

Testimony of  
Catherine K. Ruckelshaus  
National Employment Law Project

Hearing Before the  
United States Congress  
House of Representatives  
Committee on Oversight and Government Reform

*Adequacy of Labor Law Enforcement in New Orleans*

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Chairman Kucinich and members of the Committee: thank you for this opportunity to testify today on the important subject of the lack of labor law enforcement in New Orleans, LA and its impact on workers and their families and our economy.

My name is Cathy Ruckelshaus, and I am the Litigation Director for the National Employment Law Project (NELP), a non-profit organization that specializes in promoting access to and keeping good jobs for low-income workers. In the last half of my twenty years of working with low-wage workers around the country, we have lost a partner in the United States Department of Labor (DOL). Once a potent ally when it intervened to stop sweatshop jobs, DOL has become at best a nonentity and at worst a pariah in low-wage workers' worlds. It was not always so. During the Clinton years and before, DOL initiated affirmative and strategic programs aimed at combating the worst workplace abuses, and tracked its impact on working people. I submit my testimony today to urge that we redirect DOL back to its roots, check its misguided interventions for employers in on-going private lawsuits, and reinvigorate its commitment to worker's rights.

I and my colleagues at NELP work to ensure that *all* workers receive the basic workplace protections guaranteed in our nation's labor and employment laws; this work has given us the opportunity to learn up close about job conditions around the country in garment, agricultural, construction and day labor, janitorial, retail, hospitality, domestic and home health care, poultry and meat-packing, high-tech, delivery, and other services. We have seen low, often sub-minimum wage pay, lack of health and safety protections and work benefits, and rampant discrimination and mistreatment of workers in these jobs. Employers use common schemes in these jobs, including inserting subcontractors to source (often immigrant) labor, and calling employees independent contractors, to evade job standards. All of these mechanisms and corresponding bad jobs are potently illustrated by the post-Katrina clean-up in New Orleans.

NELP prioritizes enforcing workplace laws on the books and closing loopholes enabling escape from those baseline protections. In addition to bringing private actions against employers, NELP partners with labor and immigrant community groups in the states to promote good models to encourage public enforcement by state and federal departments of labor and attorneys general. This background in direct workplace law enforcement and crafting agency practices informs my testimony today.

My testimony will give a national perspective on the impacts on workers and the economy of DOL's quiescence (and sometimes hostility), and will end with some recommendations for a reanimation of its former spirit.

## Holding up the Wage Floor for Workers and Their Families

### I. Post-Katrina Rebuilding: The Perfect Storm for Labor Abuses

As described in vivid detail by first-hand newspaper accounts, one-on-one surveys, lawsuits, and by the witnesses on today's panel, the conditions for workers in New Orleans as it began the massive rebuilding after hurricane Katrina were (and remain) abysmal.<sup>1</sup> A series of events, following closely on the heels of the hurricane and orchestrated or condoned by our government, combined to create a "perfect storm" for job injustices. Phase one:

- U.S. Occupational Safety & Health Administration (OSHA) suspended enforcement of worksite health and safety rules<sup>2</sup>;
- U.S. Department of Homeland Security suspended immigration law's "employer sanctions," permitting employers to hire workers without checking for work authorization (September 2005)<sup>3</sup>;
- President Bush suspended parts of the prevailing wage law, requiring government contractors to pay wages at rates that are customary for a particular job and to keep records of hours and pay (September 2005);<sup>4</sup>
- U.S. DOL suspended affirmative action requirements enforced by the Office of Contract Compliance Programs (OFCCP).<sup>5</sup>

While the immigration law and prevailing wage suspensions were rescinded a few months later after a public outcry, the adjournments protected those employers who

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<sup>1</sup> See Samantha Henry, *False Promises*, Bergen Herald News, November 14, 2005); Roberto Lovato, *Gulf Coast Slaves*, Salon.com, November 15, 2005, [http://www.salon.com/news/feature/2005/11/15/halliburton\\_katrina/print.html](http://www.salon.com/news/feature/2005/11/15/halliburton_katrina/print.html); Sam Quinones, *Many of Katrina's Migrant Workers Go Unpaid*, Los Angeles Times, September 11, 2006; Monica Campbell, *Post-Katrina Easing of Labor Laws Stirs Debate*, Christian Science Monitor, October 6, 2005); Ann Simmons, *Guest Workers' Gulf Coast Dream Unmet*, Los Angeles Times, March 14, 2007.

<sup>2</sup> Press Release, White House, *Fact Sheet: Federal Relief for the Victims of Hurricane Katrina, Task Force Response* (August 31, 2005), available at <http://www.whitehouse.gov/news/releases/2005/08/20050831-4.html>.

<sup>3</sup> Press Release, Department of Homeland Security, *Notice Regarding I-9 Documentation Requirements for Hiring Hurricane Victims* (September 6, 2005), available at <http://www.dhs.gov/dhspublic/display?content=4788>.

<sup>4</sup> Press Release, President George Bush, *Message to Congress of the United States Regarding Hurricane Katrina* (September 8, 2005), available at <http://www.whitehouse.gov/news/releases/2005/09/20050908-7.html>.

<sup>5</sup> See Associated Press, *Minority Firms Getting Few Katrina Contracts*, "October 4, 2005, <http://www.msnbc.msn.com/id/9590752>.

arrived first, as the reinstatement of the two laws was not applied retroactively. The OSHA moratorium is still in effect in some of the hardest-hit areas.<sup>6</sup>

The overall effect of these early government (non-)interventions, on the heels of its announcement that millions of dollars in government money was available to clean up the Gulf Coast, was to send a message to employers that *all laws* were on a break. Employers heard that message, and acted accordingly, adding to the perfect storm, creating Phase Two:

- Anxious firms, wanting to capitalize on the clean-up money, recruited mostly immigrant workers from Maryland, California, Texas, and other states, through an elaborate subcontracting and labor broker structure that over-promised good jobs and housing;<sup>7</sup>
- Firms repeated scams they had practiced elsewhere to cut labor costs, including calling their employees “independent contractors” or paying workers in cash, taking unlawful deductions from workers’ pay, and requiring off-the-clock work without pay;<sup>8</sup>
- Firms cemented worker’s lack of options by using the U.S. H2B temporary guestworker program to recruit workers, which prohibits workers from working for another employer if the first job is bad, and has virtually no enforcement mechanisms for workers to use in the event of abuses.<sup>9</sup>

Phase Three of the upheaval was a complete lack of labor standards enforcement to respond to these violations:

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<sup>6</sup> Press Release, OSHA, *OSHA Resuming Regular Enforcement Along Most of the United States Gulf Coast* (January 20, 2006), available at [http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=NEWS\\_RELEASES&p\\_id=11805](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=11805).

<sup>7</sup> See NELP, Post-Katrina Policy Short, *Subcontracted Workers: The Outsourcing of Rights and Responsibilities*, <http://www.nelp.org/docUploads/subcontracted%20work%20policy%20updateKatrina%20final%2Epdf>.

<sup>8</sup> See NELP Fact Sheet prepared in response to queries from Gulf Coast worker advocates: *Post-Katrina Fact Sheet- 1099d: Misclassification of Workers as Independent Contractors*, <http://www.nelp.org/docUploads/1099%2Ded%2Epdf>, and *Post-Katrina Fact Sheet – Day Labor: Workers’ Right to Be Paid*, <http://www.nelp.org/docUploads/day%20labor%20waiting%20time%20and%20deductions%2Epdf>.

<sup>9</sup> See U.S. Department of Labor, Employment and Training Division, H-2B Certification, <http://www.foreignlaborcert.doleta.gov/h-2b.cfm>.

- U.S. DOL’s district office was shut down by Katrina and inoperable. The nearest DOL offices were in Baton Rouge, LA and out-of-state;<sup>10</sup>
- Louisiana, like a minority of states, does not have a state law requiring minimum fair pay and hours, and consequently does not have a state agency responsible for enforcing minimum wage and hour standards, meaning that the US DOL is the only option;<sup>11</sup>
- In the handful of instances where workers were able to contact DOL and it did respond, the results were disastrous. Among other things, the DOL office handling complaints from New Orleans did not, as it is authorized to do: (1) investigate retaliation claims brought by workers fired after complaining of no pay; (2) go after “joint employers” or independent contractor abuses, letting responsible employers off; or (3) seek liquidated damages or other penalties beyond the back wages actually owed to the worker, giving employers an incentive to continue to underpay for work performed.

The three phases continue, in some respects, today. The culture of lawlessness emanating from the government’s early moratoria on key labor standards protections also persists. Without active and strategic intervention by the DOL to reclaim a foothold in the region, New Orleans will remain “Exhibit A” of the lack of a meaningful wage floor in this country.

## **II. As Goes New Orleans, So Goes the Rest of the Country**

The stories of workers’ mistreatment in the post-Katrina clean-up and rebuilding efforts are unfortunately merely a local and particularly concentrated example of pandemic labor standards violations across the country and a corresponding lack of U.S. DOL response.

### **A. No Minimum Wage Floor in Too Many Jobs**

In the bottom half of our economy, almost every growing sector—health care, child care, retail, building services, construction and hospitality—is plagued by bad jobs. In addition to providing paltry benefits, if any, employers in these sectors routinely violate bedrock employment rights like the right to be paid fully for work and the right to a safe workplace. Common schemes emerge in jobs with sweatshop conditions: employers hide behind subcontractors, call their workers “independent contractors” not covered by workplace laws, and hire immigrant workers who are vulnerable to exploitation. In addition, DOL has interpreted laws to exempt large classes of low-wage workers from basic wage and hour protections, including home health care companions, and some domestic and agricultural workers. Consequently, our “growth-sector” jobs are

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<sup>10</sup> See U.S. Department of Labor Announcement of Temporary Opening of Wage & Hour Offices in Gulf Region, <http://www.dol.gov/opa/media/press/esa/ESA20052250.htm>.

<sup>11</sup> See NELP, *Post-Katrina Fact Sheet: Strategies for Enforcing The Right to Be Paid*, <http://www.nelp.org/docUploads/strategies%20for%20enforcing%20the%20right%20to%20be%20paid%2Epdf>.

not bringing people out of poverty, and workers across the socio-economic spectrum are impacted.

Recent government and private studies show many of our fastest-growing service jobs have appalling minimum wage and overtime compliance rates:<sup>12</sup>

- A majority of restaurants in New York City were out of compliance;<sup>13</sup>
- 26% of domestic workers in New York City earn below the poverty line;<sup>14</sup>
- Retail workers comprised three-fifths of the 2.2 million at-or-below-minimum-wage workers nationwide in the BLS Survey of households 2002 study;<sup>15</sup>
- 50% of day laborers suffer wage theft;<sup>16</sup>
- 60% of nursing homes are out of compliance;<sup>17</sup>
- One in five home health care aides lives below the poverty level;<sup>18</sup>
- Poultry processing has a 100% noncompliance rate;<sup>19</sup>
- Garment manufacturing has a 50% noncompliance rate.<sup>20</sup>

Additionally, in many sectors, including construction and day labor, employers misclassify employees as “independent contractors,” to avoid responsibilities under labor

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<sup>12</sup> For more statistics and information on the numbers of workers in the growing job sectors, see NELP, *Holding the Wage Floor: Enforcement of Wage and Hour Standards for Low-Wage Workers in an Era of Government Inaction and Employer Unaccountability* (2006),

<http://www.nelp.org/docUploads/Holding%20the%20Wage%20Floor2%2Epdf>

<sup>13</sup> 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*, p. 2, Jan. 25, 2005.

<sup>14</sup> Domestic Workers United and DataCenter, *Home is Where the Work is: Inside New York's Domestic Work Industry*, Executive Summary (2003-3004).

<sup>15</sup> U.S. Department of Labor, Bureau of Labor Statistics, *Characteristics of Minimum Wage Workers: 2002*, August 8, 2003.

<sup>16</sup> Abel Valenzuela and Nik Theodore, *On the Corner: Day Labor in the United States* (January 2006).

<sup>17</sup> Employment Standards Administration, U.S. Department of Labor, *Nursing Home 2000 Compliance Fact Sheet*, available at <http://www.dol.gov/esa/healthcare/surveys/nursing2000.htm>

<sup>18</sup> William J. Scanlon, *Nursing Workforce, Recruitment and Retention of Nurses and Nurse Aides is a Growing Concern*: Testimony before the Senate Committee on Health, Education, Labor and Pensions, GAO-01-750T, at 13 (released May 17, 2001).

<sup>19</sup> U.S. Department of Labor, *FY 2000 Poultry Processing Compliance Report* (2000).

<sup>20</sup> Bureau of National Affairs, Daily Labor Report 87 (May 6, 1996) U.S. Department of Labor, *Labor Department: Close to Half of Garment Contractors Violating Fair Labor Standards Act*.

standards laws. If an employer is successful in characterizing an employee as an “independent contractor,” the worker has no rights to labor and employment protections, including the right to be paid the minimum wage and overtime or the right to form a union.<sup>21</sup> Jobs where independent contractor abuses are common routinely violate basic fair pay and other workplace rules.<sup>22</sup>

Workers in many of these jobs make the minimum wage *or less*. The federal minimum wage is currently \$5.15/ hour; for a full-time worker that translates into an annual income of only \$10,712. The federal poverty level is \$13,690 for a family of two, meaning that minimum wage earners are not making ends meet and are otherwise eligible for public benefits.<sup>23</sup>

What does all of this mean? It means we have an underclass of hard-working men and women who cannot make ends meet for their families. In 2004, 7.8 million people in our country were classified as “working poor,” working at least twenty-seven hours a week but still making below the federal poverty level.<sup>24</sup> Two million workers make at or below the minimum wage, according to the Bureau of Labor Statistics, and the Urban Institute found that 2.2 million immigrant workers make less than the minimum wage.<sup>25</sup> The employer-backed Employer Policy Foundation estimated that workers would receive an additional \$19 billion annually if employers obeyed workplace laws.<sup>26</sup>

Our economy is hurt, too, by rampant workplace violations. Sub-par wages below even the minimum wage fail to drive our economy, and independent contractor abuses result in billions of dollars in lost tax and payroll revenues for our federal and state governments.<sup>27</sup>

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<sup>21</sup> See Testimony of Catherine K. Ruckelshaus, National Employment Law Project, before the House Committee on Education and Labor, Subcommittee on Workforce Protections, March 27, 2007, available at <http://www.nelp.org/docUploads/IndependentContractorTestimony2007%2Epdf>

<sup>22</sup> *Id.*

<sup>23</sup> Department of Health and Human Services, 2007 HHS Poverty Guidelines, <http://aspe.hhs.gov/poverty/07poverty.shtml>.

<sup>24</sup> Bureau of Labor Statistics, U.S. Department of Labor, *A Profile of the Working Poor, 2004* (2006), available at <http://www.bls.gov/cps/cpswp2004.pdf>.

<sup>25</sup> U.S. Department of Labor, Bureau of Labor Statistics, *Characteristics of Minimum Wage Workers: 2002*, Aug. 8, 2003; Randolph Capps, Michael E. Fix, Jeffrey S. Passel, Jason Ost, & Dan Perez-Lopez, *Profile of Low-Wage Immigrant Workforce*, Urban Institute, Oct. 27, 2003.

<sup>26</sup> See Craig Becker, *A Good Job for Everyone*, LegalTimes, Wk. of Sept. 6, 2004, Vol. 27, No. 36.

<sup>27</sup> See Testimony of Catherine K. Ruckelshaus, National Employment Law Project, before the House Committee on Education and Labor, Subcommittee on Workforce Protections, March 27, 2007, available at <http://www.nelp.org/docUploads/IndependentContractorTestimony2007%2Epdf> (citing studies showing increased tax receipts by \$34.7 billion over the period 1996-2004, and state studies in NY and MA finding that noncompliance with payroll tax laws resulted in

## **B. U.S. DOL is Not Enforcing its Laws**

A lack of a strong public enforcement presence on workplace standards has certainly contributed to these dismal conditions. But even in the face of persistent and seemingly intractable sub-par jobs that have persisted for years, the DOL has not made it a priority to stem these abuses.

The Wage and Hour Division (WHD) at DOL enforces many laws, including the Fair Labor Standards Act (FLSA), which sets the minimum wage and overtime rules, prohibits retaliation against complaining workers, and restricts child labor.<sup>28</sup> The FLSA authorizes lawsuits by DOL on behalf of employees, as well as lawsuits by individual employees. WHD also enforces the Davis-Bacon Act, requiring payment of prevailing wages on federal government contracts for the construction, alteration, or repair of public buildings or works. There is no right on the part of aggrieved employees to enforce Davis-Bacon; only the Secretary of Labor has that right. WHD enforces the Service Contract Act, another prevailing wage law covering service contracts, such as those for removal of debris and trash; custodial, janitorial, or guard service; cafeteria and foodservice; packing and crating. There is no right on the part of aggrieved employees to enforce SCA; only the Secretary of Labor has that right.

Other departments within DOL enforce the Occupational Safety & Health Act (OSHA), which provides no private right for a worker to seek remedies in court. For guestworkers brought into the Gulf Coast on H2B or other visas, the DOL is the only agency charged with enforcing labor violations under the H2B program.

While public agencies are by their nature underfunded and understaffed, DOL has been particularly under-subsidized in recent years. In addition, it has failed to use its resources strategically, as it has in the past, to have the broadest impact.

From 1975-2004, the budget for DOL Wage and Hour investigators decreased by 14% (to a total of only 788 individuals nationwide), and enforcement actions decreased by 36%, while the number of businesses covered by wage and hour law increased from 7.8 million to 8.3 million.<sup>29</sup> By 2007, the DOL's overall budget used to enforce wage and hour laws will be 6.1 percent less than before President George W. Bush took office.<sup>30</sup>

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losses as large as \$1 billion each year in NY workers compensation taxes, and annual losses of up to \$278 million in uncollected income taxes, unemployment insurance taxes, and worker's compensation premiums in MA).

<sup>28</sup> 29 U.S.C. 201 *et seq.*

<sup>29</sup> Annete Bernhardt and Siobhan McGrath, *Trends in Wage and Hour Enforcement by the U.S. Department of Labor, 1975-2004* (September 2003).

<sup>30</sup> Judd Legum, Faiz Shakir, Nico Pitney, Amanda Terkel, and Payson Schwin, *Labor—Bush Priorities Hurt Workers, Help Employers (Under the Radar)*, The Progress Report, June 14, 2006.



Legal resources at DOL have also suffered, impacting its ability to enforce its laws. In fiscal year 1992, the Solicitor's Office, responsible for enforcing all laws under DOL's jurisdiction had 786 employees,<sup>31</sup> an increase of 59 percent since fiscal year 1966. But, since fiscal year 1992, despite the fact that two additional laws have been added to the responsibilities of the Solicitor's Office: the Family and Medical Leave Act (FMLA) of 1993, and substantial amendments to the Mine Safety and Health Act (known as the Mine Improvement and New Emergency Response Act) in 2006, the number of employees of the Solicitor's Office has declined markedly; in January 2007, it was down to 590 employees.<sup>32</sup>

DOL has focused its attention on employer compliance and education in the last eight years,<sup>33</sup> and has deemphasized audits and affirmative investigations. Some of the few enforcement actions it did engage in have been challenged as insufficient: a celebrated settlement with Wal-Mart over child labor violations in Connecticut aroused the wrath of Representative George Miller, Senator Dodd and others, who demanded that DOL investigate why it would permit Wal-Mart to have fifteen days to fix any worker complaints before DOL would investigate.<sup>34</sup>

Disturbingly, in the context of fewer enforcement resources overall, DOL has affirmatively intervened in ongoing litigation on the side of employers. In one instance, DOL supported the employer's side in an opinion letter sought by a trade association during the pendency of litigation<sup>35</sup>, and in another, wrote an internal memorandum purporting to clarify the intent of its previously-enacted regulations regarding coverage of home health care workers under the minimum wage and overtime, supporting the employer's argument that the worker was not covered while the case was pending before the U.S. Supreme Court.<sup>36</sup>

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<sup>31</sup> U.S. Department of Labor Budget Submission to Congress for Fiscal Year 1993.

<sup>32</sup> "Legal Services," in volume 3 of the U.S. Department of Labor's *FY 2008 Detailed Budget Documentation*, pp. DM-28 to DM 28, available at [www.dol.gov/dol/budget/2008/PDF/CRJ-V3-02.pdf](http://www.dol.gov/dol/budget/2008/PDF/CRJ-V3-02.pdf). Although the Solicitor's office had 590 employees in January 2007, it had funding to pay for only 551 employees. *Id.* at DM-28.

<sup>33</sup> *See, e.g.* DOL Officials Travel to Provide Compliance Assistance on New Overtime Rules, <http://www.dol.gov/opa/media/press/esa/ESA20041081.htm>

<sup>34</sup> *See* U.S. House of Representatives, Representative George Miller Press Release, *Inspector General Agrees to Review Deal Between Wal-Mart and Department of Labor, Says Miller*, February 18, 2005. *See also* Diane Stafford, *Wage and Hour Cases: Worker Advocacy Groups Object to Practice*, *The Kansas City Star*, October 1, 2006 (describing DOL settlements of half of unpaid wages owed).

<sup>35</sup> BNA, Inc., *Workplace Law Report, Wage and Hour Official Faces Criticisms Over Opinion Letters Linked to Litigation*, March 2, 2007, ISSN 1546-0266.

<sup>36</sup> U.S. Dept. of Labor, *Wage & Hour Advisory Memorandum, No 2005, Application of Section 13(a)(15) to Third Party Employers* (December 1, 2005), available at <https://dol.gov/esa/whd/FieldBulletins/AdvisoryMemoranda2005.pdf>

DOL's wage and hour law enforcement is nearly wholly conducted based on worker complaints, and low-wage and immigrant workers face serious barriers to enforcement.<sup>37</sup> In 2001, WHD conducted as many as 55% of its investigations by fax or phone, and it is five times more likely to find violations of recordkeeping requirements when it visits a workplace.<sup>38</sup> Workers are afraid to come forward to complain. Workers fear retaliation (including termination) by their employers, which may cause them to quietly accept substandard conditions.<sup>39</sup> The United States General Accounting Office (GAO) observed in a report on day labor in the United States that government agencies are unable to do their job with respect to day laborers because they do not find out about violations.<sup>40</sup>

Undocumented workers are particularly vulnerable to workplace abuse, discrimination, and exploitation as well as the fear of being turned over to the INS.<sup>41</sup> Recent ICE raids on workplaces with pending workplace violation investigations creates confusion and fear among workers, and sends a message that the U.S. government will enforce immigration laws against workers, but not labor standards laws against employers.<sup>42</sup>

Unions are an important protective buffer for workers seeking to improve their jobs, and a lack of union presence in the workplace causes workplace standards to decline.<sup>43</sup>

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<sup>37</sup> For example, in 2004, 74% of all WHD enforcement was from worker complaints. David Weil and Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, Comp. 27 Labor Law & Policy Journal 59, 60 (2006).

<sup>38</sup> United States General Accounting Office (GAO), *Labor's Efforts to Enforce Protections for Day Laborers Could Benefit from Better Data and Guidance*, GAO 02-925, September 2002, at p. 18-19.

<sup>39</sup> See, e.g. *Mitchell v. Robert de Mario Jewelry, Inc.*, 361 U.S. 288, 292 (1960); *Contreras v. Corinthian Vigor Ins. Brokerage, Inc.*, 25 F. Supp. 2d 1053, 1058-59 (N.D. Cal. 1998).

<sup>40</sup> U.S. General Accounting Office, *Worker Protection: Labor's Efforts to Enforce Protections for Day Laborers Could Benefit from Better Data and Guidance*, GAO 02-925, 14 (September 2002).

<sup>41</sup> See, e.g. *Rivera v. NIBCO*, 364 F.3d 1057, 1064 (9th Cir. 2004), cert. denied, 125 S.Ct. 1603 (2005).

<sup>42</sup> See The Oregonian, *Fresh Del Monte Subject of Worker Safety Probes*, June 13, 2007 (describing an ICE raid on a Del Monte plant that had two pending OSHA investigations underway, where workers were rounded up and detained.)

[http://blog.oregonlive.com/business/2007/06/fresh\\_del\\_monte\\_subject\\_of\\_wor.html](http://blog.oregonlive.com/business/2007/06/fresh_del_monte_subject_of_wor.html)

<sup>43</sup> See e.g. David Weil, *Enforcing OSHA: The Role of Labor Unions*, 30 INDUS. REL. 21, 22 (1) (Winter 1991); Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 362 and passim (describing the important role unions play in monitoring worksite conditions in today's era of "chronic under enforcement" of workplace standards) (March 2005).

Ninety percent of workers in this country are unrepresented by a union, even though most workers (57%) would vote for a union if an election was held at their worksite.<sup>44</sup>

When the risk of enforcement is small, systemic violations of wage and hour laws become the norm in these sectors, and sweatshop conditions prevail.<sup>45</sup>

### III. Possibilities for a DOL Renaissance

When the DOL does enforce its workplace laws, it makes a difference in the wage levels of more than just the workplaces it chooses to enforce against.<sup>46</sup> Workplace enforcement of basic fair pay laws should be at a level to send a message that America will not tolerate non-payment and underpayment for work.

DOL can have an impact with strategic attention paid to a geographic region, like New Orleans, or to a particular sector or set of jobs, like any of the low-wage sweatshop jobs profiled above. This section will highlight some proposed reforms, noting where DOL need only resurrect a program or set of strategies it has employed in the past. These modest reforms, in particular the ones where DOL already has a track record and knows how to do them, could mean a significant change for workers in the Gulf coast and elsewhere around the country, with little hardship for DOL.

- Target low-wage industries with persistent violations of bedrock labor standards, like minimum wage and overtime, and health and safety. Target industries particularly prevalent in New Orleans with rampant violations are construction, day labor, and hospitality. Keep track of violations, conduct audits and investigations not solely based on worker complaints, and report on progress. DOL has done this in the past, with Initiatives in garment, agriculture, health care, and other low-wage jobs. In its *1999-2000 Report on Initiatives*, the DOL's WHD outlined a comprehensive compliance strategy for collecting data and ensuring future compliance.<sup>47</sup> DOL also launched a "No Sweat" Campaign, for which DOL had more than 100 garment firms sign its Compliance Monitoring

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<sup>44</sup> See Frank Swoboda, *Labor Unions See Membership Gains*, Washington Post, p. E2, January 20, 2000; Peter D. Hart Research Associates, *The Public View of Unions* (2005).

<sup>45</sup> David Weil, *Public Enforcement/Private Monitoring: Evaluating a New Approach to Regulating the Minimum Wage*, 58 INDUS. & LAB. REL. REV. No. 2, 238-257 (January 2005).

<sup>46</sup> See David Weil, *Compliance with the Minimum Wage: Can Government Make a Difference?*, May 2004.

<sup>47</sup> U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, *1999-2000 Report on Initiatives*. (hereafter "1999-2000 DOL Report") See attached report in Word format.

Agreement, and it developed partnerships with community groups.<sup>48</sup> It also launched health care<sup>49</sup> and “Salad Bowl”<sup>50</sup> initiatives.

- Keep data on worker complaints coming to DOL, including wages and hours claimed by each worker, regardless of whether DOL “takes the case,” and keep data on results obtained by DOL, in case of enforcement.
- Seek more funding for more investigators, or reallocate existing funding to hire more investigators who speak a language other than English and who can research the extent of workplace standards in key sectors to make recommendations on fixing these problems. DOL has done this in the past.<sup>51</sup>
- Partner with community groups who have contacts in the local communities and develop plans for learning of worst abuses and for rectifying those violations, in concert with the groups, who are the “eyes and ears” of the workers. The Chicago Area Workers Rights Initiative between state and federal agencies and local community and labor groups is one example.<sup>52</sup>
- Use DOL enforcement resources strategically to get at repeat violations, including going after “joint employers” in subcontracting jobs, where multiple levels of potentially responsible employers diffuse lines of responsibility for fair pay. Actively investigate employer claims of “independent contractors,” as suggested recently by the GAO.<sup>53</sup> DOL has done this in the past.<sup>54</sup>
- Provide agency contact information and general rights information in multiple foreign languages so that immigrant workers can learn about their rights and complain of violations. *See, e.g., NYS Attorney General’s Labor Bureau information card* (available in ten languages).
- Allow workers to file claims anonymously so that they will not fear retaliation or possible deportation.

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<sup>48</sup> [http://www.dol.gov/wb/info\\_about\\_wb/sub2000.pdf](http://www.dol.gov/wb/info_about_wb/sub2000.pdf)

<sup>49</sup> <http://www.dol.gov/esa/media/press/esa/esa98185.htm>

<sup>50</sup> <http://www.dol.gov/opa/media/press/esa/archive/esa99073.htm>

<sup>51</sup> *See* 1999-2000 DOL Report.

<sup>52</sup> For information on the initiative, *see* <http://www.iwj.org/outreach.dol.html>.

<sup>53</sup> *Employment Arrangements: Improved Outreach Could Help Ensure Proper Worker Classification*, GAO-06-656 (July 2006), at p. 33, 35.

<sup>54</sup> *See, e.g.* DOL Report on agricultural initiatives, including FYI 1998 strategy to vigorously apply the joint employment standard under the AWPAs and the FLSA (1998), [http://www.dol.gov/wb/info\\_about\\_wb/sub2000.pdf](http://www.dol.gov/wb/info_about_wb/sub2000.pdf).

- Share information with OSHA, state workers compensation and unemployment insurance offices to target repeat offenders. DOL has done this in the past.<sup>55</sup>
- Reaffirm the DOL commitment to create a firewall between DOL and Immigration and Customs Enforcement (ICE), to encourage witnesses to come forward and prevent employer threats of deportation or other intimidation. DOL currently has such a policy.<sup>56</sup>
- Aggressively pursue anti-retaliation protections in the FLSA, to send employers and workers a message that witnesses to labor standards abuses are protected.
- Reaffirm that in cases where the employer has not kept adequate records of hours worked and pay received, DOL will accept credible worker testimony on hours and pay, as established in the Supreme Court case *Anderson v. Mt. Clemons Pottery Co.*, 328 U.S. 680 (1946).
- Seek full liquidated damages and for the full statute of limitations so that employers fear getting caught by DOL and do not consider nonpayment a risk worth taking.
- Use DOL's "hot goods" power to seize goods produced in substandard working conditions. The federal government has this power to stop shipment of goods prepared under sweatshop conditions. 29 U.S.C. § 215 (a)(1).
- Refer complaints DOL receives but that it cannot handle to a private panel of attorneys or clinics trained and available to help. DOL has done this in the past, in Region 9 (in California and Nevada).

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<sup>55</sup> See U.S. General Accounting Office, *Worker Protection: Labor's Efforts to Enforce Protections for Day Laborers Could Benefit from Better Data and Guidance*, GAO 02-925, 14 (September 2002), p. 17-18.

<sup>56</sup> See U.S. Department of Labor, *Memorandum of Understanding*, <http://www.dol.gov/esa/whatsnew/whd/mou/nov98mou.htm>.