
PICKING POCKETS FOR PROFIT: WAGE THEFT AND THE FAIR LABOR STANDARDS ACT



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INTRODUCTION

Wage theft occurs when employers cheat workers out of wages owed through varying mechanisms.¹ The *Fair Labor Standards Act of 1938* (hereinafter “FLSA”),² created a statutory right for most workers³ to be paid a federally mandated minimum wage and for compensation of one and one-half times the employee’s regular hourly wage for all hours worked over forty in a week⁴. Concurrently, the FLSA created the Department of Labor’s Wage and Hour Division (hereinafter the “WHD”), which is responsible for enforcing the wage and hour statute.⁵ However, critics assert that inadequate enforcement of the right to the statutory minimum wage has allowed wage theft to grow into a “national epidemic.”⁶ Many Americans are unaware that wage theft exists,⁷ and many victims of wage theft are either not aware that their rights have been violated, or they are not in a position to enforce their rights.

Wage theft can occur in several ways—most are intentional acts by employers.⁸ Wage theft occurs when employers misclassify employees to keep them from receiving overtime pay or issue paychecks that

¹ *Wage Theft - Expanded Definition*, INTERFAITH WORKER JUSTICE, <http://www.iwj.org/template/page.cfm?id=147> (last visited, May 7, 2011). Interfaith Worker Justice defines wage theft as the problem among “[h]undreds of thousands of workers, particularly those in low-wage jobs, [who] suffer the theft of their earned wages by unscrupulous employers.” See also, Palo, Todd A. *Minimum Wage: Justifiably Enforced?* 35 SETON HALL LEGIS. J. 36, 39 (2010) (“...wage theft can be defined as when an employer deprives an employee of pay which he or she is due as remuneration for work performed.”)

² FAIR LABOR STANDARDS ACT of 1938 (hereinafter FLSA), 29 U.S.C. §§ 201-262 (2010) (as amended).

³ The FLSA creates exemptions for workers in particular industries and workers occupying certain positions, discussed in more detail, *infra*.

⁴ 29 U.S.C. § 207(a)(1)(2010). The FLSA also restricts oppressive child labor.

⁵ 29 U.S.C. § 204(a)(2010).

⁶ “*Is the Department of Labor Effectively Enforcing Our Wage and Hour Laws?:*” Hearing before the H. Comm. on Education and Labor 110th Cong. 15-16 (2008) (Statement of Kimberly Bobo, Executive Director of Interfaith Worker’s Justice) (explaining that there are 200 worker’s centers around the country, serving mostly low-wage workers, and the number one problem workers bring to them is wage theft); See also, Paul Grondahl, *Help Wanted: Long Hours, No Pay*, TIMES UNION (ALBANY), Mar. 5, 2009, at A3 (“‘Wage theft is a national epidemic,’ said Kim Bobo”). Kimberly Bobo is the director of Interfaith Worker’s Justice Center, the largest affiliate of worker’s centers in the United States. She is an advocate for low-wage workers, giving them a political voice, and is arguably the country’s topmost expert on wage theft issues. See *Generally*, Kimberly Bobo, WAGE THEFT IN AMERICA: WHY MILLIONS OF AMERICANS ARE NOT GETTING PAID AND WHAT WE CAN DO ABOUT IT xi, 41 (Revised and Updated ed., 2011) Kimberly Bobo is the executive director of Interfaith Worker Justice (IWJ), which is a national organization that calls upon religious values to improve wages and working conditions for workers.

⁷ Kimberly Bobo, *supra*, note 6, at xi, 41 (“Americans seem genuinely surprised to hear about [wage theft]....Some [Americans] have even had their own wages stolen, but believe that it is an isolated incident.”).

⁸ *Id.* at 23; See also *Stop Wage Theft: Welcome to the Online Wage Theft Resource Center*, INTERFAITH WORKER JUSTICE, <http://www.wagetheft.org/> (last visited May 7, 2011).

do not reflect the total compensation owed.⁹ Some employers do not pay workers at all, either by flatly denying them a paycheck after the employment relationship has terminated, or by issuing paychecks that bounce.¹⁰ Additionally, wage theft often occurs because employers keep workers' tips,¹¹ or pressure workers to pay to keep their jobs or for safety equipment that employers are mandated by federal law to provide free of charge.¹² Many employees are pressured to work off-the-clock in order to reduce production costs.¹³ Some firms have policies put in place that encourage mid-level managers to do so.¹⁴ Lastly, wage theft commonly occurs when employers pay workers below the statutory minimum wage required by the FLSA. In order to do this, employers will either illegally bargain with workers to compensate them below the minimum hourly wage or will pay them by the job, leading them to erroneously believe that they are being paid in accordance with the law.¹⁵

The aggregate harm of wage theft to employees is difficult to quantify because only a fraction is reported or remedied. However, experts estimate that between two and three million American workers are not paid the minimum wage mandated by the FLSA.¹⁶ In addition, the Dept. of Labor estimates that three million workers are wrongly classified as independent contractors instead of employees.¹⁷ Conservatively, \$19 billion a year is stolen from workers in the United States when their employers fail to

⁹ Classification of Independent Contractors is discussed later, see page 22.

¹⁰ *Wage Theft - Expanded Definition*, *supra*, note 1. See notes 72-73 and accompanying text.

¹¹ Kimberly Bobo, *supra* note 6, at 25, 32-33. See note 85..

¹² See note 85. *Kimberly Bobo*, *supra*, note 6 at 25.

¹³ See notes 142,

¹⁴ *Id.* at 25, 35-39. See Notes 68-78 and accompanying text.

¹⁵ Paying by the job is referred to a "piece-work." Department of Labor regulations require that piece-work pay schemes be at least equivalent to the minimum hourly wage. See notes 79-83.

¹⁶ Kimberly Bobo, *supra*, note 6 at ch. 1 (estimating between two and three million workers are paid subminimum wages). See also, *A Profile of the Low-Wage Immigrant Workforce*, THE URBAN INSTITUTE, IMMIGRATION STUDIES PROGRAM (2003). This figure of two million is based on this report profiling low-wage immigrant workers, which found that 13 percent of foreign-born female workers and 9 percent of foreign-born male workers are paid less than minimum wage. Based on immigrant workers alone, there are more than two million workers earning below minimum wage. *Is the Dept. of Labor Effectively Enforcing Our Wage and Hour Laws*, *supra*, note 6 at n1.

¹⁷ *Employee Misclassification: Improved Outreach Could Help Ensure Proper Worker Classification*, U.S. GOVERNMENT ACCOUNTABILITY OFFICE (2007). (arguing that there should be a definitive test for determining independent contractor status that spans all federal laws in order to make classification easier). There are no comprehensive studies documenting the precise numbers affected by unpaid overtime, but 85 percent of FLSA violations were related to overtime and almost all the large FLSA lawsuits filed are for overtime violations. Misclassifying workers as exempt when they are really non-exempt and misclassifying workers as independent contractors when they are really employees are both widespread practices that deny workers overtime. See also *Is the Dept. of Labor Effectively Enforcing Our Wage and Hour Laws*, *supra*, note 6 at n2. The Department of Labor estimates, using the broadest measurement of contingency, that there are 5.7 million contingent workers. Bureau of Labor Statistics, CONTINGENT AND ALTERNATE EMPLOYMENT RELATIONS REVIEW (2005).

pay them overtime compensation to which they are entitled by law.¹⁸ Over the past few years, companies have paid over \$1 billion annually to settle¹⁹ unpaid overtime claims.²⁰ In 2006, Citigroup paid \$98 million to 20,000 brokers who were shortchanged. UPS had to pay \$87 million in 2007 for 20,000 drivers who were not paid overtime. That same year, Walmart settled with 86,680 workers for \$33 million.²¹ The number of cases filed each year in federal courts, by the private bar, on behalf of employees who have been victims of wage theft,²² is rising.²³ This indicates that either wage theft is on the rise, or that alternatives to private suit are failing to adequately enforce the FLSA.

It is these intentional acts of theft by employers—the blatant disregard for the requirements of the FLSA—with which this paper is concerned. This paper is also concerned with examining the structures

¹⁸ Kimberly Bobo, *supra*, note 6. , (citing Craig Becker, *A Good Job for Everyone: Fair Labor Standards Act Must Protect Employees in Nation's Growing Service Economy*, 36 LEGAL TIMES, 27 (Sept. 6, 2004)). The Economic Policy Foundation is a business funded think tank, labor lawyers estimate much higher numbers. See Kimberly Bobo, *supra*, note 6 at ch. 1: “The Crisis of Wage Theft.”

¹⁹ The DOL and unions often issue press releases when there is a large settlement, *e.g. Gourmet Grocery Workers Fight Back Against Wage Theft*, UNITED FOOD AND COMMERCIAL WORKERS INT'L UNION, (Press Release, Feb. 26, 2009), http://www.ufcw.org/press_room/index.cfm?pressReleaseID=421(stating that the owners of New York retail gourmet grocery chains, including Amish Market, Zeytinia, and Zeytuna, settled with workers for \$ 1.5 million after the DOL discovered the employer failing to pay both minimum wage and overtime); *CVS Pharmacy Inc. Agrees To Pay More Than \$ 226,000 In Penalties and More Than \$ 38,000 In Back Wages Following Investigation By U.S. Labor Dept* U.S. DEPT OF LABOR (Press Release, Dec. 10, 2007), <http://www.dol.gov/opa/media/press/esa/archive/ESA20071543.htm> (stating that CVS Pharmacy paid over \$ 38,000 to fifty-one workers in order to settle charges of failure to pay minimum wage and overtime); *Gas Station/Convenience Store Chain Agrees to Pay \$ 1 Million To Settle U.S. Labor Dep't Lawsuit* U.S. DEP'T OF LABOR (Press Release, April 2, 2007), available at: <http://www.dol.gov/opa/media/press/esa/archive/ESA20070426.htm> (stating that employees working at Chestnut Petroleum Dist. Inc., with thirty-seven locations throughout NY, NJ, and CT, were being paid less than the federal minimum wage).

²⁰ Note that in a settlement action, employers often agree to pay a sum that is less than what is owed, often 50 cents on the dollar, therefore, the total aggregate wages actually owed are probably not accurately reflected in this number. *Wage Theft—Expanded Definition*, *supra*, note 1.

²¹ Kimberly Bobo, *supra*, note 6, at ch. 1. *See also*, David A. Love, *A Book Review of Wage Theft in America*, L.A. PROGRESSIVE (Feb. 7, 2009) available at: <http://www.laprogressive.com/economic-equality/a-book-review-of-kim-bobos-wage-theft-in-america/> (last visited May 7, 2011) (outlining several large settlements).

²² The FLSA creates a private right of action for employee victims of wage and hour violations; remedies are discussed in more detail, *infra*.

²³ Anthony McClure. *Number of New FLSA Lawsuits Filed Each Year Continues to Rise*. American Bar Association: Litigation News. Available at: http://apps.americanbar.org/litigation/litigationnews/top_stories/101410-rise-in-flsa-employment-and-labor.html (last visited May 7, 2011) (“The number of new cases filed each year in federal district courts under the Fair Labor Standards Act continues to rise.”). According to data collected from PACER’s Case Locator service operated by the Administrative Office of U.S. Courts, the number of FLSA related cases filed in federal district courts nationwide rose from 5,210 in 2008 to 6,118 in 2009. In 2010, there was a 13 percent increase in FLSA case filings over the same period in 2009. Available at: <https://www.pacer.gov/> *Id.*

that are in place—in business, government, and the law—that allow wage thieves to escape punishment. I will start with a brief history of the FLSA and the purposes for the legislation. I will also outline wage and hour requirements under the FLSA, the remedies available to workers when an employer fails to satisfy those requirements, and whistleblower protections. Next is a subsection entitled: *How do Employers Steal Wages?* In this section I will highlight the misclassification of employees and some of the other most common ways in which employers steal from workers.

While wage theft occurs at every level of employment, this paper will concentrate on theft from low-wage workers.²⁴ A section entitled: *Who is Most Vulnerable to Wage Theft?* will tell the stories of several groups of workers, predominately women and minorities, who often find themselves the victims of some of the most egregious acts of wage theft.²⁵ In this section, I will briefly bring to light the racialized and genderized history of federal wage and hour legislation. I will show that a binary system of wage protection continues to exist that leaves certain populations particularly susceptible to wage and hour violations and, at the same time, allows exploitative employers to prosper--contrary to the purposes of the FLSA. Finally, I will suggest some measures that should be taken in order to combat wage theft, focusing on wage and hour violations that occur among the least protected.

THE FAIR LABOR STANDARDS ACT

HISTORY OF THE FLSA

The Fair Labor Standards Act is part of Roosevelt's New Deal legislation entered into during the Great Depression. The original campaign for minimum-wage legislation in the United States²⁶ began at the state level and resulted from growing public concern about the prevalence of "sweatshops."²⁷ The

²⁴ The author believes that several factors combine to make low-wage workers particularly vulnerable to wage theft. This will be further discussed.

²⁵ I will attempt to uncover some of the reasons why women and minorities have found themselves the ultimate victims in a failed system of enforcement.

²⁶ One of the leading scholars and reformers in this area was Father John A. Ryan, who was greatly respected by Roosevelt. See The Catholic University Archives, *Msgr. John A. Ryan, Background Information Part I*, available at: <http://archives.lib.cua.edu/education/bishops/1919ryan-intro.cfm> Father Ryan argued for broad government intervention under a natural law theory of economic justice. See Father John A. Ryan, *A LIVING WAGE* (1906). His "wish list" of legislative reforms included a minimum wage and an eight-hour working day. John A. Ryan, *A Programme of Social Reform by Legislation*. 89 *The Catholic World* 532 (July 1909).

²⁷ Sweatshops were workhouses where recent immigrants, women, and young children were paid substandard wages. In 1912, Massachusetts was the first to enact minimum wage legislation. See *The Minimum Wage*, <http://law.jrank.org/pages/8589/Minimum-Wage.html#ixzz1JAEwfomY>

deplorable working conditions during the Great Depression saw a further shift in public policy toward worker protection.²⁸

During the first part of the 20th century, the courts consistently overturned both state and federal worker protection provisions.²⁹ However, FDR and Frances Perkins, his labor secretary, continued working on the fair labor standards bill in anticipation of a time when wage and hour legislation would be found constitutionally permissible.³⁰ That time came in 1937, when under the threat of Roosevelt's "Court Packing Plan,"³¹ the Court seemed to suddenly shift direction. In the 1937 case of *West Coast Hotel v. Parrish*³², the Court validated a Washington State minimum wage law.³³ On May 24, 1937, two months after the *West Coast Hotel*³⁴ decision, President Roosevelt sent the fair labor standards bill to Congress with a message that America should be able to give "all our able-bodied working men and women a fair

²⁸ By 1938, 25 states had enacted minimum wage legislation. The federal attempt to regulate labor began in 1892 with child labor legislation. The Supreme Court, however, found this regulation unconstitutional. See *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (holding that Congress could not properly exercise its power under the Commerce Clause to prohibit the shipment of goods produced by child labor in interstate commerce).

²⁹ The Supreme Court, during its substantive due process period, had taken the position that the Fourteenth Amendment prohibited the government from interfering with employment contracts. See *Lochner v. New York*, 198 U.S. 45 (1905). See also, *Morehead v. New York ex rel. Tiplado*, 298 U.S. 587 (1937); *Adkins v. Children's Hospital*, 262 U.S. 525 (1923). (By a narrow margin voiding legislation that set minimum wages for women in the District of Columbia.) The *Adkins* court was concerned because the legislation imposed uniform minimum wages on all women regardless of their individual needs or occupations. When, in 1933, President Roosevelt asked Frances Perkins to become Secretary of Labor, she told him that she would accept if she could advocate a law to put a floor under wages and a ceiling over hours of work and to abolish abuses of child labor. When Roosevelt heartily agreed, Perkins asked him, "Have you considered that to launch such a program... might be considered unconstitutional?" Roosevelt retorted, "Well, we can work out something when the time comes." Frances Perkins, *The Roosevelt I Knew* 152 (New York, Viking Press, 1946).

³⁰ As Frances Perkins worked on drafting a fair labor standards bill, the Supreme Court continued to hold social welfare legislation unconstitutional. In 1935, the *National Industrial Recovery Act*, which set minimum wages in several industries, was struck down by the court in the case of *Schechter Corp. v. United States* 295 U.S. 495 (1935).

³¹ Some historians believe that it was FDR's threat to "pack the court" by increasing the number of justices on the court (in order to outnumber the current justices, who were consistently striking down the new deal legislation), that caused the "switch in time that saved nine." This switch refers to a change in Justice Robert's vote on labor legislation in *West Coast Hotel* (see n23). Other historians believe that Roberts had valid legal rationale for distinguishing *West Coast Hotel* from previous cases.

³² *West Coast Hotel Company v. Parrish*, 300 U.S. 379 (1937).

³³ Roosevelt, feeling that the time was ripe for the legislation, said to Secretary of Labor Perkins, "Now what happened to that nice, unconstitutional bill you had tucked away? Franklin Roosevelt, *PUBLIC PAPERS AND ADDRESS*, Vol. VII (New York, Random House, 1937), p.392. With the recent struggle between the Court and the President in mind, Frances Perkins had drafted the bill with the help of an army of lawyers, including later Supreme Court Justice Felix Frankfurter, so that the bill would not fall victim to a ruling of unconstitutionality by the courts. *Id.*

³⁴ *Supra*, note 32.

day's pay for a fair day's work."³⁵ Though States had the right to set standards within their own borders, he said, goods produced under "conditions that do not meet rudimentary standards of decency should be regarded as contraband and ought not to be allowed to pollute the channels of interstate trade."³⁶

After heated battles in the House between Southern Democrats and Northern Industrialists, resulting in 72 amendments to the original text, the bill was approved. The FLSA was signed into law on June 25, 1938.³⁷

PURPOSE OF THE STATUTE

The Minimum Wage

The primary legislative purpose of the minimum wage was to abolish "sweating," a term that extends the "sweatshop" connotation to all those workers who work for pay below what their labor is worth in the market,³⁸ usually accompanied by deplorable working conditions. Women and children, especially, were vulnerable to sweating, and made so little that they often had to rely on charitable programs to supplement their income.³⁹

The legislation was grounded on the premise that the wage formation process was subject to "market failure," since workers were at such a comparative disadvantage when bargaining for the sale of their own labor, and that government should step in to rectify this failure of the market. A minimum wage, setting an artificial floor on wages, would correct for this market failure by forcing employers to internalize the minimum social costs of maintaining a work force, which they had succeeded in shifting onto the workers

³⁵ Roosevelt, PUBLIC PAPERS, VI (1937), pp. 209-14. See also *Chao v. Gotham Registry, Inc.*, 514 F.3d 280, 283 (2d Cir.2008) (quoting 81 Cong. Rec. 4983 (1937) (message of President Roosevelt)).

³⁶ *Id.*

³⁷ The FLSA set the minimum wage at 25 cents (40 cents the next year), banned oppressive child labor, and set the maximum working week at 44 hours (to be limited to 42 and then 40, in successive years). In 1940, it was tested by a lower federal court and survived constitutional scrutiny *United States v Walters Lumber Co.*, 32 F Supp 65 (1940, DC Fla) (Provisions of Fair Labor Standards Act prescribing minimum wages and hours in industry does not deprive defendants of liberty to contract without due process of law.) The FLSA was later upheld by the Supreme Court in *United States v. Darby*, 312 U.S. 100 (1940), which overruled *Dagenhart* (see note 28).

³⁸ See *supra*, notes 29-30, and accompanying text. Several states had passed minimum wage laws in the 1930's. Some were upheld, but the Supreme Court, in overturning minimum wage legislation by states, had focused on the fact that the wage was based on the amount of money required to live rather than the amount labor should bring in an unaffected free market. See *Adkins v. Children's Hospital*, *supra*. See also, TIME MAGAZINE, "Labor: Sweating." March 13, 1933. Available at: <http://www.time.com/time/magazine/article/0,9171,745294-2,00.html#ixzz1IrB5PRSc>. (Last accessed April 2, 2011). (Advocating a minimum wage as an effort to prohibit "sweating," Governor Lehman stated: "I am advised by competent constitutional authorities that present day conditions are so changed that a mandatory minimum wage law based not on living standards but on the minimum value of the services rendered might well be upheld by the Supreme Court.").

³⁹ Jenny Morris, WOMEN WORKERS AND THE SWEATED TRADES: THE ORIGINS OF MINIMUM WAGE LEGISLATION (1986). See also, TIME MAGAZINE, Note 38, *supra*.

or society.⁴⁰ At the same time, for these largely unorganized workers, the statutory base was designed to function in the place of a union.⁴¹

Although the minimum wage was intended to create micro-welfare effects for workers, its primary function was macroeconomic. Its purpose was to remove labor costs from competition, and in doing so, to increase productivity by driving “parasitic” firms out of business—thereby, concentrating production in the most competent firms,⁴² and steering capital:

It is the chiseler, the corner-cutter, and the downright unscrupulous who need our attention. It is this small percentage of employers who drag down our business standards and make it harder for the overwhelming majority of our American businessmen to compete on a decent basis. These are the men for whom we need a Fair labor Standards Act—let me call it a Fair Labor Competition Act...⁴³

The Maximum Hours Provision

While unions and others advocated a ceiling on hours for health or humanitarian reasons,⁴⁴ there were macroeconomic reasons for the maximum hours provision of the FLSA.⁴⁵ The provision was intended to encourage employers to “spread out” labor hours among more employees. Before the FLSA, it was more economically efficient to hire one man to work 60 hours per week than it was to hire two men to work 30

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⁴⁰ TIME MAGAZINE, *supra*, note 38. (“The community is not bound to provide what is in effect a subsidy for unconscionable employers.”)

⁴¹ Mark Linder, *MIGRANT WORKERS AND MINIMUM WAGE* 71 (1992).

⁴² The preamble to the FLSA containing the congressional “declaration of policy” is focused on findings relating to unfair competition. 29 U.S.C. § 202(a).

⁴³ 93 Cong. Rec. 1502 (1947) (statement of Rep. Klein).

⁴⁴ The Supreme Court has explained that the Act's overtime provisions were aimed not only at raising wages but also at limiting hours. *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 576-78 (1942). These provisions were designed to remedy the “evil of overwork” by ensuring workers were adequately compensated for long hours, as well as by applying financial pressure on employers to reduce overtime. *Id.* at 577-78; *see also United States v. Rosenwasser*, 323 U.S. 360, 361 (1945).

⁴⁵ Proponents of the Fair Labor Standards Bill stressed the need to fulfill the President's promise to correct conditions under which “one-third of the population” were “ill-nourished, ill-clad, and ill-housed.” They pointed out that, in industries which produced products for interstate commerce, the bill would end oppressive child labor and “unnecessarily long hours which wear out part of the working population while they keep the rest from having work to do.” Shortening hours, they argued, would “create new jobs...for millions of our unskilled unemployed,” and minimum wages would “underpin the whole wage structure...at a point from which collective bargaining could take over.” *Record of the Discussion before the U.S. Congress on the FLSA of 1938*, I.(U.S. Department of Labor, Bureau of Labor Statistics)(Washington, GAO, 1938), pp.20-21. *See also* Mark Linder, “TIME AND A HALF’S THE AMERICAN WAY: A HISTORY OF THE EXCLUSION OF WHITE-COLLAR WORKERS FROM OVERTIME REGULATION. *But see*, “TIME AND A HALF’S THE AMERICAN WAY”: A HISTORY OF THE EXCLUSION OF WHITE-COLLAR WORKERS FROM OVERTIME REGULATION, by Marc Linder. *INDUSTRIAL & LABOR RELATIONS REVIEW*, Vol. 59, No. 3.

hours each because it was less expensive to train one man and work him twice as hard.⁴⁶ The overtime provision was intended to serve as a disincentive to this practice, by increasing the cost of requiring one man to work over 40 hours a week.⁴⁷

THE SUBSTANTIVE PROVISIONS OF THE FLSA

The Fair Labor Standard Act is a federal statute, the key provisions of which regulate minimum hourly pay and overtime pay requirements, for work⁴⁸ over 40 hours in a week⁴⁹, as well as child labor, for employees that fall within the purview of the Act.³⁴

The power of Congress to regulate wages flows from its interstate commerce power;⁵⁰ therefore, the statute applies to employees engaged in interstate commerce or employed by an enterprise engaged in commerce or in the production of goods for commerce⁵¹. A business is considered to be an “enterprise” participating in interstate commerce if it makes at least \$500,000 in profit per year⁵². An employee is also covered by the statute if he works for a non-covered business but participates in interstate commerce in his job duties, for example, by utilizing interstate direct mailing or a company website that reaches other states.

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⁴⁶ Of course, there are now other costs to employment, namely benefits offered to full-time employees, which undermines this rationale. If the excess of the cost of providing benefits to two employees over the tax deduction allowed for those benefits is greater than the cost of providing benefits to one employee (minus deduction) plus the aggregate of the penalty wage for OT, then it doesn't make economic sense to employ two employees in the place of one.

⁴⁷ It is important to note that, unlike the unions' and Frances Perkins' original intent,⁴⁷ the overtime provisions in the final legislation that came from the Senate are not a maximum amount of hours that could be required of an employee, they were simply an incentive to employers not to work employees longer than the accepted 40 hours per week.

⁴⁸ “Employ” is defined in the Act as including “to suffer or permit to work,” 29 U.S.C. § 203(g), but Congress did not define the word “work.” See *IBP, Inc. v. Alvarez*, 546 U.S. 21, 25, (2005).

⁴⁹ Although neither the wage, the hour nor the overtime provisions of the FAIR LABOR STANDARDS ACT specifically provides for any other method of paying wages except by hourly rate, pay by the week, to be reduced by some method of computation to hourly rates, was also covered by the act. FAIR LABOR STANDARDS ACT OF 1938, §§ 3(m), 6(a)(1), 7, and § 6(a)(5), as amended, 29 U.S.C.A. §§ 203(m), 206(a)(1), 207 and § 206(a)(5).

⁵⁰ *U.S. v. Darby*, *supra*, note 37.

⁵¹ The FLSA applies to these businesses, unless the employer can claim an exemption from coverage. See note 56.

⁵² If a statute covers businesses “in commerce,” a fairly specific showing must be made of a connection between the particular employer regulated and interstate commerce. *Usery v Lacy* (1980, CA9) 628 F.2d 1226. See, e.g., Fair Labor Standards Act, 29 U.S.C. § 201 et seq., (1976). See *Mitchell v. Lublin, McGaughy & Assocs.*, 358 U.S. 207, 211, (1959); *A. B. Kirschbaum Co. v. Walling*, 316 U.S. 517, (1942); *United States v. Darby*, 312 U.S. 100, (1941); *Houser v. Matson*, 447 F.2d 860 (9th Cir. 1971); *Wirtz v. Idaho Sheet Metal Works, Inc.*, 335 F.2d 952 (9th Cir. 1964).

Once it has been determined that an employer-employee relationship exists,⁵³ and that the employer is covered under the FLSA⁵⁴, the statute requires employees to be paid \$7.25 per hour⁵⁵ (effective as of July 24, 2009), and, in most cases,⁵⁶ overtime at time and one-half the employee's regular rate of pay for all hours worked⁵⁷ in excess of forty per week⁵⁸.

REMEDIES UNDER THE FLSA

The enactment of the FLSA created a positive moral right for workers to be paid a minimum wage and a corresponding duty of the government to adequately enforce that right. The FLSA created the Wage and Hour Division of the Department of Labor (hereinafter DOL) and charged the division with the enforcement of the FLSA provisions. Therefore, even without an injured party, the WHD may “drop in” on businesses for “compliance checks.”⁵⁹

⁵³ The employer/employee relationship is discussed in the “misclassification of independent contractors” subsection of this paper, *infra*.

⁵⁴ Most of the states also have minimum wage laws. See Dept. of Labor: Wage and Hour Division: “Minimum Wage Laws in the States: January 1, 2011.” Last accessed on April 4, 2011. <http://www.dol.gov/whd/minwage/america.htm#content>. (Webpage provides an interactive map and an historical table illustrating the minimum wage requirements in each state and territory of the U.S.).

⁵⁵ FAIR MINIMUM WAGE ACT OF 2007. (The third of a three-step increase of 41% of the minimum wage brought the statutory minimum to \$7.25 in June of 2009).

⁵⁶ Unless the employee falls under one of several overtime exemptions. See 29 C.F.R. § 207. The FLSA gives employers three classifications under which their employees could be considered exempt from this overtime regulation. These three classifications of exempt employees are bona fide “executives,” (See 29 C.F.R. § 521.1), bona fide “administrative” employees, (See Id at § 521.2) and bona fide “professional” employees (Id. at § 521.3). In order to be classified under any one of these three exemptions, employers must pass three tests for each classification: the “duties” test, the “minimum salary” test and the “salary test.” (Id at § 541.1-541.3 and § 541.18) If any one of these three tests is not satisfied, then these employees cannot be classified as exempt from the overtime provision of the FLSA. For an in-depth discussion of the “salary test,” see G. Scott Warrick, *The FLSA's Salary Test: Impending Disaster for the American Worker and American Business*, 24 Cap. U. L. Rev. 621, 624-25 (1995)

⁵⁷ The courts have interpreted “work” under FLSA to mean: “exertion or loss of an employee's time that is (1) controlled or required by an employer, (2) pursued necessarily and primarily for the employer's benefit, and (3) if performed outside the scheduled work time, an integral and indispensable part of the employee's principal activities.” *Holzappel v. Town of Newburgh*, 145 F.3d 516, 521 (2d Cir.1998)); see also *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, (1944); see also *Armour & Co. v. Wantock*, 323 U.S. 126 (1944) (clarifying that exertion is not required to satisfy definition of work); *Steiner v. Mitchell*, 350 U.S. 247, 252-53 (1956) (addressing exertion outside of scheduled working time).

⁵⁸ 29 U.S.C. § 207(a)(1) (2010).

⁵⁹ There are strict recordkeeping requirements under the FLSA and the WHD has the right to inspect those records kept by a business at any time. However, due to institutional and budget limitations, this “hardly ever happens.” *Pay Me Now or Pay Me Later*. VA Wage and Hour CLE manual (2005).

The most common remedy for wage violations requires that the employer make up the difference between what the employee was paid and the amount he or she should have been paid.⁶⁰ This sum is referred to as “back pay.”⁶¹

There are several methods which the FLSA provides for recovering unpaid minimum and/or overtime wages⁶²: (1) The Wage and Hour Division of the Department of Labor may supervise payment of back wages; (2) The Secretary of Labor may bring suit for back wages and an equal amount as liquidated damages;⁶³ (3) An employee may file a private suit, in either state or federal court, for back pay and an equal amount as liquidated damages, plus attorney’s fees and court costs; or, (4) The Secretary of Labor may obtain an injunction to restrain any person from violating the FLSA, including the unlawful withholding of proper minimum wage and overtime pay.

It is important to note that an employee cannot recover the entire amount of his paycheck under a minimum wage claim; he is only entitled to recover the statutory minimum wage multiplied by the number of hours for which he was not compensated. If the case goes to court, the FLSA provides for possible liquidated damages in a sum equal to the back pay owed. In addition, the FLSA allows a judge to order the payment of court costs and attorney’s fees by a losing employer.⁶⁴ Generally, a two-year statute of limitations applies to the recovery of back pay⁶⁵. In the case of willful violations, a three-year statute of

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⁶⁰See *Adair v. Ferst*, 45 F. Supp. 824, 825 (D. Ga. 1942) (holding that the effect of Fair Labor Standards Act is to make an employee subject thereto a creditor of employer, and this without regard to any actual attempted agreement as to compensation, and even if payment be made in accordance with such agreement.) The court in this case prevented a business entity from transferring its assets to a shell company in order to avoid liability.

⁶¹U.S. Dept. of Labor Website. *Wages: Backpay*. Available at: <http://www.dol.gov/dol/topic/wages/backpay.htm>.

⁶²The FLSA provides that an action to recover lost wages and other damages may be maintained against any employer, including a public agency, in either federal or state court “by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.”

⁶³The federal courts have jurisdiction over FLSA claims. See *Adair* at 825.

⁶⁴The FLSA provides that, a court shall, in addition to any judgment, “allow a reasonable attorney’s fee to be paid by the defendant, and costs of the action.” But see *Arsenal Building Corporation et al. v. Greenberg* (also *Brooklyn Savings Bank v. O’Neil*) 324 U.S. 697 (1945) (holding that an employee was not entitled to interest on sums recovered in an action brought under Section 16(b) of the Fair Labor Standards Act because that would serve as interest on interest, since the liquidated damages also serve as a form of interest for late payment.)”

⁶⁵FAIR LABOR STANDARDS ACT OF 1938, § 1 et seq., as amended, 29 U.S.C.A. § 201 et seq.; Portal-to-Portal Act of 1947, § 6(a), 29 U.S.C.A. § 255(a). When the FLSA was enacted in 1938, it did not include a statute of limitations for violations committed under the Act. As a result, any civil actions that were brought against employers under the FLSA were governed by each individual state’s statute of limitations. However, in 1947, Congress passed the Portal-to-Portal Act, imposing a two-year statute of limitations for FLSA violations. In 1966, Congress amended the FLSA again and extended its statute of limitations to three years for any violation deemed to be willful. Today, if employers violate the FLSA, and their violation is found to be non-willful, employers will be liable for any damages caused by this violation for the last two years. However, if employers willfully violate the FLSA, then they will be liable for any damages resulting from this violation for the last three years.

limitations applies.⁶⁶ The FLSA provides for the possibility of a “collective action,” meaning that the party bringing the suit, if within the statutory time period, may send out notices to other potential wage and hour claimants in the case.⁶⁷

An employee gives up his right to bring suit for both unpaid wages and liquidated damages under the FLSA if he or she has been paid back wages under the supervision of the Wage and Hour Division or if the Secretary of Labor has already filed suit to recover the wages.⁶⁸ Settlement agreements, or any other agreement whereby an employee releases wage and hour related claims, are only valid if accomplished through two specific methods provided for in the FLSA. First, as mentioned above, the Secretary of Labor is authorized to supervise payment to employees of unpaid wages owed to them.⁶⁹ The only other permissible route for "settlements" of an employee's wage claims is through a court-approved stipulated judgment obtained after the employer and employee present a proposed settlement and the court scrutinizes the agreement for fairness.

⁶⁶ Section 255(a) sets a two-year statute of limitations in which to bring any cause of action under the FLSA for unpaid minimum wages, unpaid overtime compensation, or liquidated damages. The limitations period extends to three years for any such actions which arise out of “willful violations.” 29 U.S.C. § 255(a). *See also* *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 128, 108 S. Ct. 1677, 1679, 100 L. Ed. 2d 115 (1988) (holding that the standard to apply for “willfulness” implicating the three year statute of limitations is that the employer either knew or showed reckless disregard as to whether its conduct was prohibited by the FLSA). The Court explained that this standard represents a fair reading of the Act's plain language, since it comports with the general understanding that the word “willful” refers to conduct that is “voluntary,” “deliberate,” or “intentional,” and not merely negligent. (citing *Trans World Airlines v. Thurston*, 469 U.S. 111, 105, in which the standard was first described.). *Gambrell v. Weber Carpet, Inc.*, CIV.A. 10-2131-KHV, 2010 WL 5288173 (D. Kan. Dec. 17, 2010); Courts typically will not rule on the “willfulness” question until after they determine whether there has been an FLSA violation in the first place. *See Cooke v. General Dynamics Corp.*, 993 F. Supp. 56, 65- 66 (D. Conn. 1997). This means that the litigation will proceed using the three-year statute of limitations – and a prevailing employee will either be entitled to either two or three years worth of unpaid wages.

⁶⁷ Collective actions involve a "certification" process. The first "phase" of the collective action is the "conditional certification" phase. The case is filed and the court is asked to certify a "class" of employees who are similarly situated. In the second stage, after the "class" is conditionally certified, discovery, the information-gathering stage of a lawsuit, is conducted as to the named and opt-in plaintiffs. If the court finds a common policy unites the group of similarly situated employees and that the claims can be resolved with common evidence, the collective action moves forward. Lawyers.Com, *Collective Actions Under the FLSA* <http://labor-employment-law.lawyers.com/wage-and-hour-law/Collective-Actions-under-the-FLSA.html>

⁶⁸The Supreme Court had long held that the right to a judicial forum, like all FLSA rights, “cannot be abridged by contract or otherwise waived because this would ‘nullify the purposes’ of the statute and thwart the legislative policies it was designed to effectuate.” *Scott v. City of New York*, 592 F. Supp 2d 386, 400 (S.D.N.Y. 2008)(quoting *Brooklyn Savings Bank v. O’Neil*, 324 U.S. 697, 700 (1945))

⁶⁹ An employee who accepts a settlement supervised by the Secretary of Labor thereby waives his or her right to bring suit for both the unpaid wages and for liquidated damages

The FLSA has a retaliation provision that protects workers who report FLSA violations against adverse employment action by employers.⁷⁰ The Supreme Court has very recently decided that the protection against retaliation extends to informal oral complaints to an employer, as well as formal complaints made through the DOL.⁷¹

COMMON TYPES OF WAGE THEFT

LAST PAYCHECK CASE

The most frequent violation of the minimum wage provisions of the FLSA that a practitioner is likely to see is the so-called “last paycheck case.”⁷² Generally, the fact pattern will be that an employee is either terminated or quits voluntarily, and is not paid whatever wages are owed by the employer on the next regularly scheduled payday. Because this occurs so frequently, most states, but not all, have laws prohibiting the withholding of a final paycheck. Some states, like Oregon, include a punitive measure of thirty days pay. One such case was filed in the District Court for the Eastern District of California⁷³.

An alternate scenario of the “last paycheck” case is the case where a homeowner picks up a day laborer on a corner and contracts with him for a day’s work at a certain price. Often, these laborers do not get paid at all.⁷⁴ In the rare case where a day laborer insists on a written contract, unscrupulous employers will pay the contract in full and then, as an aside, ask a laborer to do another job. When the work is complete, the employer refuses to pay the laborer and there is no written document for the laborer to use to enforce the contract in court.

⁷⁰ 29 U.S.C. §215(a)(3) 29 U.S.C. § 215(a)(3) (2010). Both current and past employees are protected by the retaliation provision. *Dunlop v. Carriage Carpet Co.*, 548 F.2d 139, 147 (6th Cir. 1977). (holding that discrimination by former employers was precisely the sort of harm that Section 15(a)(3) was intended to correct.). Where the immediate cause or motivating factor of a discharge is an employee's assertion of rights under the Act, the discharge is discriminatory whether or not other grounds for discharge exist. See ABA, *Retaliation Under the Fair Labor Standards Act*. AMERICAN BAR ASSOCIATION: LABOR AND EMPLOYMENT LAW SECTION—BNA BOOKS. Available at: <http://www.bna.com/bnabooks/ababna/annual/99/annual46.pdf>

⁷¹ *Kasten v. Saint-Gobain Performance Plastics Corp.*, No. 09-834 (2011) (holding that the scope of the statutory term “filed any complaint” under the Fair Labor Standards Act (“FLSA”) includes oral, as well as written, complaints. According to the majority opinion, if an oral complaint is “sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection,” it may be protected under the FLSA).

⁷² Zachary A. Kitts. COMMENTARY BY THE NATIONAL INSTITUTE FOR TRIAL ADVOCACY ON § 206. 29 US NITA § 206 (2010).

⁷³ See *Rosalez, et. al. v. Taco Bell*, No. 809CV01290, 2009 WL 5431212 (C.D. CA) (Defendant seeking removal and joinder to class action already filed against Taco Bell for “last paycheck” violations).

⁷⁴ See *Mississippi Chicken*, *infra*, notes 83, 146.

ILLEGAL BARGAINING: PAYMENT “UNDER THE TABLE” AND “PIECE-WORK”

Wage theft also comes when an employer refuses to pay the statutory minimum wage. This occurs most often with “under the table” jobs, where the employer pays cash and illegally bargains with employees for remuneration equaling less than the minimum wage. Cash wages such as these not only deprive the worker of a fair wage, but they also present a situation where employers are paying neither the required payroll taxes⁷⁵ nor worker’s comp⁷⁶ and unemployment insurance.⁷⁷ Therefore, the employee is not only deprived of the cash wages to which he is entitled by statute, but also of the statutory “safety net” that is created through unemployment, social security, and worker’s comp insurance.⁷⁸

Illegal bargaining for remuneration below the minimum wage often happens when employees are paid on a “piece-rate” basis⁷⁹ (also called piece work⁸⁰). This is when employees are paid according to how many “pieces” they complete. A piece could be a barrel, bushel, or box in agriculture; a particular job in construction (such as putting up drywall in a house); or a particular garment or piece in the garment industry (each watch, or each sweatshirt, finished). Piece-rate workers are covered by FLSA’s minimum

⁷⁵ Federal Insurance Contributions Act (FICA) authorizes a tax to fund Social Security and Medicare at a rate of 15.3% of gross income. The employer is responsible for paying half of this tax. Self-employed individuals are responsible for the full 15.3%. These are general tax rules, for more specific tax rules for 2011, see Internal Revenue Service, *Publication 15: Circular E: Employer’s Tax Guide* (2011), available at: <http://www.irs.gov/publications/p15/index.html>.

⁷⁶ Employers are required in every state to pay a worker’s compensation insurance premium for each worker. Worker’s compensation is a type of statutorily created insurance that compensates an employee for work related injury or death.

⁷⁷ The employer is responsible for paying the entire portion of Federal unemployment (FUTA) tax and state unemployment (SUTA) tax

⁷⁸ *E.g.*, the amount of FICA taxes that an employee pays (and his employer pays for him) throughout his lifetime is linked to the amount of social security disability or retirement benefits he will be entitled to receive. A worker who is working “under the table” also does not have the benefit of worker’s comp payments when injured or unemployment benefits when out of work. The lack of future financial security is especially problematic in dangerous industries, where injuries are probable, for example, in agriculture due to chemical exposure, or in construction. Not having this safety net available, if he becomes disabled, unemployed, or too old to work, arguably serves as one of many factors that reduce a worker’s bargaining power. This, in turn, fuels a potential cycle of poverty and vulnerability (to exploitive employers) that is difficult to escape.

⁷⁹ The California Department of Industrial Relations glossary has examples of common “piece-rate” plans: (1) automobile mechanics paid on a “book rate” (that is, a brake job, one hour and fifty minutes, tune-up, one hour, etc.) usually based upon a pre-set standard; (2) Nurses paid on the basis of the number of procedures performed; (3) Carpet layer paid by the yard of carpet laid; (4) Technician paid by the number of telephones installed; (5) Factory worker paid by the number of widgets completed; (6) Carpenter paid by the linear foot on a framing job; (7) Truck driver paid by the number of loads hauled. California Dept. of Industrial Relations. *Labor Law Glossary*. CA.GOV. available at: <http://www.dir.ca.gov/dlse/Glossary.asp?Button1=P>

⁸⁰ *Id.*

wage and overtime provisions.⁸¹ The DOL publishes instructions on how to calculate the hourly wage for piecework.⁸² However, not all employers comply with these instructions.⁸³

THE SERVICE INDUSTRY: ILLEGAL DEDUCTIONS AND STEALING TIPS

Many low-wage workers are found in the service industry, and many of them have a low hourly wage that is supplemented by tips.⁸⁴ Wage theft in these industries occurs when employers keep employee's tips or when employers illegally make deductions from an employee's paycheck. In addition, restaurants are particularly notorious for paying subminimum wages to both wait staff and back kitchen employees.⁸⁵

⁸¹ Johnson et al. v. Wave Comm GR LLC, and Robert Guillerault and Richard Ruzzo individually, Case No. 6:10-cv-00346, N.D. New York. (Finding that piece-rate workers are supposed to be paid overtime for all hours worked over forty).

⁸² For example, see 20 C.F.R. Part 655 (rate and overtime for health professions); 29 C.F.R. 780 (forestry); and 29 C.F.R. 780 (for agriculture) (defining piece rate as: "that amount that is typically paid to an agricultural worker per piece (which includes, but is not limited to, a load, bin, pallet, bag, bushel, etc.), to be determined... according to a methodology published by the Department. As is currently the case, the unit of production will be required to be clearly described; e.g., a field box of oranges (1-1/2 bushels), a bushel of potatoes, and Eastern apple box (1-1/2 metric bushels), a flat of strawberries (twelve quarts), etc.")

⁸³ For a documentary film example of blatant wage theft from immigrant construction workers paid on a piecework basis, and the interventionist role of worker's center staff, see John Fiege, *Mississippi Chicken* (2007), wage theft clip available at: <http://www.youtube.com/user/filmaustin?blend=10&ob=5#p/u/0/u3jy3n4vKs0>. In 2004, the filmmaker followed his wife to Mississippi, where she set up a worker's center to aid poultry workers. The worker's center, MPOWER, is now thriving and staffed by current and former poultry workers. For access to the entire film *Mississippi Chicken*, and the filmmaker's blog, go to <http://fiegefilms.com/films/mississippi-chicken/>.

⁸⁴ Because service jobs cannot be outsourced, they will most likely continue to constitute a significant portion of available jobs. The industry with the highest proportion of workers with reported hourly wages at or below the Federal minimum wage was leisure and hospitality (about 12 percent). About three-fifths of all workers paid at or below the Federal minimum wage were employed in this industry, primarily in the food services and drinking places component. For most of these workers, tips supplement the hourly wages received. U.S. Department of Labor, Bureau of Labor Statistics. *Labor Force Statistics from the Current Population Survey: Characteristics of Minimum Wage Workers, 2007*. Available at: <http://www.bls.gov/cps/minwage2007.htm>

⁸⁵ Kimberly Bobo, *supra*, note 6, ch. 1. (citing U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, Report on Initiatives, 24 (2001)). (78% of restaurants in New Orleans were noncompliant when investigated by the WHD). Ms. Bobo gives many examples of wage theft experienced in restaurants, it seems to be especially prevalent in ethnic restaurants. *Id.* Dallas-based restaurant chain Texas De Brazil Corp. has agreed to pay \$177,502 in overtime and back wages to 715 former and current wait staff, including \$14,574 to 42 employees at its location in Downtown Memphis. In addition to Memphis, Texas De Brazil has agreed to pay these back wages to current and former wait staff at properties in the Dallas-Forth Worth area; Miami and Orlando, Fla.; Richmond-Fairfax, Va.; Denver; and Schaumburg, Ill. The agreement follows an investigation by the U.S. Department of Labor's Wage and Hour Division, which found that workers were not properly paid overtime as required by federal law. Behren Law Firm, *Take This Job and Shove It: An Employee's Rights Blog* <http://takethisjobshoveitblog.com/tag/minimum-wage/> (June 4, 2010) (visited on May 7, 2011).

It is illegal for deductions in pay to cause a paycheck to reflect less than the statutory minimum. Therefore, when an employer deducts money from the employee's pay for till shortages, breakage or bad checks; or requires the purchase of tools or a uniform when the cost is a major portion of the employee's paycheck, this might very well constitute wage theft. In a similar vein, employers also illegally deduct for the cost of safety equipment.⁸⁶ One industry where this often happens is franchised maid services,⁸⁷ where women are picked up and taken to houses to clean. Employers have been known to illegally deduct for uniforms, transportation charges, and even "insurance" for breakage.⁸⁸

Tips are often given on a cash basis,⁸⁹ so proving that tips were stolen is difficult, if not impossible, in many situations.⁹⁰ When customers pay with a credit card at a restaurant and allow a gratuity to be charged above the cost of their meal, wait staff and other employees are completely dependent upon their employer to convert these tips into cash and make sure they get to the correct employee. Often, employers keep some or all of this money, either without explanation or by charging the wait staff an administrative "fee" for converting the credit to cash.⁹¹

Another type of theft of tips involves the "tip jar." Sometimes employees are required to give all tips to management and then management supposedly divides them among all workers. Although this type of

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⁸⁶ Generally, OSHA requires that employers cover these costs. OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, § 2 et seq., 29 U.S.C.A. § 651 et seq.; *See also S & H Riggers & Erectors, Inc. v. Occupational Safety & Health Review Comm'n*, 659 F.2d 1273 (5th Cir. 1981); *See also*, Kimberly Bobo, *supra*, note 6 at 25

⁸⁷ Kimberly Bobo. *supra*, note 6, ch. 1.

⁸⁸ *Id.*

⁸⁹ Tipped employees are those who customarily and regularly receive more than \$30 a month in tips. Tips actually received by tipped employees may be counted as wages for purposes of the FLSA, but restaurants must pay wait staff at least \$2.13 per hour. If that pay and combined tips fall below the federal minimum wage of \$7.25 an hour, the employer must make up the difference and bring an employee's pay up to the minimum wage. FLSA also requires that employers pay workers time and a half their regular rate of pay for any hours worked beyond 40 hours per week. Department of Labor, Wage and Hour Division. *Fact Sheet # 15: Tipped Employees Under the FLSA* available at: <http://www.dol.gov/whd/regs/compliance/whdfs15.htm>. A recent 9th Cir. Case held that employers could "pool tip," meaning hold out a percentage for non-waitstaff employees, as long as the wait staff was receiving minimum wage. *See discussion of Cumbie v. Woody Woo, Inc.* Verdict: Restaurant's Tip Pooling Arrangement Does not Violate FLSA. Employment Law Alliance. Available at: <http://www.tip20.com/verdict-restaurant%E2%80%99s-tip-pooling-arrangement-does-not-violate-flsa/1307> (accessed May 7, 2011).

⁹⁰ Although Kimberly Bobo mentions several incidences of workers having tips stolen, she never mentions a time that the workers were able to recover their stolen tips. *See generally*, Kimberly Bobo, *supra*, note 6.

⁹¹ Kimberly Bobo. *supra*, note 6, Chapter 1.

wage theft happens in restaurants, as well, it is most common for employees of car washes and grocery store baggers and loaders.⁹²

THE “WAL-MART PINCH:” WAGE THEFT IN RETAIL

Over the last several decades, retail workers were the largest group of persons making the minimum wage⁹³. These employees are the victims of wage theft in several forms. Mid-level managers (usually store managers) feel so much pressure to keep costs low by minimizing employee work hours that they either encourage employees to work off the clock or they actually delete employee hours from time cards.⁹⁴ Sometimes employers force employees to work through lunch periods or breaks that are required by state law, or that were previously agreed upon. Then the break time is deleted from the employee’s time records.⁹⁵

I call this phenomenon the “Wal-Mart Pinch,” because Wal-Mart is particularly notorious for this type of violation—several employees have brought suit against the company. In 2008, for example, Wal-Mart announced it would settle 63 cases in 42 states charging that the company forced its employees to work “off the clock”—that is, requiring unpaid work after employees had clocked out at the end of their

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⁹² *Id.* Chapter 3. (explaining that workers report violations at Shur-brite car wash. They believe their tips are being stolen. They are also required to pay for rags with which to clean cars.) The 9th Circuit recently held that employers could “pool tips,” meaning hold out a percentage for non-wait staff employees, as long as the wait staff was receiving minimum wage. See discussion of *Cumbie v. Woody Woo, Inc.* in Employment Law Alliance, *Verdict: Restaurant’s Tip Pooling Arrangement Does not Violate FLSA*. Available at: <http://www.tip20.com/verdict-restaurant%E2%80%99s-tip-pooling-arrangement-does-not-violate-flsa/1307> (accessed May 7, 2011).

⁹³ As of 1987, the model minimum-wage worker was a white woman under thirty-five employed part-time (10-30 hours weekly) in retail trade or services. Unpublished report of BLS, *Characteristics of Workers Paid at Hourly Rates, Including those who are paid at or Below the Prevailing Wage in 1987*. Cited by Mark Linder in MIGRANT WORKERS AND MINIMUM WAGE, 1992. This assumes only legal wages, this does not contemplate the illegal misclassification of workers. Now, most persons making at or below minimum wage work in the “service industry,” it is unclear whether that figure includes retail. U.S. Department of Labor, Bureau of Labor Statistics. *Labor Force Statistics from the Current Population Survey: Characteristics of Minimum Wage Workers, 2007*. Available at: <http://www.bls.gov/cps/minwage2007.htm>. See also, note 69.

⁹⁴ Computers make this task temptingly easy, see note 97 and 103.

⁹⁵ Determination of whether an agreement exists classifying meal periods as working hours, for purposes of overtime compensation under Fair Labor Standards Act (FLSA), involves scrutiny and construction of the agreements between the particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and all of the surrounding circumstances. Fair Labor Standards Act of 1938, § 7(e)(2), 29 U.S.C.A. § 207(e)(2); Parties may reach an agreement regarding “preliminary and postliminary periods” [such as dressing times or times preparing for the day’s work by gathering information] and meal times. 29 C.F.R. §§ 553.223, 778.320, 785.19.

official shifts.⁹⁶ The settlement totaled \$352 million in unpaid wages and involved hundreds of thousands of current and former employees.⁹⁷ However, the Wal-Mart pinch is not limited to Wal-Mart. Similar wage and hour violations have occurred at Toys R Us⁹⁸, Verizon⁹⁹, UPS,¹⁰⁰ the Dollar Store,¹⁰¹ and many other well-known companies. In 2004, Taco Bell agreed to a \$1.5 million settlement when an Oregon jury found their managers guilty of requiring off-the-clock work and using their computers to erase worker's hours.¹⁰² Dick's Sporting goods has recently agreed to pay \$15 million to settle multi-state litigation.¹⁰³

Mid-level managers are put in a "pinch" by top executive orders to make a certain profit and are often told exactly how many employee hours they can use to do so.¹⁰⁴ Either the designated number of employee hours are too few or the profit they are trying to reach is unobtainable (and the expected profit margins increase each year when a manager meets the expected outcome for the year before). The store manager confronts a situation where she must squeeze blood from the proverbial turnip. She uses the computer to delete hours from time sheets or forces employees to work off the clock. Why not, thinks the

⁹⁶ Stephen Greenhouse and Stephanie Rosenbloom, *Wal-Mart settles 63 Lawsuits*. NY Times (Dec. 23, 2008).

Available at: <http://www.nytimes.com/2008/12/24/business/24walmart.html>

⁹⁷ See Greenhouse, *THE BIG SQUEEZE* (2009). See also note 67.

⁹⁸ In his book, Stephen Greenhouse, Labor Reporter for the New York Times, tells the story of one Marine veteran and his experience with wage theft by store managers in several well-known stores. He first worked at Toys R' Us, where he witnessed an employer deleting hours and was later demoted in retaliation for speaking up about the wage theft he witnessed. He later worked for Dollar General as a store manager and was specifically told by his division manager to delete employee hours. When he refused, she said, "then I'll do it." She sat at his computer and proceeded to do so. He brought suit against dollar General.*Id.*

⁹⁹ Kimberly Bobo, *supra* note 6, appendix A (list of "big money" settlements in which the WHD was involved).

¹⁰⁰ UPS has settled suits in Washington and Oregon for deducting lunch hours for employees who never broke for lunch, often eating in their trucks if they ate lunch at all.

¹⁰¹ See note 86.

¹⁰² The Taco Bell litigation lasted more than six years in Oregon trial courts and resulted in payment to the employees in excess of two million dollars. This included litigation against the Taco Bell Corporation (*Bravo v. Taco Bell*)(*unpublished, citation not available*) for off-the-clock work, which was resolved in favor of the employees after three jury trials.

¹⁰³ Dick's Sporting Goods recently paid out \$15 million to Plaintiffs in a settlement. Dick's used payroll software that automatically deducts breaks from time sheets. The legitimacy of this software has not yet been determined by the court, but many companies continue to use it. Will Astor, *Dick's Agrees to pay \$15 Million to Settle Lawsuit*. Rochester Business Journal. (April 10, 2011) (visited May 7, 2011).

¹⁰⁴ William Ritzick, a lawyer who represented one thousand workers in a collective action against Taco Bell, argues that lower-level managers know that if they don't engage in wage theft in order to meet the expected budget, they will be fired. He explains that these managers are typically making between twenty and thirty thousand dollars a year; they are "in management. They get medical... They want to keep that toe-hold in the middle class and, often, they'll do whatever is necessary." William Ritzick as quoted by Stephen Greenhouse. *THE BIG SQUEEZE* (2009).

manager, when I am working 55-65 hours a week on \$25,000 per year?¹⁰⁵ Why shouldn't everyone give a little?

In addition to deleting hours, employers have “reworked” hours, moving them from day to day or from week to week in order to avoid paying the time and a half rate¹⁰⁶. Another form of wage theft comes when employers encourage workers not to report overtime hours, but insist that certain jobs be finished, so that the employee ends up working overtime without the statutorily required time and a half wage. In many companies, employers hire contingent workers (discussed later) who not covered by the wage and hour statutes and, in doing so, make an implicit threat that employees reporting overtime hours will lose their jobs to independent contractors who legally receive straight pay for hours over 40 per week.¹⁰⁷

JOINT EMPLOYMENT

One way that employers have attempted to escape liability is by using subcontractors, day-labor firms, or “jobbers.”¹⁰⁸ Jobbers are middlemen who collect of gang of workers, and receive a payment from the employer for the aggregate work hours of the gang, from which he pays the gang. The “jobber” generally oversees the work, but not always, and distributes wages to the workers--after removing a percentage for his “services.” Not surprisingly, the wage earned by the workers is often far less than either the wage they were promised, or the wage that the contracting employer normally pays for the same

¹⁰⁵ According to the BUREAU OF LABOR STATISTICS, *Fact Sheet*, one out of every six managers worked longer than a 60 hour average workweek in 2004. A store manager would typically be exempt from the overtime provisions of the FLSA under the “white collar” exemption. After putting in 55 hours in a week, a store manager making \$25,000 would be earning same amount as a minimum wage worker who worked 40 hours in a week.

¹⁰⁶ The unit of time within which to distinguish regular from overtime is the week. Fair Labor Standards Act of 1938, § 7(a)(1), 29 U.S.C.A. § 207(a)(1). One temporary staffing agency settled a class action suit with over 3,300 workers, totaling nearly half a million dollars. Usually hired by the day, workers were placed in minimum-wage jobs doing assembly, packaging and janitorial work. But when they accumulated more than 40 hours in a week working for different client companies, they didn't receive overtime—instead, the temp agency “split” their checks to avoid triggering mandatory overtime pay. Workers also reported that regardless of the actual amount of hours they worked in a given day, their time was reported as eight hours by the agency. See United States District Court. 2007. *Notice of Removal, Arrez and Alonso vs. Kelly Services, Inc. March 7, 2007*; United States District Court. 2009. *Final Approval Order, Arrez and Alonso vs. Kelly Services, Inc. October 8, 2009*

¹⁰⁷ This was the tactic used at JP Morgan Chase, which was exposed by Catherine Clarke, a client services manager at the firm, when she reported it to Steven Greenhouse. However, at that company, the threats were not implicit. Ms. Clarke had overheard management telling employees that if they continued filing for overtime—many worked 50-55 hours a week—they would be replaced with “consultants.” (The term consultants is another term for independent contractor, which is discussed below.) See Greenhouse, *supra*, note

¹⁰⁸ Jobbers are particularly parasitic forms of the subcontractor model. They are rampant in industries that exploit undocumented ethnic minorities for subminimum wage, mostly unskilled, labor. Farmers hiring hand-harvesters and the garment industry are particularly notorious for the use of jobbers—and the jobbers stay in the fields with the workers, acting as overseers. The garment industry also has its share of jobbers delivering workers to textile producing sweatshops. Jobbers seem to have become an industry custom.

work.¹⁰⁹ Ironically, the employer is generally paying much more per labor hour to a subcontractor than he would if he had hired the worker directly. He is paying for the freedom not to be legally responsible for the employee.¹¹⁰

The courts have developed the “joint employment” doctrine in order to prevent employers from “subcontracting risk” of wage and hour violations to labor subcontractors. The courts have been consistent in keeping with FLSA’s remedial purpose by interpreting the statute broadly and not allowing businesses to get away with using business mergers and acquisitions to avoid liabilities to employees.¹¹¹ An employee can have more than one employer, and all employers can be held jointly and severally liable, which means that an employee can collect a judgment from either of them or both of them, in any proportion. This protects workers from judgment-proof “middle-man entities set up to absorb the risk of employment standards violations.

¹⁰⁹ Jobbers are often of the same ethnic minority as the workers they exploit, which initially might make them seem trustworthy to newly arrived immigrants. They know enough English to be able to conduct business with the primary employer—of course, this is a skill newly arrived immigrants might lack. In addition, jobbers can help a newly arrived immigrant immediately find work. However, workers exploited by a jobber or another unscrupulous subcontractor might find themselves in a vicious cycle. Both in the fields and in the sweatshops, others who lack English skills generally surround workers. In the garment industry, workers often are “homeworkers,”¹⁰⁹ and have little contact with the world outside their apartments. The cycle exists because, when working 10-12 hours per day, there is no opportunity to learn the language, acquire occupational skills, seek employment or create a network of support. Certainly, with the typical farm owner/jobber/employee scenario, a court would have no trouble finding a case of joint employment. However, due to the combination of several factors, enforcement in this situation seems extremely unlikely. Some of these factors are: lack of funds, fear of legal ramifications due to immigration status (discussed in more depth, *infra*), distrust of the government or lack of understanding about the proper procedure to file a complaint, lack of English skills, little chance for employment elsewhere without English, and even fear of violent retaliation by the jobber.

¹¹⁰ Note: Not being responsible for the employee in an employer/employee relationship means that the employer is not responsible for FLSA recordkeeping requirements, for his immigration status, nor for paying workman’s compensation and unemployment insurance. Neither does he have liability for failure to enforce a non-discriminatory workplace, nor for negligence suits brought by 3d parties under a theory of *respondeat superior*. In the employer/subcontractor scenario, the surcharge on labor—the difference between what the employer pays per labor hour to the subcontractor and what he would pay a regular employee, is in consideration of the subcontractor absorbing the risk of the factors mentioned above.

¹¹¹ See *Adair v. Ferst*, 45 F. Supp. 824, 825 (D. Ga. 1942)(holding that the effect of Fair Labor Standards Act is to make an employee subject thereto a creditor of employer, and this without regard to any actual attempted agreement as to compensation, and even if payment be made in accordance with such agreement.) The court in this case prevented a business entity from transferring its assets to a shell company in order to avoid liability.

¹¹¹ U.S. Dept. of Labor Website. *Wages: Backpay* Last accessed on March 31, 2011 at: <http://www.dol.gov/dol/topic/wages/backpay.htm>.

In a recent case, Wal-Mart was found to be a joint employer of janitors who were hired by, and paid their wages through, a janitorial business.¹¹² In another case, a drug store chain using West African immigrant delivery persons claimed that only the labor firm that hired the workers employed them and was therefore singly liable for wage or hour violations. The court held that the drug store was the joint employer of the delivery persons because drug store managers made decisions about when to fire an employee, where they would deliver, and treated them like store employees when they were working.¹¹³

CONTINGENT WORKERS

The “employment” relationship is a legal one, where parties have legal rights and responsibilities. When a worker contracts for a relationship outside of the traditional employee/employer relationship, this party is generally termed an “independent contractor” or “self-employed.” Misclassifying regular workers as independent contractors allows companies to circumvent minimum wage and overtime requirements. These misclassified employees also lose compensation owed them in the form of the employer’s share of payroll taxes¹¹⁴ and benefits to which they are entitled as employees.¹¹⁵ Misclassification tactics include (1) employment contracts in which the workers purportedly “elect” to work as independent contractors and (2) obtaining workers through use of “subcontractors” or labor supply companies.¹¹⁶

Because the employment relationship confers certain benefits on employees that are not usually available to independent contractors, including the statutory wage and hour protections under the FLSA,¹¹⁷ the issue of whether a worker is an employee or an independent contractor is an important and commonly litigated issue in employment law.¹¹⁸ The traditional, common law test for determining

¹¹² In *Zavala v. Wal-Mart Stores, Inc.* 393 F. Supp. 2d 295 (DNJ 2005), undocumented workers were employed through maintenance contractors who performed janitorial services for Wal-Mart Stores. A federal New Jersey District Court held that these workers were not precluded from seeking relief under FLSA on unpaid minimum wage and overtime claims.

¹¹³ *Anoumana v. Gristede’s Operating Corp.*, 255 F. Supp. 2d 184 (S.D.N.Y. 2003)

¹¹⁴ See notes 73-76.

¹¹⁵ See Sarah Leberstein, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries* NATIONAL EMPLOYMENT LAW PROJECT (2010), available at <http://www.nelp.org/page/-/Justice/2010/IndependentContractorCosts.pdf?nocdn=1> (compiling studies). Misclassification also steals from public coffers and leaves workers who are injured or “laid-off” in a position where they may need state assistance. Perhaps this is why, according to the IWJC, eight states have begun misclassification campaigns. *State and Local Campaigns*, WAGE THEFT.ORG Available at: <http://www.wagetheft.org/campaignmap/campaignmap.html>. Last accessed on: April 14, 2011.

¹¹⁶ Jason J. Thompson. *Wage and Hour Litigation: Employee Status*. 90 MI Bar Jnl. 38, 39.

¹¹⁷ See 29 U.S.C. § 203 for definition of “employee” under FLSA. (“...an ‘employee’ means any individual employed by an employer.”)

¹¹⁸ Citation to Employment Law Textbook.

whether a person is an employee derives from the common law of agency and turned on whether the worker was physically “controlled” by the employer.”¹¹⁹

A majority of the federal circuit courts have diverted from the common law when determining worker status for purposes of the FLSA.¹²⁰ In the application of the FLSA, an employee, as distinguished from a person who is self-employed, is one who, as a matter of economic reality, follows the usual path of an employee and is dependent on the business that he or she serves.¹²¹ This inquiry is referred to as the “economic realities test,” or the “economic reality of dependence test.”¹²²

The courts will not consider terms used in an employment contract to be controlling,¹²³ it is the expectation and intent of the parties that is controlling. However, workers often do not know the law, and

¹¹⁹An employee, termed “servant” under the common law.” is a person whose physical conduct in the performance of services is controlled by the “master.” See “Servant.” Restatement (Second) of Agency § 2(1) (1958). By the same token, the “independent contractor” is one who “contracts with another to do something for him but who is not controlled by the other nor subject to the other’s right to control with respect to his physical conduct in the performance of the undertaking.” “Independent Contractor” Restatement (Second) of Agency § 2(3) (1958).

¹²⁰ *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992). (Reasoning that the definition, at 29 U.S.C.A. § 203(g), of verb “employ” as meaning “suffer or permit to work,” stretches meaning of “employee” to cover some parties who might not qualify as such under strict application of traditional agency-law principles.”)

¹²¹ The economic reality test is a fact-based analysis and it is the total activity or situation that controls. Among the factors which the Court has considered significant are: 1) The extent to which the services rendered are an integral part of the principal’s business; 2) The permanency of the relationship; 3) The amount of the alleged contractor’s investment in facilities and equipment; 4) The nature and degree of control by the principal; 5) The alleged contractor’s opportunities for profit and loss; 6) The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor; 7) The degree of independent business organization and operation. See Generally DOL: WHD. Fact Sheet #13: Employment Relationship under the FLSA. Available at: www.wagehour.dol.gov. The conventional wisdom is that the independent contractor gives up employee rights and benefits in favor of greater freedom and flexibility. Traditionally, those who were independent contractors were usually highly skilled employees, whose labor was so valuable that the worker came to the bargaining table with power equal to his potential employer. Under these circumstances, the determination that an independent contractor is not economically dependent on the employer is straightforward.

¹²² *Maldonado v Lucca* 629 F Supp 483 (1986, DC NJ). (Holding that to determine whether employment relationship exists for purposes of Fair Labor Standards Act, court must consider underlying “economic reality;” final determination “depends not on isolated factors but rather upon circumstances of whole activity.”) The remainder of courts still use the common law master and servant test or a combination of the two.

¹²³ *Rutherford Food Corp. v McComb* (1947) 331 US 722, reh den 332 US 785 (1947). (“Where the work done, in its essence, follows the usual path of an employee, putting on an ‘independent contractor’ label does not take the worker from the protection of the Act.”). See also *Real v. Driscoll Strawberry Assoc.*, 603 F.2d 748, 755 (9th Cir. 1979) (“Economic realities, not contractual labels, determine employment status for the remedial purposes of the FLSA.”). These rules are intended to protect workers from overbearing employers who have the unequal bargaining power to impose a phony “election” on their workers under the threat of termination. See *Imars v Contractors Mfg Servs, Inc.* (“We agree that it makes very good sense to reject contractual intention as a dispositive consideration in our analysis. The reason is simple: “The FLSA is designed to defeat rather than implement contractual arrangements.” (citing *Sec’y of Labor v. Lauritzen*, 835 F.2d 1529, 1544-45 (7th Cir.

are duped into thinking that they are bound by the terms of the employment contracts they agreed to under threat of termination.¹²⁴

Certain categories of workers seem to be more vulnerable to misclassification. Workers often misclassified include cable TV installers, loan underwriters, construction workers, and home-health aides. Low and mid-level employees in the financial service industry, such as mortgage brokers,¹²⁵ and insurance adjusters, also seem to be vulnerable.¹²⁶ Another group that has recently been involved in FLSA litigation is delivery drivers. FedEx Ground¹²⁷ and UPS¹²⁸ have both had recent litigation pending

1987) (Easterbrook J., concurring); *See also Reich v Circle C Investments Ltd*, 998 F2d 324, 329. [CA 1993]. (“The FLSA represents the New Deal’s rejection of *Lochner v. New York* and its doctrine of freedom of contract. Even if employees freely want to work for below the minimum wage, or work in statutorily banned work conditions, or work long hours without extra compensation—even if their choices are moral and economically efficient—the FLSA does not allow this. This is true even when the bargaining is done at arm’s length. (referencing *Lochner v. New York*, 198 U.S. 45 (1905)).

¹²⁴ The belief that the independent contractor has freely chosen to contract out of the statutory benefits of the employee/employer relationship assumes an equal bargaining power between the worker and the firm or person who is contracting for his services. The FLSA imposes limitations on freedom of contract, so that a worker cannot be forced, when the bargaining power is skewed toward the firm, to promise his labor for less than what he is legally entitled to in return. Sociological studies in several disciplines have revealed that independent contractor or informal economic relationships exist in occupations where the worker has the least amount of power. Thus, the employer may be signaling its strength in the labor market when it offers independent contractor employment arrangements; only employers who have leverage or power in bargaining can make such arrangements. Employers save costs since they do not have to pay employment taxes, benefits, insurance, or workers’ compensation benefits for such arrangements. Consequently, the worker pool shrinks to include only those who have little choice for alternate employment. *See* Leticia M. Saucedo & Maria Cristina Morales, *Masculinities Narratives and Latino Immigrant Workers: A Case Study of the Las Vegas Residential Construction Trades*, 33 Harv. J. L. & Gender 625, 629 (2010) (Finding that the Latino workers interviewed for their study accepted the independent contractor structure in part because they had no choice.)

¹²⁵ Citigroup agreed to pay \$98 million to 20,000 brokers who were shortchanged. *Bahramipour v. Citigroup Global Mkts. Inc. f/k/a Salomon Smith Barney*, N.D. Cal., No. 04-4440, *settlement announced* 5/24/06. This was part of a series of class actions filed against brokerage houses and financial service companies. The suits are modeled after a successful August 2005 settlement with Merrill Lynch, which agreed to pay \$37 million to settle claims of over 3,000 California brokers (3 WLR 1065, 8/12/05). A month later, two similar suits were settled with Bank of America for \$15 million (3 WLR 1235, 9/23/05). In March, 2006, Morgan Stanley agreed to pay \$42.5 million to settle allegations that it failed to pay overtime and other expenses to some 5,000 California-based financial advisers (4 WLR 299, 3/10/06).

¹²⁶ For example, Allstate paid a \$120 million settlement to 3,000 insurance adjusters in California. Lisa Girion, *Allstate to Settle Overtime Claims*, LOS ANGELES TIMES (Sept. 2, 2005), available at: <http://articles.latimes.com/2005/sep/02/business/fi-allstate2>. In addition to Allstate, the article referenced several other recent California settlements, including RadioShack Corp., Starbucks Corp. and Rite Aid Corp. “[t]hese suits highlighted the practice of classifying workers as managers or administrators to avoid paying overtime.” *Id.*

¹²⁷ FedEx has been involved in misclassification suits in several states, some have been filed by state attorney generals due to a failure to abide by state overtime provisions, similar to FLSA’s provisions (Massachusetts), others have been filed in federal court (New York, Montana), still others have been settled before suit was filed. *See* http://www.newyorkemploymentattorneyblog.com/compensation_wages_and_overtim/

in several states; both companies are paying settlements upward of \$100 million. The uniform company, Cintas, recently paid a \$23 million settlement to drivers.¹²⁹

WHO IS MOST VULNERABLE TO WAGE THEFT?

Who experiences wage theft? Wage theft is a national epidemic that robs millions of workers of billions of dollars they've worked for but never see.¹³⁰ A national survey of nearly 4,500 workers in the U.S.'s three largest cities – New York, Chicago and Los Angeles – found that 26 percent of surveyed workers were paid less than the minimum wage and an astonishing 76 percent were not paid overtime pay they had earned the previous week.¹³¹ The answer to the question seems to be that all hourly employees are susceptible to wage theft.

Interfaith Worker Justice reports some alarming statistics. Approximately 80 percent of workers who come to the IWJ-affiliated worker centers report having been victims of wage theft.¹³² They are routinely threatened with termination or other discipline when they complain about pay or other conditions of work.¹³³ Most of the worker centers' members are low-wage, immigrant workers, who on their own would not file written complaints with their employers or with government agencies.¹³⁴

Often, the workers who have the most difficulty with wage theft are those that work for a non-union firm or in an industry not covered by FLSA. Unions have been extremely effective in gaining work-related benefits for their members, including wages above the minimum; however, unions are rarely

¹²⁸ UPS will pay \$87 million in 2007 for 20,000 drivers who were not paid overtime. Attorney Lynn Faris of the firm Leonard Carter, is lead counsel for cases against both UPS and FedEx. Faris says that UPS will pay out another 12.8 million to a second group of 660 plaintiffs. A Richmond, Virginia, plaintiff's attorneys' bulletin board highlighted both the Cintas settlement, and the UPS settlement, advising other attorneys to be looking out for FLSA claims. <http://www.law.com/jsp/article.jsp?id=1202436211191&slreturn=1&hbxlogin=1A>

¹²⁹ See "Delivery Drivers \$22.75 Million Overtime Settlement," <http://richmond.injuryboard.com/workplace-discrimination/delivery-drivers-win-2275-million-overtime-settlement.aspx?googleid=269844>. Cintas is also highlighted in Kimberly Bobo's book for allowing subcontractors to exploit immigrant, female, garment workers. In a negotiation, they insisted that they had policies in place to prevent exploitation, but Bobo points out that, due to the company structure, these policies do not translate into protections in actual practice. See Bobo, *supra*, note 6, ch. 1.

¹³⁰ John Wojick, *Obama Labor Dept. Acts Against Wage and Benefit Theft*. PEOPLE'S WORLD (Dec. 15, 2010) available at: <http://www.peoplesworld.org/obama-labor-dept-acts-against-wage-and-benefit-theft/> (quoting Kimberly Bobo's speech at the National Day of Action Against Wage Theft, November, 2010)

¹³¹ Annette Bernhardt, Ruth Milkman, Nik Theodore, et al., *BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES*, available at http://nelp.3cdn.net/1797b93dd1ccdf9e7d_sdm6bc50n.pdf.

¹³² *Kasten v. Saint-Gobain Performance Plastics Corporation*, 2010 WL 2565287, page 1-2 (U.S., 2010) (brief for appellant) (arguing for protection against retaliation).

¹³³ *Id.* at 2

¹³⁴ *Id.*

available to protect workers in small businesses and are usually focused on strategic approaches in key industries.¹³⁵

Wage theft affects almost every industry, but there are some industries that are particularly notorious for wage theft, leaving their low-wage workers especially vulnerable. The following is a list of the industries that are reported by the DOL as being rife with wage theft violations:¹³⁶ Sixty percent of nursing homes stole workers' wages;¹³⁷ 89% of nonmonitored garment factories in Los Angeles and 67% of nonmonitored garment factories in New York stole workers wages;¹³⁸ as far as agriculture is concerned, the percentage of producers of a certain crop that stole wages follows:¹³⁹ 25% of tomato producers, 35% of lettuce, 51% of cucumber, 58% of onion, and 62% of garlic. In 1999, 78% of restaurants in New Orleans stole workers wages; half of day laborers, who tend to work in the construction industry, report having had wages stolen;¹⁴⁰ and 100% of poultry factories steal wages.¹⁴¹

Wage theft occurs at all levels of employment, in all industries, and in many different contexts. However, there is evidence that it occurs most frequently among the poorest workers.¹⁴² This denial of full wages and protections to the poorest workers, which both (1) makes individual low-wage workers (the "working poor") even poorer and (2) creates a permanent "underclass" of unskilled and low-skilled

¹³⁵ ¹³⁵ See, Bobo, Kimberly, *supra*, note 6, at 107. (Author is co-founder and executive director of the Interfaith Worker Justice Center in Chicago, and concedes that the organization's initial practice of referring workers to unions was insufficient for workers not represented by unions.)

¹³⁶ U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, *Report on Initiatives*, February, 2001.

¹³⁷ *Id.* at 19

¹³⁸ *Id.* at 15. Compliance went up significantly for "effectively monitored" garment shops. In Los Angeles, from 11 to 44 percent and 33 to 46 in New York.

¹³⁹ *Report on Initiatives* at 24.

¹⁴⁰ Abel Valenzuela, Jr., Nick Theodore, Edwin Melendez & Ana Luz, *On the Corner: Day Labor in the United States*, UCLA (2006)

¹⁴¹ One industry that is particularly notorious for safety, wage, and hour violations is poultry processing plants. The DOL first investigated this industry in 1997, in response to requests from IWJC, whose own fact-finding mission found multiple violations. At that time, the DOL found a 60% noncompliance rate. Both poultry workers and "catchers" (workers who collect the birds from chicken farms) were victims of wage and hour violations. Conditions were so horrible that a follow-up study was done in 2000, in which the DOL found that 100% of the 51 poultry processors continued to steal wages from employees. U.S. Department of Labor, *Report on Initiatives*, 21, 25 (2005). One common practice was not to pay employees for "donning and doffing" (putting on and taking off) protective gear. Employees also reported being "clocked out" hours before they actually ended work, when the last chicken rolled down the line. Kimberly Bobo, *supra*, note 6, at ch. 1, under section heading: "Studies Reveal Wage Theft;" See generally, Rafael Jimenez, *Blood, Sweat and Fears: Worker's Rights in U.S. Meat and Poultry Plants*, HUMAN RIGHTS WATCH (2004) available at:

<http://www.hrw.org/en/reports/2005/01/24/blood-sweat-and-fear> (last visited May 7, 2011).

¹⁴² See note 130, *infra*.

workers.¹⁴³ Recent social science research also shows an intersection of poverty with other characteristics, like race/ethnicity and gender,¹⁴⁴ which may serve to heighten both the frequency and the effects of these detrimental employment practices on those individuals and communities. The history of wage reform excluding minorities and women is long and expansive, and is documented in legislative histories on FLSA. The result is that many of the occupations that are filled almost exclusively by women¹⁴⁵ (“pink collar jobs”), and labor predominately preformed by minorities, do not get the same statutory protection that occupations traditionally filled by white men receive, as the following subsections will attempt to demonstrate.

IMMIGRANT WORKERS

Immigrant workers, both legal and illegal, make up a significant portion of this country’s low-wage work force.¹⁴⁶ There was an upsurge of immigration in the 1990’s, resulting in an estimated 11 million undocumented workers.¹⁴⁷ From 1980 to 2000, the percentage of foreign-born persons in the U.S.

¹⁴³ Juan Carlos Ordenez. Wage Theft Harms Robs Workers and the Economy. (editorial by the director of Oregon Center for Public Policy)(“Wage theft diverts dollars that would otherwise flow to the poorest communities, lowering economic activity in already depressed areas.”)

¹⁴⁴ There seems to be a significant correlation between the demographics of workers and the likelihood that they will be the victims of labor and wage law violations. A study by UCLA of Los Angeles, Chicago, and New York “front-line” workers found that, in L.A., (1) women were more likely to experience violations than men, that (2) foreign born workers were more likely to experience violations than U.S. born workers; and (3) the very highest rates of minimum wage violations were experienced by unauthorized, female survey respondents—over half of which had experienced a minimum wage violation in the past week. Ruth Milkman, Ana Luz González, and Victor Narro, *Wage Theft and Workplace Violations in Los Angeles: The Failure of Employment and Labor Law for Low Wage Workers*, UCLA Institute for Research on Labor and Employment, University of California, Los Angeles, 2010. (Sampling a total of 744,220 workers, or an estimated 34.4 percent of front-line workers and 17.0 percent of all workers in L.A. County).

¹⁴⁵ I have already discussed wage theft in the retail industry—where low-wage workers are predominately women. Certified Nursing Assistants at nursing homes have been another group who have suffered wage-theft in a disproportionate amount and does not receive the same statutory protections under the FLSA (nursing homes can calculate overtime hours over a two-week time period. Meaning that a worker could work 60 hours one week and 20 the next week, but not be paid overtime for the first week). See Specialty Healthcare System of Mobile v. United Steelworkers (brief of Amicus Curiae Service Employees International) for an exhaustive explanation of the FLSA as it applies to CNAs. Available at: www.laborrelationstoday.com/uploads/file/SEIU.pdf. Later, I will discuss problems in the regulation of wages and hours for domestic workers and garment industry sweatshop workers, both positions have traditionally been occupied by women.

¹⁴⁶ Shirley Lung, *Exploiting the Joint Employer Doctrine: Providing a Break for Sweatshop Garment Workers*, 34 Ly. U. Chi. L.J 291 (2003).

¹⁴⁷ See Office of Immigration Statistics, U.S. Dep’t of Homeland Sec., *2003 Yearbook of Immigration Statistics* 11 tbl.1 (2004), available at <http://uscis.gov/graphics/shared/aboutus/statistics/2003Yearbook.pdf>; Jeffrey S. Passel, Pew Hispanic Ctr., *Estimates of the Size and Characteristics of the Undocumented Population* 3 (March 21, 2005), <http://pewhispanic.org/files/reports/44.pdf>.

workforce more than doubled.¹⁴⁸ In 2009, Immigrants made up 12.9% of the population, and 15.9% of the workforce, many of them in low-wage jobs.¹⁴⁹

Immigrants are particularly susceptible to wage and hour violations. They are often willing to risk unsafe, insecure, low-paying jobs because they know they can still make more than they would have been able to make in the developing countries from which they have come.¹⁵⁰ The exploitative firms that the FLSA was designed to cull from the market thrive on this seemingly unlimited supply of immigrant workers who will work for less than the statutory minimum wage. Immigrants are being hired in increasing numbers, particularly in low-wage industries such as agriculture, cleaning and maintenance, construction, domestic service, and health care.¹⁵¹

Following this logic, undocumented immigrants are particularly vulnerable. Unscrupulous employers know that a lack of legal status makes undocumented workers unlikely to challenge the inadequate wages and poor working conditions.¹⁵² By failing to pay legal wages, businesses save on production costs, which may increase their profits and give them an economic advantage over competitors who comply with federal law.

Employers have been known to use threats of deportation as a shield against organization and DOL complaints. Recent decisions have made it overwhelmingly clear that undocumented workers are entitled to FLSA protections.¹⁵³ However, these decisions do little good for undocumented workers who cannot

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¹⁴⁸ In 1980, there were 6.7% foreign-born persons in the labor force, in 2000, 12.5%. Migration Policy Institute Website. *Foreign Born as a Percentage of the Total US Population and of the US Civilian Labor Force, 1970 to 2009*. (Using Census Data to Construct Graph).

<http://www.migrationinformation.org/datahub/charts/laborforce.2.shtml>

¹⁴⁹ *Id.*

¹⁵⁰ See Passel, n 147, at 41-42; see also *Patel v. Quality Inn S.*, 846 F.2d 700, 704 (11th Cir. 1988) (“[I]t is the hope of getting a job--at any wage--that prompts most illegal aliens to cross our borders.”).

¹⁵¹ See Wage & Hour Div., Dep't of Labor, *2004 Statistics Fact Sheet*, <http://www.dol.gov/esa/whd/statistics/200411.htm> (last visited Feb 21, 2006) (identifying nine selected low-wage industries that the Wage and Hour Division targeted for payment of back wages).

¹⁵² See *Flores v. Amigon*, 233 F. Supp. 2d 462, 465 (E.D.N.Y. 2002) (“If forced to disclose their immigration status, most undocumented aliens would withdraw their claims or refrain from bringing an action such as this [suit for FLSA violations] in the first instance.”); see also *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1064-65 (9th Cir. 2004) (“[U]ndocumented workers confront the harsher reality that, in addition to possible discharge, their employer will likely report them to the INS and they will be subjected to deportation proceedings or criminal prosecution.... The caselaw substantiates these fears.”) (internal citations omitted). See also National Employment Law Project at www.nelp.org and the National Immigration Law Center at www.nilc.org for several studies of various immigrant abuses in different industries and examples of the hiring dynamic between employer and undocumented worker.

¹⁵³ In *Zavala v. Wal-Mart Stores, Inc.* 393 F. Supp. 2d 295 (DNJ 2005), undocumented workers were employed through maintenance contractors who performed janitorial services for Wal-Mart Stores. A federal New Jersey District Court held that these workers were not precluded from seeking relief under FLSA on unpaid minimum

claim the protections because of deportation risks. Further, once an immigrant admits to working illegally, or is discovered to be working illegally, he or she will face much greater chance of rejection if they do go through the proper legal channels seeking legal status.¹⁵⁴ Thus, the undocumented immigrant faces a catch-22, and, as a practical matter, these workers often have little recourse against wage and hour abuses by their employers.

RACIAL HIERARCHY, THE FLSA, AND MIGRANT WORKERS

The impetus for the FLSA was protection from sweating, and farm laborers then had, and now have, one of the most difficult and lowest paying jobs in the United States. FDR, in order to get the fair labor bill passed, made concessions to Southern Democrats in the form of exemptions for farm laborers from the FLSA's protections.¹⁵⁵ Farm workers were totally excluded from wage and hour protection at that time because it was thought that equal wages between black and white workers in the South would result in the draining of public coffers, since it was believed that employers would refuse to hire black workers at the same wage as whites and unemployed blacks would become dependent on state services.¹⁵⁶

This exclusion of minority farmworkers is the foundation for a structure that has resulted in Blacks and Latinos dominating agricultural work ever since. An underclass of minority agricultural workers was formed due to several concomitant factors:¹⁵⁷ workers were either in a sharecropping situation or migrating and being paid extremely low wages; they had no unemployment insurance or worker's compensation to sustain them during off-seasons or when injured; and, the entire family, including children, had to work in order to survive. Actual and threatened violence in the south kept them from organizing. Generation after generation was denied education because, when children were old enough, they were picking cotton, sugar beats, or pickling cucumbers. Their pay was so low and their prospects so bleak that they had absolutely no bargaining power when negotiating wage contracts.

wage and overtime claims. *See also Flores v. Amigon*, 233 F. Supp. 2d 462 (E.D.N.Y. 2002) (holding that discovery regarding employee's immigration status was not relevant to FLSA claim for unpaid wages for work already performed, and employee was entitled to requested protective order as potential for prejudice from that disclosure far outweighed whatever minimal probative value the information would have.)

¹⁵³ See 29 U.S.C. § 203 for definition of "employee" under FLSA. ("...an 'employee'

¹⁵⁴ Interview with Domestic Violence Staff Attorney, Anne Marie Maudlin, Blue Ridge Legal Services, Harrisonburg, VA.

¹⁵⁵ Morris, *Agricultural Labor and National Labor Legislation at 1945-51*; Wolters, *Negores and the Great Depression at 150*.

¹⁵⁶ E.g., 82 Cong. Rec. App. 442. (Statement of Edward Cox of Georgia) ("The organized Negroes of the country are supporting it [the FLSA] because it will, in destroying state sovereignty and local self-determination, render easier the elimination of racial and social distinctions...I say to you that these local problems cannot be so administered. It is dangerous beyond conception to try to so adjust all of these intimate questions of daily life.")

¹⁵⁷ *See generally*, MIGRANT FARMWORKERS, *supra*, note 41.

Thus, farmers became used to a rebounding supply of cheap labor. Mexican immigrants had been working on cattle ranches and fruit farms in the Southwest United States since the latter part of the 19th century. From that time through World War II, when labor was scarce in the U.S., Mexican laborers were imported.¹⁵⁸ In 1967, when Congress attempted to include agrarian workers' wages in the amendments to the FLSA, there was an upheaval among Congressmen from states that depended on a never-ending supply of cheap Mexican farm labor and a tenant farming system that advantaged white landowners.

Some members of Congress, and DOL representatives, argued for a FLSA amendment and other regulations protecting farm laborers. They believed that the farming industry needed the same protections that had led other industries to a place where workers were able to negotiate, form unions, and become more efficient and offer higher paying jobs through mechanization. The farmers, knowing that they had an elastic supply of cheap labor, resisted mechanization.¹⁵⁹ Eventually, the FLSA was amended to give agricultural labor a minimum wage of \$5.15,¹⁶⁰ far below the statutory wage for other occupations.

¹⁵⁸ See generally PBS: "The Border: Mexican Immigrant Labor History" available at:

<http://www.pbs.org/kpbs/theborder/history/timeline/17.html>. and SEATTLE CIVIL RIGHTS AND LABOR HISTORY PROJECT *Mexican Attempts to Organize*. The American history with Mexican workers is one of exploitation. During the first half of the 20th century, due to scarce harvests resulting in loss of employment opportunities in Mexico, Mexican laborers were recruited and came by the thousands to the United States to work. Mexicans were known to be willing to work in squalid conditions for very little pay. With the advent of mechanized cotton production, there was less demand for low-wage, unskilled agricultural labor in the south. Some black workers had organized themselves into two unions, beginning in 1936. Generally, whites, then blacks, were given the better paying jobs running mechanized farm equipment on larger farms. Blacks were also sharecropping. Mexicans could still get the hand-harvesting, hoeing, and other prep work that was still done by hand on smaller farms or those larger farms resisting mechanization due to the low cost of Mexican labor. Mexican workers also began leaving the border and southern states and migrating north, generally for sugar beets, cucumber, and fruit harvests. When Mexicans attempted to organize, strikes were easily broken by inviting more laborers across the border.

¹⁵⁹ Where an overabundance of cheap labor has thwarted the introduction of mechanized harvesting of some crops—in at least one case "an increase in the availability of hand labor" actually prompted "a major shift from mechanical back to hand harvesting"—supplanting sweatshop labor is precisely the function of a minimum wage. D. Lenker, *Factors Limiting the Harvest Mechanization of Some Major Vegetable Crops in the U.S., in Fruit, Nut, and Vegetable Harvesting Mechanization: Proceedings of the International Symposium on Fruit, Nut, and Vegetable Harvesting Mechanization* 29, 31 (Am. Soc'y Agric. Engineers 1984); Gary Van Eve, Richard Ledebuhr, & Imad Haffar, *Development and Testing of a "Threshing Concept" Cucumber Harvester*, in *id.* at 284, 285. "Given the real or perceived reduction in labor constraints associated with recent economic conditions, producers have not created a strong demand for mechanization progress." A pickling cucumber harvester capable of replacing eighty workers was produced as early as the mid-1960's. The DOL noted that: "Pickle-harvest machines are an accomplished fact...Enough machines are in existence to fully mechanize the harvest, almost at will, but...-[w]ith sufficient labor available, no change is anticipated in the current harvest practices." Harold Stanley, *Mechanization and the Recruitment of Farm Workers, Farm Labor Developments*, Aug. 1968, at 11, 16.

¹⁶⁰

Migrant farmworkers are the archetypical “dependent” employees, “selling nothing but their labor,” whose location within the social division of labor systemically constructs them as a uniquely atomized and disempowered stratum.¹⁶¹ The work is described as: “a menial, unskilled task which requires no aptitude, no training, and no ability to reason, It is a work of drudgery which can be performed by persons ranging from very young to quite old...”¹⁶²

Although many farmers are legally obligated to pay 5.15 per hour, \$2.50 is the going rate all over Texas.¹⁶³ Further, many workers are not even aware of their entitlement because they mistakenly believe their piece-rate work supersedes the minimum wage law¹⁶⁴. Their primary concern is the amount of time it will take them to earn a sum that will carry them through the off-season unemployment.

Migrant workers are the victims of some of the most egregious forms of wage theft. During the past decade, the Department of Justice has brought suit against seven growers in Florida alone for forced labor. While this slavery is the worst form of wage theft, migrant workers regularly suffer from lesser forms of labor abuses that do not normally affect workers in other industries—they often have to pay for showers, to sleep in their own trucks or set up tents on the farmer’s property, and for food and water.¹⁶⁵ This type of abuse has the effect of continuing migrant worker dependence and disempowerment.

DOMESTIC WORKERS

Historically, domestic workers were largely African American women in the south, and both African American and European immigrant women in the north. Today, they are predominately immigrant women, some working illegally. Workers in private homes—taking care of children, cleaning, and doing other household labor—have long fallen outside the scope of labor and employment laws.¹⁶⁶ If they live in the home, they are expressly excluded from the wage and hours requirements of the Fair Labor Standards Act.⁵² If they do not live in the home, they are usually regarded as self-employed, thus fall outside of FLSA protections.

¹⁶¹ Latin American workers have been supplanting other groups to become the mainstay of the seasonal labor force. Monica Heppel & Sandra Amendola, *Immigration Reform and Perishable Crop Agriculture; Compliance or Circumvention* 23, 27, 65-74, 80 (1981).

¹⁶² *Castillo v. Givens*, 704 F. 2d 181, 183-84 (1983)

¹⁶³ *Salinas v. Rodriguez*, No CA-5-87-057-C (N.D. Tex. Jan 18, 1990) (order).

¹⁶⁴ Xiii Linder. Professor Marc Linder, once a legal aid attorney in Texas, has done thousands of interviews with migrant farm workers.

¹⁶⁵ Lamacha *Forced Labor Continues in Florida*, April 8, available at: Vivalatina Website. Archives. Accessed on April 10, 2011

¹⁶⁶ Alan Hyde, *Who Speaks for the Working Poor?: A Preliminary Look at the Emerging Tetralogy of Representation of Low-Wage Service Workers*, 13 Cornell J.L. & Pub. Pol'y 599, 609 (2004)

Employers of domestic workers operate outside the radar of government agencies, like the Department of Labor, charged with protecting their employees. Household surveys reveal about 1.13 million employees in private homes, while only about three hundred thousand employer households report household wages to the IRS.⁵⁴ Clearly, even with respect to household workers legally able to work, many of them are in situations where their income is not reported, and payments to Social Security are not being made.¹⁶⁷ At best, most domestic workers are denied the employer-paid portion of FICA and other benefits,¹⁶⁸ as well as the wage and hour protections of the FLSA.¹⁶⁹

SWEATSHOPS AND THE GARMENT INDUSTRY

One industry notorious for wage and hour abuses is the garment industry.¹⁷⁰ The U.S. General Accounting Office has developed a working definition of a sweatshop as “an employer that violates more than one federal or state labor, industrial homework, occupational safety and health, workers’ compensation, or industry registration law.”¹⁷¹

There are aspects of the structure of the industry that make those within the industry who are inclined to commit these abuses able to do so more easily.¹⁷² The apparel industry custom seems to be to contract work out to subcontractors, who, in turn, run sweatshops or intricate homework networks. First, many

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¹⁶⁷ This would correlate with the fact, mentioned in text, above, that many employers of domestic workers who live outside the home consider them self-employed.

¹⁶⁸ See notes 74-78

¹⁶⁹ At worst, some domestic workers are essentially kept in slavery, unable ever to leave the house and given no days off and there is no one to speak for them, protecting them from these conditions and guaranteeing payment for services. Many of these cases have been of employers who are foreign diplomat employers in the U.S. See ACLU: MODERN ENSLAVEMENT OF DOMESTIC WORKERS (June, 2007) available at: <http://www.aclu.org/human-rights-immigrants-rights-womens-rights/domestic-workers>

¹⁷⁰ This problem has been a longstanding one throughout the United States. It arose with industrialism, see n 33. And is particularly prone to abuses during periods of economic recession. See, e.g., Susan Sward & Bill Wallace, *Problems at S.F. Garment Shops*, S.F. CHRON., July 25, 1991, at A1, A15 (“In a shrinking industry squeezed by recessionary pressures and intense competition from foreign manufacturers, financial collapse is not new. . . . [E]pisodes like [this] are indicative of a larger industry problem.”). See Julie Su, *No Sweat: Fashion, Free Trade and the Rights of Garment Workers*, Verso, 1997.) In the Los Angeles suburb of El Monte, labor officials discovered a slave-sweatshop where 80 Thai immigrants were forced to sew brand-name clothes in a compound behind razor wire and armed guards. Making clothing that was sold at major stores like Mervyn’s and Montgomery Wards, the workers made less than \$2 per hour.

¹⁷¹ U.S. Gen. Acct. Office, SWEATSHOPS” IN THE U.S.: OPINIONS ON THEIR EXTENT AND POSSIBLE ENFORCEMENT OPTIONS 1 (GAO/HRD-88-130BR, Aug. 1988).

¹⁷² See *Made in LA*, a poignant documentary released by PBS in 2007 which follows the legal battle of three Latina sweatshop laborers as they fight a three year battle to recover wages they were owed. They sewed in a sweatshop producing clothing for Forever 21. For a synopsis of the film, see PBS Website, available at: <http://www.pbs.org/pov/madeinla/>. Last accessed April 14, 2011. The film won an emmy.

sweatshop owners/employers do not have assets enough to cover liabilities to their employees. Second, the abuses in this industry go unreported and are not usually the focus of media attention, either because the amounts in question are so small, or because the workers don't report because they are undocumented. Third, sweatshops are designed to be mobile, to avoid ICE and DOL officials. Finally, "homeworkers," those persons who work from home, usually on a piece rate basis, are covered by FLSA--but only have to be "registered" with the department of labor if they participate in producing certain types of products. Therefore, the only garment factories that are monitored by the WHD are those that are specifically enumerated in the DOL regulations. Previous DOL studies have shown that "effectively monitored" garment producers are up to four times less likely to be violating the law.¹⁷³

"BROWN COLLAR" CONSTRUCTION WORKERS

Historically, construction workers in most cities were white men who were unionized. Increasingly, however, the construction industry has been using day laborers, mostly Latinos. A New York study found that the firms that still hire union employees and other ethical firms that do not steal wages are concentrated in commercial construction, while the firms that exploit workers are in residential construction.¹⁷⁴ Usually wages are kept low by construction firms using subcontractors and squeezing them. The subcontractors hire day-laborers who are either willing to work below the minimum wage, or are less likely to complain when wage laws are violated—or when they are completely denied a paycheck.

This is one area where we clearly see the bargaining power concentrated on the employer's side, which leads to illegal wage contracts. The New York study found that one in four Latino construction workers were either misclassified as independent contractors or paid "off the books."¹⁷⁵ There have been no national studies of wage violations in the construction industry, but Kimberly Bobo reports that construction is one of the industries that workers' centers see most often. Sometimes, they are the victims of the most egregious form of wage theft, they haven't been paid at all.¹⁷⁶

¹⁷³ U.S. Department of Labor, *Report on Initiatives* at 15. Compliance went up significantly for "effectively monitored" garment shops. In Los Angeles, from 11 to 44 percent and 33 to 46 in New York.

¹⁷⁴ Fiscal Policy Institute, *Building Up New York, Tearing Down Job Quality* (New York; Fiscal Policy Institute, 2007), p. 1.

¹⁷⁴ Kimberly Bobo, *supra*, note 6, chapter 1.

¹⁷⁵ Fiscal Policy Institute, *Building Up New York, Tearing Down Job Quality* (New York; Fiscal Policy Institute, 2007), p. 1.

¹⁷⁶ Kimberly Bobo, chapter 1. (Christina Txintzun, coordinator of the Worker's Defense Project in Austin, TX confirms that construction workers in her service area often haven't been paid at all.)

Sociologists use the term “employer structures” to refer to the workplace arrangements, terms, or conditions that make brown-collar construction jobs qualitatively different from the blue-collar construction jobs previously held by unionized white workers. For example, several studies reveal alternate employment structures between Anglo, unionized, blue-collar construction workers and what is termed “brown-collar” Latino workers who are being hired for the majority of construction jobs in some cities.¹⁷⁷ This unequal bargaining power is, in itself, a form of wage theft. When workers who otherwise would have been entitled to FLSA protections do not have the power to insist upon them as part of their employment arrangement, the spirit of the FLSA is violated.

ADDITIONAL BARRIERS TO ADEQUATE ENFORCEMENT

THE PROBLEM WITH FINDING EFFECTIVE REPRESENTATION

Especially for the poor, it is difficult to find lawyers of the private bar who are able and willing to take on what seems like an insignificant minimum wage violation. Let us consider, for example, the most common type of wage theft, the failure of an employer to give the employee his or her last paycheck. One week’s pay, at the minimum wage, is about \$290, before taxes are withheld. To a private attorney, who bills that much or more per hour, the remedy seems hardly worth his time.¹⁷⁸

In addition, many private attorneys are not equipped to handle such cases. One trial practice manual explains that, “[w]hile it may seem basic, the idea that an employee who received no wages at all for work performed in his or her last pay period certainly did not receive the minimum wage of \$ 5.85 [now \$ 7.25] per hour eludes many practitioners faced with such a fact pattern.”¹⁷⁹

Private attorneys who specialize in this area are more likely to consider this type of case when there are other victims, and the case can be certified as a “collective action.”¹⁸⁰ An employee’s other option is to find a lawyer who volunteers his or her time, handling cases *pro bono*, either in conjunction with a

¹⁷⁷ See Leticia M. Saucedo & Maria Cristina Morales, *Masculinities Narratives and Latino Immigrant Workers: A Case Study of the Las Vegas Residential Construction Trades*, 33 Harv. J. L. & Gender 625, 629 (2010) (Finding that the Latino workers interviewed for their study accepted the independent contractor structure in part because they had no choice and listing other studies of employer structures and Latino workers in the construction industry.)

¹⁷⁸ But see ABA, note 70. (analyzing the reasons why FLSA claims are rising). Suggesting that the difficulty of proving other employment related claims leaves plaintiffs attorneys with the FLSA and with what seems like a more attractive option, because attorneys believe that, at least, the judge will award legal fees. Perhaps this is a temporary by product of the recession?

¹⁷⁹ Kitts, *supra*, note 72.

¹⁸⁰ This is similar to the well-known Rule 21 class action suit, except that employees “opt-in” to the suit, rather than being automatically included and able to “opt-out,” as in a class-action. This makes coming up with a group of plaintiff’s more difficult.

workers' center, or a legal aid lawyer with resources to take the case. These lawyers may be difficult to find.¹⁸¹

An employee's least-best option is to call the Wage and Hour division. When the DOL investigates, the cases sometimes never come to fruition, even valid claims.¹⁸² Further, the WHD sometimes settles for 50 cents on a dollar,¹⁸³ and liquidated damages are not available in a WHD settlement. However, if there is not a worker's center in the area where the employee works or lives, this is the only option of which most employees are likely aware.¹⁸⁴

ENFORCEMENT PROBLEMS

There are several institutional problems that create problems with enforcement for the Wage and Hour Division of the Department of Labor. First, the policies of the division are to put the most resources toward investigations that will recover the greatest amounts of money.¹⁸⁵ This is not the best method for helping the employees who are most vulnerable to wage theft. This is because the largest amounts collected usually come from cases of overtime violations in very large companies. Most of the workers benefitted by overtime recovery are middle-class, and may not be hurt by wage theft as much as minimum wage workers. Certainly, \$200 has a different relative value for a middle-class family than it does for a family living close to the poverty line.

Another problem for enforcement is the lack of manpower in the wage and hour division. In 1941, the WHD conducted more than 48,000 on-site investigations, personally inspecting 12% of establishments covered by the law. Today, the Obama administration has allowed funding for 250 new enforcement

¹⁸¹ Note that in 2008, cases in central Florida expanded exponentially. This is likely due to a heavy advertising campaign. Therefore we see that whether an employee is able to find effective representation often may hinge on who reaches out to the employee.

¹⁸² *"Is the Department of Labor Effectively Enforcing Our Wage and Hour Laws?:" Hearing before the H. Comm. on Education and Labor 110th Cong. 15-16 (2008) (Statement of Kimberly Bobo, Executive Director of Interfaith Worker's Justice) (stating that only one of six valid claims her worker's center forwarded to the DOL were investigated). But See, ABA, supra, note 70. (quoting one lawyer who states that the DOL investigates every claim forwarded to them).*

¹⁸³ See note 1. Extended definition.

¹⁸⁴ Employers are required to hang up posters at each workplace site with a phone number for the WHD.

¹⁸⁵ U.S. Dept. of Labor Announces Record Wage Recovery for 2007: Agency Collects more than 1.25 Billion for Workers Since 2000. Accessed on April 7, 2011. Accessed at: <http://www.dol.gov/opa/media/press/esa/archive/ESA20071952.htm> ("Recently, WHD has placed a major focus on bringing very large employers into compliance. Numerous employers have made multi-million dollar payments, in two instances to more than 20,000 workers. Earlier this year, WHD obtained the largest private-sector settlement in the agency's history.")

officers,¹⁸⁶ which brings the total number of investigators to 1000. The WHD is charged with protecting 130 million workers. Today, there are only about 30,000 enforcement actions per year, and 12,000 are merely single phone calls to employers, informing them that there has been a possible violation and asking that they correct it, but never following up. That means only .05% of covered workplaces have any oversight at all.¹⁸⁷

As discussed earlier, sometimes the only option of enforcement, especially for a low-wage employee, is through the WHD. Unfortunately, the WHD has 1000 employees to protect 13 million workers.¹⁸⁸ The GAO did a study in 2009 and found that the WHD investigators were simply not doing their jobs.¹⁸⁹

SUGGESTIONS FOR PREVENTING WAGE THEFT

EVALUATING POSSIBLE IMPLEMENTATIONS

When evaluating the efficacy of both legal and non-legal implementations, we should view possible legal and social remedies through the lens of modern employment structures. Therefore, we should be applying the original purposes of the FLSA to a new, service-based economy, with a significant contingent labor force. Our goals should be to improve enforcement efficacy and to put in place structures that preserve workers' wage and hour rights under the FLSA. These structures can contain legal and administrative changes that disincentivize wage theft, while at the same time protecting ethical employers who are attempting to follow the law in good faith. Special care should be taken to ensure that those who have suffered disproportionately inadequate enforcement of the FLSA's provisions are given equal protection under the law in the future.

Make them Think: "It's *not* Worth the Risk"

An employer can most likely quantify the risk of getting caught committing wage theft and use that estimated calculation to engage in a cost-benefit analysis. For wage theft committed against low-wage workers, the gaps in enforcement caused by lack of staff at the agency, coupled with the low risk of being reported by nonunion workers, especially undocumented immigrants, makes the risk of getting caught

¹⁸⁶ National Public Radio, *Interview with Kim Bobo*: accessible at:

<http://www.youtube.com/watch?v=sF97MovgbFI&feature=related>

¹⁸⁷ "Is the Department of Labor Effectively Enforcing Our Wage and Hour Laws?:" *Hearing before the H. Comm. on Education and Labor* 110th Cong. 15-16 (2008) (Statement of Kimberly Bobo, Executive Director of Interfaith Worker's Justice)

¹⁸⁸ The Obama Administration has hired 250 new investigators, bringing the number from 750 to 1000.

¹⁸⁹ *Record of the Discussion before the U.S. Congress on the FLSA of 1938* (U.S. Department of Labor, Bureau of Labor Statistics) (Washington, GAO, 1938), pp.20-21.

very small. The profits that can be made by decreasing output--the price of labor--makes the risk economically worthwhile. Add in the time value of money, and it seems to unscrupulous employers that wage theft is a profitable, and low-risk, solution. The cost-benefit analysis comes out in favor of stealing wages and forcing employees to work off-the-clock when it is well known in the business world that WHD enforcement strategies are not effective.

Solutions to the problem of wage theft have to rid the system of the intrinsic incentives to steal wages. We should keep in mind the premise on which wage and hour legislation is founded; it is to protect workers, so that they might earn a living wage;¹⁹⁰ it is to spread hours out between more employees to decrease unemployment; it is to level the playing field for ethical businesses: by incentivizing firms to use technology in a way that will increase productivity, create higher paying jobs, and lessen physical strain on workers—and, at the same time, to put out of business those firms that can survive in the market only if workers are compensated at a subminimum wage.

Rethinking Employment Structures

There have been several relatively recent changes in employment structures, and these must be taken into consideration in any attempt to find effective solutions to the problem of wage theft. In our modern economy, many production jobs are being outsourced and the jobs that cannot be outsourced--service jobs--are the fastest growing segment of the labor force.¹⁹¹ Further, a significant proportion of service-jobs are temporary positions, held by contingent workers.¹⁹² Labor and employment law is premised on the industrial model, with a stable workforce in each industry, who can negotiate collectively with employers, and, if necessary, go on strike, in order to secure appropriate employment terms and

¹⁹⁰ While this is not a paper about whether the statutory minimum is a sufficient wage, I would be remiss if I didn't point out that in 2011, the federal minimum wage is not enough to support a family in most of the United States. See Dr. Amy Glasmeier, The Pennsylvania State University, *Living Wage Calculator*, available at: <http://www.livingwage.geog.psu.edu/>

¹⁹¹ See note 84.

¹⁹² As discussed earlier, at the time the FLSA was written, independent contractors were generally high-skilled workers with power to bargain for appropriate contractual terms. However, today's workforce, especially in the service industries, is made up of a significant number of low-skilled contingent workers (whether misclassified or not, they do not receive the benefits of employment). Whether it is to escape employment relationship liabilities, including wage and hour laws, or whether it is a function of other factors, the fact is that a significant proportion of service-jobs are held by contingent workers. Alan Hyde, *Who Speaks for the Working Poor?: A Preliminary Look at the Emerging Tetralogy of Representation of Low-Wage Service Workers*, 13 Cornell J.L. & Pub. Pol'y 599, 600-01 (2004) ("The growth of these short-term service jobs challenges our entire system of labor and employment law in ways that scholars (this author included) have only begun to explore. It is no exaggeration to say that our entire system of labor and employment law is premised on the picture of a worker who works every day at the same place and for the same employer--a model increasingly at odds with reality")

conditions.¹⁹³ The FLSA acted in place of a collective bargaining agreement, setting a floor on wages and a ceiling on hours for those workers who are not represented by a union. Independent contractors were considered high skilled workers with enough bargaining power to negotiate for appropriate contractual terms (at least equal to those that would be negotiated by a union or imposed by the FLSA).

In order to accommodate modern employment structures, labor and employment law must expand to include “worker communities” that differ from the 20th century industrial/production model.¹⁹⁴ FLSA protections would then must be expanded to incorporate the workers that are not protected by unions.

NON-LEGAL SOLUTIONS

Education and Awareness

Part of the solution to the wage theft dilemma is found outside of the law. Awareness and education of the public on these matters is probably the most important factor in a multi-factor solution to the wage theft problem. Making the public aware of the many ways in which wage theft might touch their lives is imperative; citizens with knowledge are empowered to make a difference in myriad ways--by choosing carefully where they shop, what products they buy,¹⁹⁵ and who they hire, they can vote with their wallets.¹⁹⁶ By volunteering at worker’s centers, they can help in enforcement efforts. And by lobbying their congressman, they can advocate for legal reforms designed to empower workers and make wage theft less attractive to employers.

Appeal to their Humanity

Education must also reach worker, managers, employers, and attorneys. Corporations exist for one reason, to make a profit--and wage theft is profitable. But there are human beings behind the corporate shield who have the ability to constrain profit-seeking in order to conform to the law. Therefore,

¹⁹³ The National Labor Relations Act (NLRA) created protections for workers who organized into unions.

¹⁹⁴ See Hyde, note 175, *supra*. While union organization is outside the scope of this paper, it is important to note that the modern, “service economy,” model would either have to expand the concept of unions to geographical or sector-based worker communities (sector based unions would be made up of people who do the same type of work, but on a temporary basis, for different employers. For example landscapers, seasonal workers in the hospitality industry, or temporary office workers).

¹⁹⁵ In the 1990s, at the peak of the garment industry’s flight overseas, student organizations at several universities launched campaigns to make the public aware of the labor abuses, sweatshop conditions, and child labor, that went into making their brand named apparel. The DOL published a list of known violators of international labor standards who imported to the U.S. Educated consumers refused to buy. Investigative journalists sought out the abuses and reported on them. Consumers demanded that apparel companies only buy from subcontractors that conformed to international standards.

¹⁹⁶ United Students Against Sweatshops is very vocal and has 250 chapters at colleges and universities around the country. These groups have been successful in convincing their own universities to purchase “University Name” apparel only from approved vendors. See *United Steelworkers, Students Against Sweatshops*, available at: http://www.usw.org/our_union/allies_and_partners?id=0006

education and awareness can help balance the pure profits interest of a corporation. All persons within a corporation, from the CEO to the night janitor, must be made aware of the problem, and must be motivated to comply with the law and to report abuses.¹⁹⁷

PURELY LEGAL SOLUTIONS

While appealing to the humanity of corporate members, directors, and managers might stop some wage theft, there are also legal measures that should be taken in order to encourage those who want to comply and to disincentive wage theft.

From the Bench...

Continued Expansive Reading of Retaliation/Remedial Provisions

A broad reading of the retaliation provision of the FLSA is appropriate, protecting workers who involve the DOL, as well as workers who make an informal, oral complaint with management.¹⁹⁸ The Supreme Court has recently held accordingly, in *Kasten v. Saint-Gobain Performance Plastics Corporation*.¹⁹⁹ The decision is clearly written and does not leave much room for alternative interpretations by the lower circuits.

In keeping with the remedial nature of the statute, any other questions arising as to provisions under the FLSA should also be read expansively and should bear in mind the purpose of the statute. Courts have

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¹⁹⁷ Directors and officers must not only construct policies that discourage wage theft, but enforce the policies, making adherence to a principle of justice not only a part of corporate culture, but necessary for continued employment—that a “fair day’s work” deserves “fair pay” (Quoting FDR’s statement of the purpose of the FLSA. See note 22). Low-wage workers should be encouraged to report abuses, and assured that retaliatory measures by their direct managers will not be tolerated. Mid-level managers (store managers in retail) need to know that deleting hours is illegal, understand what harm they are causing employees, and know that denying workers the full wage they have earned is not a proper avenue to increasing profits. Upper-level management must be made aware that policies “picking profits” from the pockets of employees are detrimental and illegal. Employment lawyers should be on the lookout for wage and hour violations, making certain their clients are classifying employees properly and complying with DOL reporting requirements. Most importantly, employees need to be educated about their rights in the workplace and how to be proactive if they are violated.

¹⁹⁸ There are numerous advantages to such an expansive reading of worker protections. First, it will encourage employers to self-correct, because they will be aware of possible violations before they are subpoenaed to answer a suit or an investigation. Second, it will place more responsibility on the employer, giving both the employee and employer a role in the discovery and elimination of wage theft—and thus eliminating a portion of the burden on investigators. Third, an attempted correction will serve as evidence of good faith, and ignoring a complaint, or failing to correct it, could likely be evidence of a “willful” violation for future suits brought under FLSA.

¹⁹⁹ No. 09–834 (Slip Opinion) (2011) Available at: *Supreme Court Website: Term Opinions* <http://www.supremecourt.gov/opinions/slipopinions.aspx?Term=10>

been instrumental in protecting workers, and can continue to do so, especially with the recent rise in litigation under the FLSA.²⁰⁰

Legislative Changes...

Extend the Statute of Limitations

As discussed, *supra*, there is a two year statute of limitations (SOL) on wage and hour claims, three years if the violation is “willful.” The enforcement process is rife with hurdles to meeting that two-year SOL, and, accordingly, the SOL should be extended to five years. One manual, put together by a Virginia employment lawyer, explains that it usually takes at least a year from the time the violation is reported to the time an investigator forwards it to the solicitor’s office. Therefore, at least half of an employers potential liability drops off. A GAO undercover investigation showed that many wage and hour investigations were inadequately handled and eventually dropped because the statute of limitations was deemed too short and investigations too long. In 2009, in response to the report, a bill²⁰¹ was introduced to Congress, that would suspend the statute of limitations, but the bill died in committee.

Increase liability

Keeping in mind the purpose of the FLSA, to drive unscrupulous, parasitic firms out of the market, effective legal solutions to the problem of wage theft have to increase the risk of sanctions for wage theft for employers. There is a provision in the FLSA that allows goods made in violation of the FLSA’s requirements to be confiscated by the WHD. This may have been a deterrent in the past, but in an increasingly service-based economy confiscation of produced goods is outdated.²⁰² Amendments to the FLSA could increase the available monetary remedies to worker victims of wage theft. Liquidated damages of double the wages stolen has proven, through experience, to be simply not enough to deter wage theft. Allowing a traditional class actions under the Federal Rules of Civil Procedure, Rule 21, where employees would have to “opt-out” rather than “opt-in” to a class, as well as punitive damages determined by a jury, would increase employer liability, make cases more appealing to the private bar, and possibly make it worth the risk to employees to take their employers to court. Liquidated damages has been viewed by the courts as interest on the money owed to a creditor (the employee)²⁰³ and courts have

²⁰⁰ See notes 17 and 18, *supra*, and accompanying text.

²⁰¹ Wage Theft Prevention Act, H.R. 33-03 (Rep. George Miller, CA); Sent to House Committee on Education and Labor

²⁰² The one industry that I mentioned in the paper that is still in the business of production is the garment industry. However, confiscation of goods produced would not have much bite. The contracts are spread out over many subcontractors and jobbers, so confiscating goods made by one or two is not going to hurt the industry. Also, as mentioned earlier, garment sweatshops are designed to be able to be broken down and moved or abandoned at a moment’s notice, without much financial loss.

²⁰³ See note 64.

been reluctant to grant liquidated damages.²⁰⁴ From a retributive standpoint, liability for an action that impacts the everyday life of workers and has a detrimental effect on society should reflect the harms it causes and impact the employer by the same proportions. Punitive damages allow a jury to assess the damage and punish the employer accordingly, e.g., a week's worth of wages stolen could mean a week's worth of company profits as punitive damages.²⁰⁵ This would increase the risk quotient for employers engaging in a cost-benefit analysis.

Expand Liability

There are two potential expansions of liability that might help to deter wage theft by making it less profitable. The first is criminal liability to the actual doers or promoters of wage theft. When individual managers delete hours from time cards, they are essentially committing the crime of larceny. When upper level managers create situations where mid-level employees feel the necessity to do this, they are also a party to the crime, and perhaps even more culpable. While it might be difficult to prove in retail-type settings, there are certainly times where wage theft can be traced to a specific employee or to a certain policy advocated by upper management. Individuals, knowing they could face criminal liability, may rethink policies that pick the pockets of employees in order to keep prices low and increase profits. Further, defining wage theft as a punishable crime is closer to reality. The millions of dollars stolen from employees amounts to felony larceny multiple times over. Identifying and codifying it as such attaches moral sanctions to wage theft, which may make persons engaged in the activity, who used to think it was “no big deal,” think twice about continuing the practice.

In addition to criminal liability, the FLSA could be amended to provide for 3d party liability for stockholders. Not criminal liability, but simply a way to pierce the corporate veil for closely held corporations and go after stockholders for wage and hour violations, liquidated damages, or any other increased civil liabilities suggested above. Instead of being focused only on profits, stockholders would then insist on measures protecting workers wages and hours as part of a risk-management strategy.

Create a Safe-Harbor for Employers Acting in Good Faith

The DOL has a website and phone line called *elaws* that gives information to both employers and employees on an anonymous basis, and without triggering an investigation. However, there are very real risks, even to employers with the best of intentions, of admitting that they have committed a violation of

²⁰⁴ See also *Pay Me Now or Pay Me Later*. VA Wage and Hour CLE manual (2005).

²⁰⁵ FAIR MINIMUM WAGE ACT OF 2007, TITLE II SMALL BUSINESS TAX INCENTIVES--SMALL BUSINESS AND WORK OPPORTUNITY ACT OF 2007, Part II, Subtitle B, § 223 (Denies a tax deduction to businesses for any amount paid or incurred as damages).

FLSA's requirements.²⁰⁶ Usually when one employee has been misclassified or not paid the correct overtime, then there is a whole class of employees who have been similarly violated. The aggregated sum could be substantial. The employer could also be liable for the cost of suit, liquidated damages, and, under a tougher liability scheme suggested above, punitive. Settlement agreements entered into between employer and employee where the employee gives up future claims to wages owed are invalid unless scrutinized by a court for unconscionability, or approved by the DOL. Therefore, the employer has no recourse outside of taking on the risk of the liabilities mentioned above.

I agree that employees should not be able to contract out of wages owed them, because clearly an employee cannot be bargaining at arms-length for such a contract. However, there needs to be some sort of safe-harbor for ethical employers who want to remedy a wage or hour violation committed under a good faith belief that they were in compliance. The employer should have to pay the wages owed, within a reasonable amount of time. The employer, if self-reporting a compliance error, should be immune from suit, as well as from liquidated damages, as long as they comply with the WHD requirements and a payment schedule.

Administrative Fixes...

Re-defining "Independent Contractor" and "Contingent Worker" in Light of Modern Employment Structures

To protect low-skilled, low-wage temporary workers, distinctive definitions of "independent contractor," and "contingent employee" should be developed. The test for whether an employee is an independent contractor should still include the factors used to determine economic dependence, but would primarily focus on the worker's skill level and whether he had the opportunity and ability to negotiate for appropriate contractual terms and conditions. If there is a great difference in what the worker will be able to provide himself through self-employment and what he would have been entitled to under the FLSA (and other employment benefits and safety legislation) if he were in an employment relationship, then those facts should indicate to an employer, or to a court, that the relationship is one where the worker is economically dependent.

There is still a place for the independent contractor in modern employment structures, but, under the suggested paradigm, the relationship between contractor and independent contractor will no longer expand to cover all contingent workers, labeling them as self-employed simply because they are temporary workers. The addition of a post hoc, fact-specific inquiry to determine independent contractor

²⁰⁶ Pursuant to the U.S. Department of Labor's *Confidentiality Protocol for Compliance Assistance Inquiries*, information provided by a telephone caller will be kept confidential within the bounds of the law. Compliance assistance inquiries will not trigger an inspection, audit, investigation, etc.

status would incentivize employers to err on the side of granting employment benefits to all workers who do not clearly wish to be employed on a very tentative, consulting-type basis.

Lower skilled contingent workers, defined simply as temporary employees, would be protected by the wage floor and hour ceiling of the FLSA (as well as other statutes that concern an employee's benefits that arise through the legal relationship of employer/employee).

Increasing Enforcement Power

Clearly, the first and foremost solution is better enforcement of the basic FLSA provisions. The WHD investigators are the wage and hour "police." There certainly needs to be more investigators, but the investigators also need to be more efficient. The DOL needs more attorneys. When the investigators uncover wage and hour violations, they must have attorneys to back them up. There were seven thousand cases filed in federal court, but the Department of Labor attorneys only did 150 of them.²⁰⁷

Investigators can be more efficient if resources are used in the best way possible. The WHD policy is to go after the large employers for overtime violations, because these cases result in the most money recovered for employees. Overtime cases, especially large numbers of employees at large companies, are the types of cases that are brought by the private bar. Therefore, because there are limited enforcement recourses, they should be put toward investigations that are unlikely to be picked up by the private bar.

This would protect the most vulnerable employees, who usually have nowhere else to turn but the WHD for enforcement of the minimum wage. These cases should be a priority.

Another tool for using resources properly is to conduct targeted investigations in the industries that have been identified as largely violative. Also, targeted investigations should occur where workforces are drawn largely from an immigrant population and in industries that prey on undocumented workers, like the garment industry and agriculture.

Finally, the WHD must continue its effort to combine with state and local organizations in a collaborative effort. WHD investigators can train laypersons to serve as educators and counselors in worker's centers. DOL grants can be earmarked for programs that help raise awareness, investigate businesses, counsel workers or provide job training for low-wage workers who are put out of work when unethical employers are driven from the market.

Involve Ethical Employers in Finding Solutions

In every industry there are ethical employers and there are unscrupulous employers. The WHD should involve the ethical employers in discussions about how to best combat wage theft in their particular industry. The original purpose of the FLSA was to put unethical firms out of business and allow fair competition between ethical firms. In industries like the garment industry, the customs need to be

²⁰⁷ Bobo, Wage Theft in America (kindle version, 2010) chapter 7.

changed from within in order to battle the employment structures that have arisen around cheap, subminimum wage and sweatshop labor. The WHD could co-operate with ethical businesses in finding an administrative solution to the problems unique to each industry. Ethical employers could also be instrumental in helping to flush out some of the unscrupulous employers for targeted investigations. Ethical employers are put at a major competitive disadvantage by wage theft. They should be happy to participate and to help put parasitic firms out of business.

Modernize Recordkeeping Requirements

The recordkeeping requirements of the FLSA are outdated, and should be updated to reflect new employment structures and the fact that the use of networked computers make it much easier to keep payroll records, make them available to employees, and report to the WHD. Many employers in the lowest-paying jobs persist in failing to make or retain payroll records of any kind, creating severe barriers for their employees seeking to enforce wage and hour rights.²⁰⁸ The DOL can come up with software that makes recordkeeping standard. In that way, employers and employees would know what to expect, lowering costs for businesses in the long run. Further, there could be a requirement that payroll records be sent to WHD on a quarterly basis. Due to the standardization, anomalies could easily be red flagged and investigated.

The FLSA should start requiring recordkeeping for contingent workers and independent contractors. In that way, businesses with a high percentage of one or both could be red flagged and easily investigated. In addition, this would help to alleviate some of the headaches involved when an employer is found to have been misclassifying an employee as an independent contractor. Often, because he was an independent contractor, an employer hasn't kept wage and hour records on him, since that is not required under the FLSA. This makes it difficult to determine what overtime payments are owed to him. Employers who are hiring contingent workers as independent contractors should have to define that term and lay out all of the terms and conditions of independent contractor status, versus employee status, in writing. A copy of that contract should have to be on file and included in quarterly recordkeeping reports to the WHD. Any employer with a large proportion of independent contractors as workers will raise a red flag and perhaps warrant an investigation into whether they are appropriately classified.

CONCLUSION

²⁰⁸ National Employment Law Project, *Winning Wage Justice: An Advocate's Guide to State and City Policies to Fight Wage Theft* at 106 (January 2011), available at <http://www.nelp.org/page/-/Justice/2011/WinningWageJustice2011.pdf?nocdn=1>. But see, *Pay now or Pay Later*. CLE on FLSA Litigation. (2005) (suggesting that employees only have to have a reasonable idea of what wages are owed, records would be used for the employer to affirmatively rebut the charges.).

Above all, we must make wage theft less profitable. Aware of the high risk of wage and hour violations, employers would be more likely to police their supervisory personnel and to make sure that policies do not encourage wage theft. Greater liquidated damages or punitives may be necessary to make wage theft unattractive, especially considering the slight chance of employers being investigated.

Because resources in the WHD are stretched so thin, we should find ways to disincentive wage theft and to encourage businesses to self-police and self-correct. Part of this solution involves incentivizing “good faith” compliance adjustments by insulating those employers from suit.

Any policies or solutions that conform to modern employment structures will help to ensure that they are reaching the most vulnerable populations and are dealing with the problems that have arisen in our modern, service-based economy with a large contingent workforce. Policymakers and legislatures should keep in mind the most vulnerable populations to wage theft and targeted investigations from within the WHD should start in industries known to exploit those workers.

Wage theft is a national epidemic, but there are many solutions that can be accomplished working within existing law or by modest amendment to the regulations. However, the most important challenge is not a legal one. It is imperative that Americans become more aware that wage theft is occurring—so that workers will understand their rights, and employers will view wage theft as intolerable, immoral, and potentially criminal behavior.

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