

Written statement of the National Employment Law Project on the Subject of Employment and Labor Protections for Day Laborers

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Washington, D.C.

September 26th, 2002

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About NELP

The National Employment Law Project (NELP) is a nonprofit law and policy organization based in New York City. NELP has advocated on behalf of low wage, unemployed and immigrant workers for nearly 30 years. The Immigrant Day Laborer Project is part of NELP's Immigrant Worker Project which provides technical support and legal resources to community organizations, organized labor, advocates and policy makers interested in protecting and expanding the rights of immigrant workers. In this capacity, NELP is currently working with members of the National Day Labor Organizing Network (NDLON) and Representative Luis Gutierrez (D-III) to introduce legislation that would address the exploitative working conditions of day laborers.

Executive Summary

Day labor is not a new phenomena in the United States. Historically, employers have relied on day laborers to perform manual labor such as construction work, landscaping and to provide domestic services. More recently, the downturn in the economy has resulted in a growing number of workers turning to day labor as their only viable employment option. Whether seeking work informally on urban and suburban corners or through temporary labor agencies, day laborers continue to make significant contributions to the economy.

Despite providing a flexible pool of workers to the benefit of employers, day laborers are commonly subject to the most egregious workplace exploitation. Day laborers are often assigned to the dangerous tasks shunned by workers with more options. As a result, day laborers face a higher incidence of workplace injuries and fatalities. A stark example of health and safety abuses occurred soon after September 11th. For weeks, hundreds of day laborers, mostly immigrant women, were being hired off of street corners to clean the debris from stores and apartments in the World Trade Center Area. NELP staff, organizers from the Latin American Workers' Project and the New York Committee on Occupational Safety and Health spoke with hundreds of these workers and not a single worker was informed of the nature of the work, potential exposure to hazardous materials such as asbestos and fiberglass and not a single worker had been offered safety training. The vast majority of employers were not providing any health and safety equipment. Despite these dangerous work conditions, people needed to work. Those who complained of coughing up blood or irritated eyes were quickly replaced with another worker.

Studies and anecdotal evidence also show pervasive wage and hour violations committed by day labor employers and temporary labor agencies. Day labor employers often delay payments of promised wages until the completion of a job. Upon completion, day laborers are commonly left with less than promised or a void check. Lack of access to social and legal services that could assist them in enforcing their workplace rights leave few options for day laborers seeking to recover unpaid wages. NELP supports legislative reforms that recognize the particular vulnerability of day laborers and seek to proactively assert and protect the workplace rights of day laborers.

Overview of Workplace Rights of Day Laborers

Day laborers like many other workers in the United States, are protected by federal and state employment laws that govern wage and hour protections, workplace health and safety and the right to workplace organizing. The Fair Labor Standards Act (FLSA) protects the wage and hour rights of most day laborers. Generally, the FLSA provides for payment of at least the federal minimum wage for the first 40 hours worked in a workweek, overtime pay of time and one half pay for time worked over 40 hours in a workweek, restrictions on child labor and maintenance of employment records. The FLSA covers all employers engaged in interstate commerce or in the production of goods for commerce and annual gross sales or business volume of at least \$500,000. The Occupational Safety and Health Act (OSH Act) provide workplace health and safety protections. OSH Act authorizes the Department of Labor's Occupational Safety and Health Administration (OSHA) to adopt workplace health and safety regulations. Employers are responsible for meeting these guidelines to ensure healthful and safe work and work conditions. The National Labor Relations Act (NLRA) prohibits employers from engaging in unfair labor practices against employees and unions seeking to organize them. Furthermore, the NLRA requires employers to bargain in good faith with organized workers over the terms and conditions of their employment.

State employment and labor laws vary, but often provide broader protections for day laborers. For instance, some state laws will offer workplace wage and hour protections to employees of employers who may not be covered by the FLSA. Within the health and safety context, states such as California have adopted workplace requirements more stringent than those delineated by the OSHA. State laws govern administration of workers' compensation benefits for day laborers suffering injury arising out of or in the course of their employment.

While many day laborers are in fact covered by the aforementioned federal and state labor and employment laws, there is often confusion amongst the courts and the various federal and local agencies charged with enforcing these laws. This confusion can lead to day laborers being wrongly excluded from coverage under protective laws. The United States General Accounting Office (GAO) reports that there is a lack of uniformity amongst the state Wage and Hour Divisions charged with enforcing the laws as to the extent of coverage for day laborers. NELP understands the FLSA, OSH Act and the NLRA to broadly protect day laborers and other contingent workers while supporting legislative reforms that expand and protect the rights of those workers. Day laborers and other contingent workers are an integral part of the workforce and should not be excluded from employment and labor law protections because of their contingent employment status.

Recommendations for legislation to expand and protect the workplace rights of day laborers

1. Hold temporary day labor service agencies and other day labor employers accountable for compliance with employment and labor laws

Any legislative reform addressing the needs of day laborers must clearly define the entities responsible for compliance with the law. Given the relationships between day laborers, temporary day labor agencies, worksite employers, contractors, recruiters and others, a broad definition of day labor employer is necessary to ensure accountability for legal compliance. Temporary day

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labor agencies, the entities that contract with such agencies and others who suffer or permit day laborers to work should be deemed joint employers and held accountable for compliance with the relevant employment and labor laws. Several states including, Illinois and Georgia have adopted laws that hold temporary day labor agencies and worksite employers responsible for the working conditions of day laborers.

Temporary day labor service agencies and other day labor employers should be required to register with the Department of Labor. The Secretary of Labor should be given authority to investigate employment and labor law violations, to assess penalties and revoke the registration of day labor service agencies and employers who violate the laws.

2. Wage and Hour: Ensure day laborers are properly compensated through strong wage and hour protections and enforcement

Despite of the important role day laborers play in the health of the economy, low wages, the lack of benefits and the intermittent nature of day labor make financial stability impossible for day laborers. Wage and hour problems confronting day laborers take many forms and include: complete non-payment of wages; payment of less than the agreed upon rate; payment by checks with insufficient funds and late payment of wages. Furthermore, as the GAO report notes there are certain lawful practices such as permissible wage deductions under the FLSA for items such as meals and transportation that can adversely impact day laborers.

According to a survey of day laborers conducted in conjunction with the Workplace Project on Long Island, New York, daily earnings on average are \$66. Day laborers are typically working three days a week. Average weekly earnings were \$222.50. A Chicago study focusing primarily on homeless day laborers found that 82% were paid an hourly wage of \$5.50 or less. Nearly two-thirds of the respondents (64.5%) were earning less than the federal minimum wage of \$5.15/hr. The study concluded that if a day laborer were to work steadily and somehow manage to avoid the seasonal downturns that are a part of the industry, they would still earn less than \$9,000 a year. A comprehensive study of street corner day laborers conducted by the University of California in Los Angeles found the average monthly wage for a day laborer in Los Angeles during months with good weather and plentiful work was \$1,000. Monthly wages plummeted to \$350 during the off-season. These factors show that without a sustainable wage rate, day laborers will be relegated permanent poverty.

Day laborers are often not paid at all for their labor. The short nature of the employment relationship, multiple barriers to enforcement resources and the lack of strong protective wage and hour laws render day laborers particularly vulnerable to non-payment of wages. Surveys of day laborers in Los Angeles, CA, Chicago, IL, and Long Island, NY reveal that nearly 50% of day laborers reported non-payment of wages by temporary day labor agencies or the on-site employers. Legislative reforms must provide for strong enforcement measures and penalties against employers who do not pay day laborers.

Even when day laborers are paid as promised, various lawful deductions can undercut the value of the promised hourly rate. Under the FLSA, an employer can make deductions from an employee's wages for certain items if it is for the benefit of the employee and acceptance is voluntary and uncoerced. Thus, it is common for temporary day labor agencies and other day labor employers to

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deduct the costs of a meal, transportation and cashing of payroll checks. After numerous deductions, the day laborer is often earning less than the federal minimum wage. Over the past several years, states have sought to end this exploitative practice and enacted legislation limiting the kinds of items and amount an employer may make deductions for. Arizona, Florida, Georgia, Illinois and Massachusetts have all passed laws addressing wage deductions of day laborers.

The following are some suggested wage and hour protections for day laborers.

Sustainable Wages: Day laborers must be guaranteed compensation in parity with fulltime, permanent workers performing similar work.

Employers who benefit the reduced costs of utilizing day laborers have an obligation to pay a sustainable wage. While companies have benefited from downsizing their permanent regular employee workforce, this has resulted in an increase in the number of workers lacking benefits and means to basic financial stability. Absent the right to a sustainable wage, the low-wages and irregular nature of the work leave day laborers with no means of escaping poverty. Day laborers whether referred from a day labor service agency or working for a day laborer employer should be paid at the same rate as permanent employees performing similar duties on the work site.

Properly compensate day laborers for overtime

Employers benefit from the flexibility of the day labor workforce. Employers often rely on day laborers to work long hours over short periods of time to reduce costs and meet deadlines. Day laborers should be compensated for the benefits their flexibility offer and protected from excessive work hours through daily overtime protections. California, New York, Nevada and Alaska have all passed daily overtime provisions to properly compensate workers for excessive hours and to prevent exploitative employer practices. Day laborers should be paid one and a half times the hourly rate for each hour over eight hours in one day and for the first eight hours working on seventh consecutive day of work in a workweek. Day laborers should be paid double the hourly rate for each hour over 12 hours in one day and for all hours over eight hours on the seventh consecutive day of work in a workweek.

Prohibit transportation and equipment fees and compensate day laborers for time spent traveling

Day laborers should not be charged for the cost of transportation to and from a day labor service agency or day labor site to the work assignment. Furthermore, the time spent traveling between the point of hire or temporary day labor agency and the worksite should be considered compensable time at the regular rate of pay. Finally, as temporary workers, day laborers should not be asked to provide or pay for any equipment or tools required to complete the job.

Ensure the timely payment of wages

For workers living from paycheck to paycheck, timely payment of wages is critical to maintaining financial stability. Unless a day laborer requests a semi-monthly payment schedule, s/he should be paid on a weekly basis and no later than seven calendar days after the end of the week in which the wages were earned.

Ensure the right of day laborers to receive wages in cash or negotiable instruments that are payable in cash on demand

Temporary day labor agencies have repeatedly perpetrated illegal check cashing schemes. Protective legislation should address this problem by ensuring the right of day laborers to receive wages in cash or other commonly accepted negotiable instruments that are payable in cash, on demand at a financial institution. Day labor agencies and other day laborer employers should be prohibited from directly or indirectly deducting fees for cashing checks.

Require temporary day labor service agencies and other day labor employers to provide itemized wage statements

In addition to stricter enforcement of the record keeping provisions of the FLSA, NELP supports reforms requiring temporary day labor service agencies and other day labor employers to provide itemized statements of wages and deductions. Itemized statements are important records of deductions made from a day laborer's wages and proof of payment for work performed. Several states including Arizona, Florida and Illinois have passed legislation requiring temporary day labor service agencies to provide such statements.

3. Health and Safety: Place affirmative duties on temporary day labor agencies and other day labor employers to furnish required health and safety equipment and to provide a safe and healthful work environment

Day laborers often toil under hazardous conditions without the benefit of health and safety training or equipment. Due to the lack of notice requirements, most day laborers have no advance warning about possible exposure to hazardous materials or dangerous tasks. Desperate for work and fearing retaliation, day laborers often risk life and limb without ever reporting work hazards.

The Chicago day labor study found that nearly half of the respondents (46%) were worried about their health and safety on the job. Yet, only 56% of those concerned reported the problem to the temp agency or on-site employer. The belief that no corrective action would be taken and that temp agencies and employers would refuse future employment prevented reporting. These fears are valid. The same study found that when day laborers actually reported health and safety concerns, employers took corrective action in only 60% of the cases. Furthermore, nearly one in four day laborers reporting health and safety concerns were terminated or not reassigned to future jobs. NELP supports legislative and policy reforms that encourage day laborers to report health and safety violations without fear of retaliation.

Many day laborers fall within the jurisdiction of the Federal Occupational Safety and Health Administration (OSHA). Limited investigative resources, the fleeting nature of day labor employment and the complaint driven nature of OSHA enforcement result in a virtual absence of health and safety enforcement for day laborers. In theory the complaints process that drives enforcement of the OSH Act makes it possible for any employee to report a health and safety violation. In practice, fear of retaliation and the short term nature of day labor have defied effective OSHA monitoring of day labor worksites. Furthermore, the GAO reports that where OSHA conducts industry monitoring due to limited resources, they generally do not target the smaller worksites where many day laborers are employed. While legislative protections mean nothing without adequate enforcement, there are legal protections that could increase health and safety protections for day laborers.

Hold the day labor service agency, the temporary day labor agency, day laborer employer, on-site employer and any other entity in control of the hazard or responsible for remedying dangerous conditions responsible for compliance with health and safety requirements

Day labor service agencies and day labor employers should ensure that each job placement is free of hazards and that the worker is provided with the necessary health and safety equipment. Congress should adopt measures similar to those in California imposing an affirmative duty on employers to provide safe and healthful employment. The employer exposing workers to the hazard, the employer who actually created the hazard, the day labor service agency and the day laborer employer should all be responsible for providing a safe and healthful work environment. Day labor service agencies and day labor employers who require or permit day laborers to be employed unsafely should be penalized.

Impose an affirmative duty to furnish safety equipment and adopt safe employment practices

Day labor service agencies and day laborer employers must furnish day laborers with health and safety equipment at no cost to the day laborer. It follows that a day labor service agency or day labor employer should not charge for clothes, tools, safety equipment or other items legally or customarily required for the job. For any other equipment, the day labor service agency or day labor employer should be limited to charging the market value of the item.

Require temporary day labor agencies and other day laborer employers to provide notice and obtain consent before assigning day laborers to hazardous tasks

Day laborers who discover they are assigned to hazardous duties only after they are on the job are faced with a Hobson's choice of refusing work and losing a day of wages and risking retaliation or performing dangerous work without health and safety protections. At the very least, day laborers should have the right to be notified if their work is potentially hazardous to their health and to refuse to perform such work without fear of retaliation. Day labor service agencies and day laborer employers should be required to provide day laborers with written notice and obtain written consent before assigning them to tasks that may expose them to hazardous materials. Notice and consent should be provided in English and in a language the day labor is proficient in. Day labor service agencies and day labor employers may not retaliate against day laborers who refuse to accept hazardous jobs due to health and safety concerns.

Ensure that injured day laborers receive workers' compensation

The Chicago day labor study found that one in ten respondents had sustained workplace injuries severe enough to require medical attention. Anecdotal evidence from day laborer organizers and advocates points to a high rate of on the job injuries that go unreported and untreated. It is not uncommon for employers to flee after dumping a worker off at an emergency room. The UCLA study found that not a single day laborer had private health insurance. The precarious financial well-being of a day laborer could be shattered by a single visit to the emergency room. Day labor agencies and day labor employers should not be allowed to shirk their responsibilities to provide the costs of medical care, treatment and where applicable income replacement through workers' compensation benefits.

Require notice of workers' compensation benefits

On the first day of employment, day laborer employers and day labor service agencies should provide written notice of a day laborers right to workers' compensation and the relevant workers' compensation insurance carrier name and number. This notice should be provided in English and any in a language the day laborer is proficient in.

Hold employers accountable for transporting workers in a safe manner

Day labor agencies and day labor employers who transport employees to and from work sites should be required to comply with basic motor vehicle safety requirements. Protective legislation should establish basic safety guidelines for motor vehicles used primarily or regularly to transport day laborers. Federal and state laws intended to protect agricultural workers can serve as examples for such legislation.

4. Workplace Rights: Ensure strong enforcement of the workplace rights of day laborers

Provide for penalties to ensure employer compliance with workplace obligations

The rights embodied in current laws seeking to protect the rights of workers and the items proposed now are the most basic elements of a workplace with dignity and respect. Employers who violate even these baseline workplace rights of workers should be penalized harshly. Strict penalty provisions will also serve as an economic disincentive for employers inclined to exploit day laborers.

Ensure day laborers have a private right of action

Given the Department of Labor's limited enforcement resources, it is imperative that day laborers can seek enforcement of their rights in court. Protective legislation should provide a private right of action without the need to exhaust administrative remedies prior to going to court.

Waiver of a day laborers workplace rights should be declared against public policy and void

To ensure that ruthless employers do not benefit from coercive employment arrangements, agreements to waive the rights afforded to day laborers under protective legislation should be deemed against public policy and void.

Day laborers must be protected from retaliation when asserting their workplace rights

Even the best workplace laws are useless without some form of protection for those seeking to assert those rights. The extreme imbalance of bargaining power between an employer and day laborer calls for strong anti-retaliation protections for workers asserting their rights under the law.

Attorney's fees and costs

If a defendant is found to have broken the law, the court should award attorney's fees and court costs to the plaintiff. Like most low-wage workers across the country, day laborers face enormous economic barriers to adequate legal representation. Ensuring fees and costs eases some of financial restraints of engaging in litigation on behalf of day laborers and allows advocates to represent low-income day laborers.

5. Organizing: Prohibit the use of day laborers as strike breakers

Temporary day labor service agencies should not allow employers to undercut workplace organizing efforts by providing replacement workers.

Illinois recently enacted day labor legislation that prohibits temporary day labor service agencies from placing workers at sites where a strike, lockout or other labor dispute exists.

6. Agency Rules: Prohibit restrictions on the right of day laborers to accept permanent employment

Temporary day labor service agencies and other day labor employers should not be permitted to make deductions for, otherwise charge or limit the right of a day laborer to accept permanent employment. Recently enacted laws in Arizona, Illinois and Florida prevent day labor service agencies from placing restrictions on accepting permanent employment.

7. Facilities and Rights: Ensure the right of day laborers to look for work with dignity and respect.

Temporary day labor service agency facilities where day laborers wait for work should meet certain basic guidelines.

Temporary day labor service facilities should at the least provide restrooms, fresh drinking water and sufficient seating for day laborers waiting for work. Florida, Illinois and Texas have enacted laws to provide adequate facilities for day laborers.

Allocate funds to create and maintain day laborer hiring sites

All over the country public monies have been allocated to operate successful day labor hiring sites. Many of these sites are run by not for profit community based organizations working closely with day laborers. The sites offer a safe place for day laborers and employers to negotiate terms of employment. Day labor sites can also be a means to reach out to day laborers to inform them of workplace rights and means of enforcement.

Protect the First Amendment rights of day laborers

Generally, day laborer sites are public, commercial or residential areas where day laborers assemble to seek work. Day laborers gathered at these sites meet and negotiate work arrangements with employers. Some day labor sites are central locations where service providers and advocates can meet with day laborers. Street corners, a worker center operated by a non-profit organization or parking lots are all common day laborer sites. Legislation should affirmatively state that day laborers at day laborer sites are engaged in constitutionally protected commercial speech. Anti-solicitation ordinances that restrict a day laborer's right to seek work should be deemed overbroad and an unconstitutional infringement of the right to free speech.

Conclusion

Day laborers provide employers with a flexible workforce and contribute significantly to the economy. Despite these contributions, day laborers are routinely subjected to workplace abuse

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with little or no recourse. The growing numbers of day laborers and other contingent workers in the workforce calls for legislative reforms that expand and protect the rights of day laborers.

References for further information

Available from NELP at www.nelp.org

From Orchards to the Internet: Confronting Contingent Work Abuse. A report from the National Employment Law Project and the Farmworker Justice Fund, Inc., finds that subcontracting, a growing trend, is detrimental to workers. From high-tech workers to farm workers, employers have been steadily increasing their use of subcontracting in an effort to cut costs and shift responsibility for wages and working conditions. (March 20, 2002)

The Legal Landscape for Contingent Workers in the United States. Contingent or non-standard work is now present in virtually every sector of the economy; in some industries (such as computer programming, financial services and telecommunications) these types of jobs are a relatively new development, while in others (garment, agriculture, taxi drivers) the jobs cannot be called “non-standard” because they have been the paradigm for a century or more. By Catherine K. Ruckelshaus, National Employment Law Project and Bruce Goldstein, Farmworker Justice Fund, Inc. (2001)

Other resources

Labor’s Efforts to Enforce Protections for Day Laborers Could Benefit from Better Data and Guidance, United States General Accounting Office, Sept. 2002.

Workers in Contingent Employment Lack Insurance, Other Benefits, United States General Accounting Office, Mar. 1991.

Day Laborers in Southern California: Preliminary Findings from the Day Labor Survey, Abel Valenzuela, Jr., Ph.D, Center for the Study of Urban Poverty, Univ. of California, Los Angeles, May 30, 1999.

A Quantitative Analysis of ‘Shape-Ups’ on Long Island: A Report Prepared for the Workplace Project, John Leonardo, James O’Shea et. al, Hofstra University, Jan. 1997.

A Fair Day’s Pay? Homeless Day Laborers in Chicago, Nikolas Theodore, Center for Urban Economic Development, Univ. of Illinois at Chicago, Feb. 22, 2000.

Contingent Workers Fight for Fairness, A Report From the National Alliance for Fair Employment. Available from www.fairjobs.org.