted is \$6.00, i.e. $40 \times \$0.15 = \6.00 .

- *Fees for transport*

Day laborers are often provided with transportation between the work hall, or pick-up location, and the work site. Employers frequently deduct an amount from the employees' wages for providing transportation. If the transportation is part of and necessary to the employment, transportation deductions cannot bring workers' wages below the minimum.

In federal courts, travel by day haul workers in a contractor's bus from a recruitment site to the fields is normally not compensable time, in the absence of some work-related activity at the recruitment site or during the trip.

In state courts, fees for transport have been found to be illegal deductions. For example, a state court in New Hampshire found in August 2001 that such deductions, made by Labor Ready, a large day labor agency, were illegal under state law.

- *Essential tools and safety equipment*

These items should generally not be deducted from wages, if the deduction reduces the wage below the minimum level, for the following reasons:

1. such deductions should be regarded as primarily for the benefit or convenience of the employer;
2. uniforms are not deductible if they are required by law, by the employer, or by the nature of the work performed.

Examples of safety equipment include gloves, hard hats and boots. These items should be regarded as necessary for the benefit or convenience of the employer if they are required to safely perform the work asked of the worker. The use of such safety items might also be required by law and could then be considered uniforms.

- *Meals*

If accepting meals is voluntary, the meals are generally considered to be for the benefit or convenience of the employee and therefore the cost can be deducted from the employee's wage whether or not it reduces the wage below the minimum. The amount deducted is restricted to the reasonable cost of the meal (the lesser of the actual cost and the market value of the meal).

- *Check cashing*

If the service is voluntary, it could be considered primarily for the benefit of employees and therefore a fee could be deducted from the wages. Federal law requires that wages (up to the minimum wage) be paid "free and clear," so that any check cashing fees should not be permitted if the wages end up below the minimum wage.