Journal on Migration and Human Security

The US Labor Standards Enforcement System and Low-Wage Immigrants: Recommendations for Legislative and Administrative Reform

Donald Kerwin
Center for Migration Studies

Executive Summary

Low-wage immigrants in the United States, particularly the 8 million unauthorized workers, suffer from widespread labor standards violations. Their protection represents a singular challenge for modestly-resourced federal and state regulators, particularly in an era of record immigration enforcement. Many employers hire the unauthorized, knowingly or unknowingly, because they cannot attract sufficient numbers of authorized workers. An enduring minority, however, prefer to employ unauthorized workers in order to suppress wages and working conditions and to gain an advantage over their competitors. Their business model depends on the exploitation of workers who are less likely to complain, organize or pursue other remedies for mistreatment. Exacerbating matters, the unauthorized work disproportionately in jobs to which certain labor standards do not apply, and they belong to labor unions at lower rates than the US workforce as a whole (Schmitt 2010). Employers, in turn, face intense competition and pressure to cut costs. In addition, intensive immigration enforcement can make employees more vulnerable to retaliation for exercising their rights and less likely to challenge abuses (Cho and Smith 2013).

This paper analyzes labor standards enforcement in light of the challenges posed by bad-faith employers, the historically high population of low-wage immigrant laborers (particularly the unauthorized), and record spending on immigration enforcement. It draws from a comprehensive report titled *Labor Standards Enforcement and Low-Wage Immigrants: Creating an Effective Enforcement System* (Kerwin and McCabe 2011). The paper identifies gaps in protection in the legal and regulatory labor standards framework, with a particular focus on the US Department of Labor's (DOL's) Wage and Hour Division (WHD) which enforces the Fair Labor Standards

© 2013 by the Center for Migration Studies of New York. All rights reserved.

Act (FLSA).[1] It argues that labor standards should be strengthened and enforcement resources bolstered. However, it also recognizes that federal and state agencies will never be able to investigate, penalize, or monitor a significant share of the employers subject to their jurisdictions. Thus, it concludes that the overall goal of these agencies should be to deter violations and to maximize compliance with the law.

To achieve these goals, regulators must be able to identify industries, sectors and firms with vulnerable workers; map the structures, relationships, and the distinct incentives of employers within these industries; and continuously evaluate the effectiveness of their enforcement strategies. WHD, in particular, needs to establish robust partnerships with other federal and state enforcement agencies, as well as with businesses, labor unions, and community-based organizations (CBOs) that enjoy direct access to low-wage immigrant workers. Status-blind enforcement and a coordinated response to the "misclassification" of employees as independent contractors must also be key priorities. In addition, a large-scale legalization program would strengthen the ability of immigrant workers to exercise and defend their rights.

The Legal and Regulatory Framework

Federal Standards and Enforcement Resources

WHD has responsibility for enforcing core federal labor laws, which include the FLSA, Migrant and Seasonal Agricultural Worker Protection Act (MSPA), Family and Medical Leave Act (FMLA), Davis Bacon and Related Acts (DBRA), and certain temporary worker programs. These laws cover more than 135 million private, state, and local government workers in more than 7.3 million business establishments (US DOL 2011). Yet despite the scope of its responsibilities and staffing increases in recent years, WHD still employs only about 1,100 investigators (US DOL 2013).

The FLSA sets standards for national minimum wage, overtime pay, recordkeeping, and child labor.[2] It exempts certain domestic workers, farmworkers, and seasonal and recreational workers from its minimum wage and overtime requirements, as well as additional workers from its overtime rules.[3] In general, the FLSA allows children to work at younger ages in agricultural than in other jobs.[4] The FLSA's remedies for minimum wage and overtime violations include back pay, liquidated damages equal to the wages owed, and civil monetary penalties.[5] Repeated or willful violations of minimum wage and overtime requirements carry fines up to $1,100 per violation.[6] The penalties for illegal termination or discrimination against employees who bring complaints or who institute suits over FLSA violations include reinstatement, promotion, payment of lost wages, and

1 *Fair Labor Standards Act*, Pub. L. No. 75-718, 52 Stat. 1060 (June 25, 1938).
2 29 USC §§ 201 et seq.
3 29 USC §§ 213(a)(15) and 213(b)(21).
4 29 USC § 213(c).
5 29 USC § 216(b).
6 29 USC § 216(e)(2).

liquidated damages (equal to lost wages).[7] Willful violations carry criminal penalties of up to $10,000 and imprisonment of up to six months.[8] US DOL can also seek to restrain the transport, delivery, and sale of "hot goods," which are goods produced in violation of the law.[9]

Many commentators contend that the FLSA's remedial sanctions and penalties do not sufficiently deter violations by bad-faith employers, particularly when weighed against the limited chances of being caught or, if caught, of having to pay the full penalty assessed (Smith and Ruckelshaus 2007). An analysis of WHD's Wage and Hour Investigative Support and Reporting Database (WHISARD) found that DOL collected only 61 percent of the civil monetary penalties that it assessed between 1998 and 2008 (Weil 2010, 14). Others criticize WHD and the DOL's Office of the Solicitor for failing to seek all penalties available under the law (Just Pay Working Group 2010, 10). In addition, the FLSA's two-year statute of limitations for recovery of wages (three years in the case of willful violations) runs from the time of the employer's failure to pay the proper wages and not from the filing of the complaint.[10] As a result, investigative delays can threaten recovery of back wages and liquidated damages (Kutz and Meyer 2009, 22-23).

The Occupational Safety and Health Act of 1970 (OSH Act) requires employers to comply with safety and health standards, warn of potential hazards, and provide appropriate safety equipment.[11] OSH Act also allows workers to request workplace inspections and it protects them from discrimination for filing complaints or instituting legal actions.[12] Employers must address violations within a reasonable time and can be assessed financial penalties and criminal sanctions for violating the law.[13]

OSH Act applies to businesses affecting interstate commerce,[14] but it does not apply to domestic workers.[15] In addition, a longstanding rider to US DOL's appropriations bill has prohibited enforcement of OSH Act's safety and health standards against farming operations that do not have labor camps and have ten or fewer employees. Except on the basis of complaints, the rider also prohibits OSH Act's safety (not health) standards from being enforced against employers in an extensive list of "low-hazard industries" with ten or fewer employees (OSHA 2011).

OSH Act covers an estimated 114 million workers at 7.5 million *private* business establishments and 200,000 construction work sites (US DOL 2011). Like WHD, the Occupational Safety and Health Administration (OSHA) can investigate only a fraction of the employers under its jurisdiction, even in the most dangerous industries (Smith and Ruckelshaus 2007, 587-588). OSHA has also been criticized for levying fines that do not approximate what it would cost employers to comply with the law, thus creating

7 29 USC § 216(b).
8 29 USC §216(a).
9 29 USC §§ 215(a) and 217.
10 29 USC § 255(a).
11 29 USC §§ 654 and 655(b)(7).
12 29 USC §§ 657(f)(1), 660(c)(1).
13 29 USC §§ 658(a), 659(a), 666.
14 29 USC § 652(5).
15 29 CFR § 1975.6 (2009).

a disincentive to compliance (Weil 2007, 145).

The National Labor Relations Act (NLRA) safeguards the right to "self-organization, to form, join, or assist labor organizations, to bargain collectively … and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[16] The National Labor Relations Board (NLRB), an independent government agency, administers the NLRA. The NLRB investigates potential unfair labor practices and administers elections to determine whether groups of employees want union representation.

The NLRA does not cover agricultural workers, certain domestic workers, and other categories of workers.[17] The authors of the Wagner Act of 1935 (the original NLRA) viewed agricultural workers as the "hired hands" of small family farmers and domestic workers as quasi-family members to their employers (Human Rights Watch 2000, 247-250). As a result, they deemed these workers as ill-suited for coverage under a law designed to curb industrial strife and unrest. However, in the current era of large-scale corporate farming and expanded demand for in-home child and elder care, these assumptions may no longer be valid.

In 2002, the US Government Accountability Office (GAO) estimated that three-quarters of the civilian workforce enjoyed collective bargaining rights under federal, state, or local laws. This left an estimated 32 million workers without such rights, among them 10.2 million managers and supervisors; 8.5 million independent contractors; 6.9 million federal, state, and local employees; 5.5 million small-business employees; 532,000 domestic workers; and 357,000 agricultural workers (GAO 2002, 10). Low-wage immigrants, including the unauthorized, work at high rates in jobs within these exempt categories (Passel and Cohn 2009, 32).[18] Overall, immigrants belong to labor unions at lower rates than the US workforce as a whole (Schmitt 2010).

The NLRB can order an employer to discontinue an unlawful practice, to reinstate an employee, and to pay back wages and benefits.[19] Critics argue that these non-punitive sanctions lack the teeth to deter anti-organizing efforts. In addition, the NLRA's most substantial penalty, payment of back wages, is not available for unauthorized workers.[20] Nor can the unauthorized be reinstated. Like WHD and OSHA, NLRB staffing levels fell significantly between 2001 and 2008, but increased after 2009 (Kerwin and McCabe 2011).

State Enforcement

Federal law undergirds the nation's system of labor protection. However, some states devote substantial resources to labor standards enforcement, possess extensive expertise in the area, and target industries and practices that are also federal priorities. Many states have minimum wage or child labor laws that exceed federal standards and view themselves as the "primary enforcer" of claims under the law (Lurie 2010, 10). Some states cover

16 29 USC §§ 151-169.
17 29 USC § 152(3).
18 The unauthorized represent 23 percent of private household workers and 20 percent of crop-production workers.
19 29 USC § 160(c).
20 *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 122 S. Ct. 1275 (2002).

employees and situations not protected by the FLSA (2-3). For example, there is no federal counterpart to state "wage payment" or "payday" laws, which require that employees be paid on regularly scheduled days (6-7, 26-27). In addition, many state enforcement agencies enjoy the authority to compel payment of back wages, liquidated damages, and civil monetary penalties (12-14). By contrast, WHD must rely on the DOL Office of the Solicitor to pursue cases in court.

In recent years, the role of state labor enforcement agencies has been highlighted in reports and surveys by the Brennan Center for Justice (Bernhardt, McGrath, and DeFilippis 2007), Policy Matters Ohio (Schiller and DeCarlo 2010), the Nelson A. Rockefeller Institute of Government at the State University of New York (Lurie 2010), and the Migration Policy Institute (MPI) (Kerwin and McCabe 2011).

MPI's report revealed a range of state funding and investigative staffing levels. States with laws that are stricter than or parallel to federal standards often devote substantial resources to enforcing these laws. By contrast, states with weaker (than federal) labor laws have little reason to enforce their laws and employees in these states typically seek redress under federal laws.[21] According to WHD, 17 states and the District of Columbia have minimum wage rates higher than the federal rate, 24 have rates that equal the federal rate, four have lower rates, and five have not established a minimum wage requirement. Thirty-two states and Washington, DC, require premium pay for overtime work (Lurie 2010, 3).

Most states devote modest resources to labor standards enforcement. Of the 13 respondents to MPI's survey, two states reported that they did not enforce minimum wage or overtime laws. The Georgia Department of Labor reported enforcing only child labor standards, while the Florida Department of Business and Professional Regulation enforces only child and farm labor standards. The Mississippi Department of Employment Security reported that it provided job training and business services, but did not enforce labor standards (Mississippi Department of Employment Security, n.d.; Interstate Labor Standards Association, n.d.). Georgia and Texas provide "little or no enforcement by any [state] agency" but offer a private right of action for labor standards violations (Lurie 2010, 4-6).

However, states *collectively* employ nearly as many investigators as WHD (Schiller and DeCarlo 2010, 4). The 43 respondents to the Policy Matters Ohio survey employed 659.5 labor standards investigators (2-4). The 18 state agencies surveyed by The Rockefeller Institute employed 405 investigators (Lurie 2010, 18). Twenty-seven states also administer and enforce health and safety standards under plans approved and monitored by OSHA. The safety and health standards of state plans must equal or exceed OSHA standards (OSHA, n.d.). In total, these states employ 1,331 investigators, the great majority of them "safety" investigators (Kerwin and McCabe 2011, 55).

The Brennan Center studied 13 industry clusters in New York City. Its report highlighted enforcement challenges even in a community with comparatively strong labor laws, established task forces devoted to particular industries and high union density (Bernhardt, McGrath, and DeFilippis 2007, 36). At the time, roughly 100 of the New York labor

21 Some employees may only be able to seek redress under state laws as, for example, when a state statute of limitations for obtaining back wages (such as in Florida) is longer than the federal statute of limitations—even though state minimum wage or other provisions are weaker than federal laws.

investigators covered approximately 500,000 workplaces (32). The report documented widespread minimum wage, overtime, OSHA, and workers' compensation violations against unauthorized and authorized immigrants (36).

Although certain workers (like the unauthorized) are less likely to file complaints than others, states overwhelmingly rely on complaints to initiate investigations (Lurie 2010, 8, 25). By way of contrast, California, New York, New Jersey, and Connecticut engage in "proactive, strategic enforcement." In particular, they target industries with a history of violations, inspect firms within targeted industries, conduct "sweeps" of targeted neighborhoods and employers, partner with community groups, and participate in task forces devoted to particular industry sectors (9).

Lessons from Past Administrations

To be effective, a labor standards enforcement system should incorporate lessons learned from past enforcement programs and strategies. To that end, this section examines the distinct enforcement philosophies and strategies of the Clinton, Bush and Obama administrations.

Under the Clinton administration (1993 to 2001), WHD attempted to shift its strategic focus away from complaint-based investigations and toward industries with the most pronounced compliance problems. Complaint-based enforcement strategies do not adequately cover workers who "feel vulnerable to exploitation" (Weil and Pyles 2005, 91), including those without immigration status, union representation, knowledge of their rights, or job security (Weil 2010, 76). WHD reasoned that pursuing individual claims for wages that should have been paid in the first instance did not sufficiently deter violations or otherwise increase compliance. It relied upon enforcement data and historical information from OSHA, INS, state agencies, and other sources to target industries that:

- employed high concentrations of low-wage workers and substantial numbers of immigrant workers (legal and unauthorized) who were unlikely to complain about violations;
- were undergoing rapid growth or contraction in a "changing, often global marketplace;" and
- included prominent corporations that could help to effect compliance throughout their supply chains. (US DOL 2001, 6)

The garment manufacturing, health care, and agriculture industries met these criteria nationally, as did several locally targeted industry sectors (US DOL 2001, 7, 8). During inspections, WHD surveyed randomly selected establishments within targeted industries and industry sectors. This allowed it to establish baseline information on patterns of noncompliance. As part of a multi-faceted strategy, WHD educated consumers, workers, and contractors; conducted investigations; imposed civil sanctions, including back wages, liquidated damages, and the return of gains realized from the sale of goods produced in violation of the FLSA; referred cases for criminal prosecution; entered compliance agreements with multi-establishment and lead employers; established strike forces in select low-wage industries; and intensively monitored targeted employers by reviewing their payroll records and time cards, interviewing employees, recommending corrective action,

and making unannounced visits (US DOL 2001, 11-12).

Subsequent surveys, typically two or three years later, measured changes in compliance levels. Although premised on a long-term, unflagging commitment to changing behavior in select industries, WHD measured its success over a relatively short period. This may explain, in part, why compliance rates did not uniformly or steadily improve in the targeted industries and sectors during these years (US DOL 2001, 36). Additionally, the studies may have failed to account for external factors, such as the penetration of imports or increased out-sourcing. WHD attributed what it viewed as "disappointing" results in US garment centers to competition by offshore manufacturers, as well as to pricing and consolidation by apparel retailers (14).

During this era, WHD developed an innovative compliance strategy of pressuring manufacturers and their suppliers by embargoing (preventing the delivery) of "hot cargo" goods produced in violation of the FLSA (Weil 2007, 140-142). Under this initiative, WHD required manufacturers to develop compliance programs with subcontractors, which led to decreases in wage-and-hour and other violations (USCIR 1993a).

An analysis of data collected through WHD surveys of the Southern California (1998 and 2000) and New York (1999 and 2001) garment industries confirmed that intensive monitoring increased overall compliance with minimum wage laws, and led to fewer violations and less severe violations per worker (US DOL 2001, 13-15). WHD also found that compliance was higher in firms that paid workers through their regular payroll systems than in those that did not; compliance was lower among new and small businesses; compliance improved when contractors could renegotiate prices with manufacturers when circumstances changed; and top-down investigations of retailers effectively engaged them in efforts to address problems of noncompliance in their supply chains (14-15).

WHD's work during this era confirmed the importance of:

- rigorously identifying problem industries and sectors;
- pursuing multi-pronged education and enforcement strategies (in partnership with others), with severe penalties for repeat or egregious offenders;
- assessing the effectiveness of strategies, and making adjustments in response;
- exerting pressure on manufacturers, retailers, multi-establishment businesses, and brand-name agencies in order to enlist them in monitoring their contractors; and
- adopting a sustained, multi-year approach to ensuring compliance in industries with a long history of labor violations.

Under the George W. Bush administration (2001 to 2009), WHD prioritized outreach, educational activities, and compliance assistance, primarily to employer groups (Lasowski 2008). During this period, the number of establishments subject to WHD's jurisdiction grew significantly (Weil 2007, 6; Bernhardt and McGrath 2005).[22] Yet its investigative

22 Between 1975 and 2004, the number of workers within WHD's jurisdiction grew 55 percent, the number of business establishments covered by WHD increased by 112 percent, and the number of WHD investigators decreased by 14 percent.

staff fell from 945 to 731. Staffing at US DOL's Office of the Solicitor also continued a long decline, from 786 employees in FY 1992 to 590 in FY 2009, as did the number of FLSA law suits filed by the Solicitor's office (Weil 2007, 90).[23] The GAO issued two sharply critical reports on WHD's planning, prioritization, and investigative work during this period (Lasowski 2008; Kutz and Meyer 2009).

In 2004, however, WHD reported that it had improved compliance in the garment, long-term health care industry and agricultural commodities industries (US DOL 2004, 80-81). It attributed these results to "compliance assistance" in the form of fact sheets and worker rights cards, in-person consultations with employers, and compliance agreements with nursing homes and farm bureaus. It also successfully monitored garment industry employers through unannounced visits, review of payroll records and timecards, and interviews with employees.

Under the Obama administration, WHD staffing has increased: US DOL plans to increase the number of WHD investigators to 1,132 by the end of FY 2014 (US DOL 2013). In addition, WHD has revisited several strategies from the Clinton era. In particular, it has sought to identify problem industries and practices through:

- Current Population Survey data on industries that pay sub-minimum wages and require more than 40 hours of work per week (i.e. potential overtime pay violators);
- federal and state complaint databases;
- WHD-commissioned and academic studies on industries and business clusters thought to violate labor standards at high rates;
- investigator reports;
- partnerships with labor unions, consular offices, worker centers, and other entities with direct access to low-wage workers; and
- state datasets, commissioned reports and other non-traditional information sources.

WHD has also prioritized analysis of statistically reliable samples of firms in targeted industries to determine the extent and nature of their noncompliance with the law and to test if it has accurately identified problem industries, sectors, and firms.

WHD is attempting to create "communities of compliance" by targeting lead or dominant employers that can influence contractors, suppliers, and other entities within their ambit. It also plans to revitalize the Clinton-era strategy of pressuring private corporations to create monitoring programs for their contractors and subcontractors (US DOL 2011, 30-32). In the case of business clusters or independent firms, it seeks to target known violators in particular geographic areas and, thus, to dissuade similar firms (in their proximity) from violating the law through public education and media coverage before, during, and after enforcement actions. It uses the media to educate employers, workers, and community members about workplace rights and the consequences of violations. It also plans to measure baseline compliance in targeted industry sectors over multiple years and to monitor these sectors.

23 Between FY 1987 and FY 2007, the number of FLSA law suits filed by the Office of the Solicitor fell from 705 to 151.

WHD has also prioritized leveraging enforcement resources through partnerships with state labor standards enforcement agencies. To date, working relationships between states and WHD have largely involved case referrals. However, improved data sharing, including possible aggregate analysis of federal and state data, may prove to be an effective form of collaboration, particularly on issues of common concern like employee misclassification.

WHD has historically reported on metrics like back wages collected, penalties assessed, resources expended, cases concluded, and other outputs (Table 1) (Lasowski 2008, 17-21).[24] It has not reported on the link between these metrics and its overarching goals of deterrence and compliance. Nor does its case management database record the different contractual and employment relationships at targeted work sites, which would make it a more useful tool in effecting compliance and deterrence (Weil 2007, 91). Meeting these goals, however, will require more sophisticated research, enforcement strategies and metrics.

Recommendations for Legal and Administrative Reform

This section describes the characteristics of an effective labor standards enforcement system and recommends legal and administrative reforms. It argues that the United States needs to strengthen its federal labor laws, legalize a substantial share of its unauthorized population, and increase federal and state labor standards enforcement resources. An effective enforcement system would seek to deter violations and would continuously assess the deterrent effects of its strategies. WHD and other regulators need to improve their ability to identify problem industries, sectors and firms; to map their structures, relationships, and the distinct incentives of employers within them; and to evaluate the effectiveness of their programs. Robust partnerships, status-blind strategies, and an aggressive response to problem of employee "misclassification" will also be key to this response.

Strengthening Labor Standards, Expanding Resources and Reforming US Immigration Law

Federal labor laws set significant standards for minimum wage, overtime pay, child labor, safe and healthy workplaces, anti-discrimination, and freedom to organize and to bargain collectively. However, gaps in coverage undermine the underlying goals of these laws, particularly in industries, sectors and firms that employ substantial numbers of low-wage immigrants. In addition, labor standards enforcement agencies receive insufficient resources, given the scope of their responsibilities.

By way of comparison, in FY 2012, the two U.S. Department of Homeland Security (DHS) immigration enforcement agencies, Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE), received 16-times more funding (a combined $17.6 billion) than WHD, OSHA and NLRB (which received less than $1.1 billion combined) (US DOL 2012a; US DOL 2012b; NLRB 2012; DHS 2012). In addition, the $17.6 billion figure, while covering some non-enforcement costs, likely understates immigration enforcement spending because it fails to include signature DHS enforcement programs that are not located within CBP or ICE. It also does not count the substantial

24 GAO has criticized WHD for failing to track certain performance metrics, including how often willful and repeat violations were found, and for frequently changing metrics.

Table 1. WHD Enforcement Metrics, FY 1997- 2010

Year	Back Wages Collected All Acts Enforced by WHD (Not Inflation Adjusted)	Employees Receiving Back Wages All Acts Enforced by WHD	Complaints Registered All Acts	Concluded Cases All Acts	WHD-Initiated Enforcement Actions All Acts	Enforcement Hours All Acts	Fair Labor Standards Act Registered (Concluded) Cases*	Civil Money Penalties Assessed All Acts Enforcement by WHD	WHD Investigators at End of Fiscal Year
FY 2010	$176,005,043	209,814	31,824	26,486	4,579	1,066,188	20,182	$7,574,953	1,035
FY 2009	$172,615,125	219,759	26,311	24,922	5,826	879,626	19,155	$10,525,617	894
FY 2008	$185,287,827	228,645	23,845	28,242	6,868	882,419	21,375	$9,935,111	731
FY 2007	$220,613,703	341,624	24,950	30,467	7,094	899,406	23,576	$10,255,735	732
FY 2006	$171,955,533	246,874	26,256	31,987	7,250	951,971	25,603	$7,879,529	751
FY 2005	$166,005,014	241,379	30,375	34,858	7,891	969,776	29,473	$10,541,997	773
FY 2004	$196,664,146	288,296	31,786	37,842	8,845	1,000,739	31,448	$8,865,725	788
FY 2003	$212,537,554	342,358	31,123	39,425	10,534	1,032,879	32,591	$9,974,537	850
FY 2002	$175,640,492	263,593	31,413	40,264	10,342	1,070,600	33,154	$9,397,213	898
FY 2001	$131,954,657	216,647	29,085	38,051	11,669	998,937	31,772	$11,978,461	945
FY 2000	$163,601,821	257,326	34,113	44,002	12,095	968,350	37,432	$10,567,305	949
FY 1999	$131,735,341	259,870	43,286	48,441	13,502	982,332	35,940	$9,259,131	938
FY 1998	$163,953,081	252,247	36,892	50,344	14,660	909,616	43,057	$9,947,063	942
FY 1997	$96,719,108	189,244	37,025	42,275	11,619	740,643	35,940	$10,448,778	942

***Note:** *Data from FY 1997 through 1999 are not comparable to more recent data because of a change in the agency's data management system. FLSA Registered Cases are those investigations or conciliations in which the FLSA is the primary Act investigated or conciliated. WHD checks for FLSA violations in many investigations registered under different Acts.*

Source: *USDOL, WHD, January 2011.*

immigration enforcement expenses borne by other federal agencies, by the federal court system, or by states and localities. Immigration enforcement programs can impede the exercise and protection of labor rights. To cite two examples, the electronic employer verification process has been found to drive low-wage immigrant laborers underground and effectively outside the reach of government regulators (Lofstrom, Bohn, and Raphael 2011, 25). In addition, inter-operable criminal and immigration screening systems can result in the deportation of workers who are arrested based on false accusations (Cho and Smith 2013, 3; Meissner, Kerwin, Chishti and Bergeron 2013, 119-120).

Congress should comprehensively review federal, state, and local labor and workplace safety and health laws. Among other reforms, it should: extend core labor protections to categories of employees who are now exempt or otherwise not substantially afforded these protections; strengthen penalties so they meaningfully deter violations; and provide for the tolling of statute of limitation periods upon the filing of complaints.

As part of this review, Congress should consider granting US DOL authority to compel payment of back wages, liquidated damages, and civil monetary penalties. It should also pass legislation to make unauthorized workers eligible for payment of back wages under the NLRA and to ensure that all remedies under the FLSA, OSHA Act, NLRA and other workplace protection laws are available to all workers, regardless of their immigration status.

Congress should also pass comprehensive immigration reform legislation, including a legalization program for a substantial percentage of the US unauthorized population. Legal status would make low-wage immigrant workers less vulnerable to workplace abuses and allow them to exercise their labor rights without fear of deportation. Immigration reform legislation should include substantial funding increases for federal and state labor standards enforcement agencies. Rigorous labor standards enforcement would create a strong disincentive to hiring unauthorized workers, diminish the competitive disadvantage faced by good-faith employers, and help to ensure that bad-faith employers do not exploit low-wage immigrant laborers and drive down wages and working conditions for other workers.

Leveraging Additional Resources and Pursuing High-Impact Strategies

While labor standards enforcement resources should be increased, federal and state agencies will never be able to investigate, penalize, or monitor a significant share of the employers subject to their jurisdictions. Thus, these agencies need to prioritize the use of their limited resources, leverage additional resources, and pursue cost-effective, high-impact strategies. Their overall goal should be to maximize compliance with the law and deter violations. They should establish metrics that reflect these goals**.**

Voluntary compliance can typically be achieved by educating otherwise law-abiding employers on the law and by applying graduated, proportional penalties for occasional violations. For employers that willfully, repeatedly, or severely violate the law, enforcement agencies should pursue significant civil monetary penalties, liquidated damages, injunctive relief, and criminal sanctions. They should also enlist lead or dominant corporations to pressure the employers within their spheres of influence to comply with the law.

WHD should leverage additional enforcement resources through expanded partnerships with other federal agencies, states, and localities; consulates; business and trade associations; labor unions and worker centers; faith-based groups and other stakeholders. Such partnerships would improve WHD's ability to educate employers, employees, and the public on the law; reach vulnerable workers who are unlikely to register complaints; identify problem industries and employers; chart the complex relationships in fissured industries; pursue employers who violate labor and related laws; train employees how to file complaints; test and evaluate enforcement strategies; and monitor compliance with the law.

US DOL already tracks and maps state labor laws. However, it should expand its collaboration with state enforcement agencies by creating an office of federal/state labor standards that would survey states annually on their enforcement resources, priorities, and activities as a means to share best practices and research, to inform federal and state planning processes, to promote partnerships, and to avoid enforcement redundancies. The goal of this office should be to establish a continuous learning and enforcement cycle that helps participating agencies to identify problem industries, understand business models and tactics designed to evade the law, coordinate education and enforcement strategies, evaluate the effectiveness strategies, and adjust their programs accordingly. State labor enforcement agencies should likewise develop more expansive partnerships with federal and state agencies, business associations, labor unions, worker centers, and faith-based groups.

Identifying Industries and Firms that Substantially Violate Labor Standards

Effective labor standards enforcement turns on the ability of federal and state regulators to identify industries and firms that substantially violate labor standards. Unauthorized and other low-wage immigrants have long worked at high rates in certain industries and firms that substantially violate these laws.

A congressionally-mandated study in 1991 compared firms that violated employment verification requirements, with those that violated the FLSA's minimum wage, overtime, and child labor provisions (US DOL 1991, 19-20). The study reviewed administrative data on the non-agricultural investigations opened and closed by WHD between October 1, 1987 and January 31, 1990 (11, 21). Roughly one-half of the investigated firms had been targeted under US DOL's Special Targeted Enforcement Program (STEP) (15, 21). Firms selected for the STEP program were deemed to be "more likely" to employ unauthorized immigrants (15). The study further distinguished between firms in "high- and low-alien" industries: it defined "high-alien" industries as "non-agricultural industries that routinely employ illegal aliens" (26).

The study found that WHD-investigated firms violated labor and immigration standards at high rates: 24.1 percent violated only the FLSA, 18.5 percent violated only employment verification rules, and 42.7 percent violated both sets of standards (US DOL 1991, 20-21). STEP-designated firms proved only marginally more likely to violate the FLSA (69 percent compared to 64 percent) and slightly more likely to violate both immigration and labor laws (46 percent compared to 39 percent) (21). The study posited that these modest differences reflected a lack of "hard evidence" by WHD in determining which firms merited the STEP

designation (US DOL 1991). In addition, employers in the five "high-alien" industries committed FLSA violations (69 percent versus 66 percent) and minimum wage violations (16 percent versus 14 percent) at slightly higher rates, but they were marginally *less* likely to violate overtime pay requirements (23, 27).

In 2008, the Center for Urban Economic Development, the National Employment Law Project, and the UCLA Institute for Research on Labor and Employment surveyed 4,387 persons working in low-wage industries in Chicago, Los Angeles, and New York (Bernhardt et al. 2009). Respondents included workers who: (1) were at least 18 years old; (2) worked in "front-line" jobs (i.e. not management or professional workers); and (3) worked in industries for which the median wage for front-line workers was less than 85 percent of the city's median wage (56). Foreign-born persons represented 70 percent of the total respondents, and nearly 40 percent were thought to be unauthorized (14-15, 43-45, 58, 62).

The study started with a seed group of workers and used their social networks and the networks of successive respondents to identify survey participants (Bernhardt et al. 2009, 56-58). Its authors attempted to reduce the bias inherent in "snowball sampling" by accounting for differences in social network size. The survey found widespread labor standards violations. Based on hours worked and pay received the week prior to the survey, it appeared that more than one-fourth of all respondents had been paid sub-minimum wages and 76.3 percent who had earned overtime pay had not received it (20). Violations occurred at higher rates for unauthorized than for authorized foreign-born workers, for foreign-born than for US-born workers, and for foreign-born women than for foreign-born men (42-44). The study underscored the limits of complaint-driven enforcement. Twenty percent of the workers surveyed had experienced a serious workplace problem in the previous 12 months but did not complain due mostly to fear of losing their jobs (24). Another 20 percent either registered a complaint or attempted to form a union. Of the latter, 43 percent experienced retaliation in the form of diminished hours and pay, threatened deportation, termination, or increased work (25). The report recommended more "proactive, 'investigation-driven' enforcement in low-wage industries" with systemic violations (52).

Another study analyzed formal labor charges, petitions, complaints, and other proceedings brought against companies that the INS district office in New York raided for immigration violations over a 30-month period between 1997 and 1999 (Wishnie 2004, 389-395). Of the 184 entities raided, 102 had been subject to formal federal or state labor investigations or proceedings, including 18 before multiple labor enforcement agencies.

Immigration enforcement at work sites with a history of labor standards complaints and investigations can potentially chill the exercise of labor rights by unauthorized immigrants. Bad-faith employers exploit unauthorized workers by threatening to have them arrested and deported for protesting or reporting violations, and by acting on these threats (Cho and Smith 2013; Bernhardt, McGrath, and DeFilippis 2007, 36; Browne-Dianis et al. 2006; US DOL 2008a; Smith and Ruckelshaus 2007, 565-566; Human Rights Watch 2000, 33-35; Kwong 1997, 172-174; Preston 2007; Greenhouse 2000; Taylor 1999).

More recent studies suggest that employers gain an advantage over their competitors by hiring workers whose lack of status limits their work options. The studies analyze data

from Georgia's Employer File and Individual Wage File from 1990 to 2006 (Brown, Hotchkiss, and Quispe-Agnoli 2009, 5-6; Hotchkiss and Quispe-Agnoli 2008, 23-27, 40, 43; Hotchkiss and Quispe-Agnoli 2009). They conclude that Georgia employers paid unauthorized workers less than authorized employees, unauthorized workers had fewer work options than authorized workers (as measured by worker separations due to reduced wages), and firms benefitted competitively (as measured by firm survival) by employing the unauthorized.

The GAO or US DOL should commission and regularly update a study that matches industries and industry subsets that violate employment verification laws with those that violate labor laws. Such a study could serve as a centerpiece of federal and state labor enforcement planning. In addition, WHD should draw on an exhaustive range of information to identify industries that violate labor standards at high rates in order to determine the nature of the violations and to map the structure of industries and the incentives of different employers within them. It should conduct probabilistic sampling to determine the nature, incidence, and geographic concentrations of violations. Probabilistic sampling will also allow WHD to explore anomalies in broader datasets, like firms with low self-reported accident rates in industries with high rates of injury and fatality.

Reports, studies, and database mining should be supplemented by investigations that include interviews with affected workers in their primary languages and consultation with stakeholders that enjoy access to and the confidence of low-wage workers. WHD should prioritize the cases of employers that have been assessed penalties for violations of the law but have failed to pay them. It should publicize its findings in order to increase public awareness, accountability and support for its work.

Targeting Labor Standards Violations against Low-Wage Workers in Fissured Industries

Over the last four years, US DOL has commissioned a series of studies that identify and map the structures of industries that violate labor standards at high rates (Weil 2010, 132-135). Much of this work has been summarized in a May 2010 report titled *Improving Workplace Conditions through Strategic Enforcement: A Report to the Wage and Hour Division* (Weil 2010). The report argues that WHD should target industry sectors with large concentrations of vulnerable workers in which employer behavior could be changed "in a lasting and systematic manner" (75-77). It concentrates on "fissured" industries, which are characterized by the extensive use of subcontracting, franchising, third-party management, and self-employed contractors. In such industries, the dominant employer, the one that links multiple smaller employers, may be a buyer at the end of a large supply chain (like Wal-Mart), a national, brand-name organization (like McDonald's), a central production coordinator (like the large national home builder corporations), or a purchaser of services from multiple entities (like building owners) (24-25).

The research concludes that low-wage workers in fissured industries, including immigrants, are particularly vulnerable to labor standards violations (Weil 2010, 18-19). It argues for enforcement strategies that take into consideration the non-traditional structures and the often-competing incentives of the corporate actors in these industries. Fast-food outlets, for example, are owned both by large brand-name organizations and by franchisees that

operate through highly prescriptive agreements. Analysis of US DOL investigation data from 2001 to 2005 found that fast-food outlets owned by brand-name corporations were more likely than franchisee-owned outlets to comply with the law. The study attributed the difference to the diverse incentives of branded organizations and franchisees (44-48). Brand-name organizations seek to preserve the value of their brands through compliance with the law, as well as to ensure a flow of revenue from their franchisees. By contrast, franchisees are driven by shorter-term considerations of profit (revenue *minus* costs), giving them a stronger incentive than branded corporations to keep costs low and to violate the law (58-71). The research suggests a greater need to direct WHD investigations at franchisee-owned outlets than at outlets owned by branded corporations.

WHD should extend "hot goods" penalties, including the seizure and embargo of goods, to "fissured" industries, certain "lean retailers," and others that violate labor standards at high rates (Just Pay Working Group 2010, 12). It should also target problem industries and practices through task forces comprised of federal and state labor standards enforcement and related agencies. WHD and state enforcement agencies should formally evaluate their programs at least annually, and they should make strategic adjustments on a regular basis.

Deterring Violators by Pressuring Dominant or Lead Employers in an Industry or Geographic Area

Because WHD will never be able to investigate more than a fraction of the employers subject to its jurisdiction, deterrence should be a primary goal of its enforcement system. Yet the deterrent effect of WHD enforcement strategies has been difficult to measure, in part because WHD has not traditionally collected data on the workplaces that it has *not* investigated. However, recent US DOL-commissioned research has attempted to measure deterrence by analyzing the impact of prior investigations on the behavior of *subsequently investigated* fast-food outlets and hotels and motels. This research has found that investigations can have a significant deterrent effect, depending, *inter alia*, on their geographic location, the businesses investigated, and the type of investigation.

Analyzing US DOL data from 2001 to 2005, the research examined the incidence and severity of labor standards violations among fast-food outlets in areas (measured by five-digit zip code) where there had been investigations of top 20 fast-food outlets within the previous year, compared to areas in which no investigation had taken place (Weil 2010, 50-57). The research found that labor standards compliance, as measured by the percent of subsequently investigated outlets with no violations, steadily improved based on the number of past investigations in the area. Likewise, total back wages owed (per investigation) steadily diminished based on the frequency of past investigations (Weil 2010).

The study concluded that prior investigations lowered the total back wages owed by subsequently investigated outlets, lowered the number of employees found in violation, and lowered the average back wages owed per worker. These trends grew more pronounced in the case of prior *WHD-directed* (as opposed to complaint-driven) investigations. The report attributed this difference, in part, to the increased publicity generated by directed investigations. However, the deterrent effect largely disappeared when the previous investigation(s) occurred in a larger geographic area, measured by a three-digit (not five-digit) zip code.

Like the fast food industry, the hotel and motel industry rely heavily on franchising arrangements: roughly 80 percent of hotel properties are franchised (Weil 2010, 61). Ownership and operating structures in franchise arrangements vary significantly. Both brand-name corporations and franchisees may own an individual hotel or motel. Brand corporations, independent "management" companies, and other entities can manage properties. The top 50 management companies operate 10 percent of all branded hotels and, thus, have wide-ranging influence within this industry (66-67).

The researchers sought to determine whether branded hotels acted as *market leaders* in setting and influencing policies and practices in particular geographic areas. As with the fast food industry, the hotel-motel study looked at properties that were located in areas (five-digit zip code) that had experienced investigations in the previous year and compared them with properties in areas in which no investigations had occurred in the prior year. It found that prior investigations of top-five brand hotels significantly improved subsequent compliance (measured by total back wages per investigation) by *branded* hotels in the area. By contrast, the impact of prior investigations of any hotel/motel property, or even of a top 25 or a top 50 brand property, was far more modest (Weil 2010, 71-72). Prior investigations of top-five branded hotels and of independent hotels also substantially improved compliance by independent hotels (73). Based on these results, the report concluded that hotels/motels "follow the leader" (71).

This research underscores the importance of identifying the lead or dominant entities in particular industries and industry sub-sets, and of learning which employers "watch" each other and how they do so, whether through trade journals, membership associations, publicity, or word-of-mouth.

It also highlights the need to measure the deterrent effect of WHD enforcement strategies and to adjust strategies accordingly. Deterrent-relevant factors in the fast food and hotel/motel industries include the location of enforcement activities, their frequency, the entities targeted (brand-name, independent, or other), and the type of enforcement (complaint-driven or agency-directed).

Finally, labor standards monitoring should be incorporated into existing systems, standards, and procedures used by brand organizations to promote quality and performance in particular industries (Weil 2010, 87). Franchise agreements set forth the responsibilities of franchisees in painstaking detail. Regulators should consider requiring targeted organizations (franchisors) to monitor their franchisees through these agreements.

Ensuring that Immigration Enforcement Does Not Compromise Labor Standards Enforcement, and Vice Versa

Labor standards have long applied to workers irrespective of their immigration status, and investigators have been reluctant to assume immigration responsibilities that might impede their ability to gain the confidence of unauthorized workers (USCIR 1993b, 173, 177). The distinct purposes of immigration and labor laws argue for vigilance in ensuring that enforcement of one set of laws does not undermine the goals or enforcement of the other. For this reason, US DOL and DHS/INS have long operated under formal working arrangements that recognize that their respective missions require distinct and coordinated enforcement

tactics. In late 1996, ten years following passage of the Immigration Reform and Control Act of 1986 (IRCA), INS adopted a policy on immigration enforcement during labor disputes, which it incorporated into its Operating Instructions (OI) and subsequently into its Special Agent Field Manual.[25] The policy attempted to block employers from triggering immigration investigations that would interfere with the exercise of their employees' labor rights, and it encouraged unauthorized workers to bring complaints related to labor law violations.

The policy applied to complaints or tips on potentially unauthorized workers, but only in situations in which a labor dispute was in progress. If an immigration officer suspected there was a pending dispute, he or she was required to make a "reasonable attempt" to determine whether this was indeed the case. If so, the OI required that an INS supervisor review the case. However, immigration officials could still move ahead with an enforcement action. The OI did not detail the remedy for a violation of these procedures. In a 2003 deportation proceeding, an immigration judge ordered the suppression of evidence due to INS's failure to abide by these procedures.[26]

In 1998, INS and US DOL entered a Memorandum of Understanding (MOU) to coordinate their work and to enhance enforcement of labor standards and employer verification laws (INS, DOJ, and DOL 1998). The MOU assumed that labor standards enforcement could deter illegal immigration by denying the competitive advantages "gained through the employment of highly vulnerable and exploitable workers at sub-standard wages and working conditions" (INS, DOJ, and DOL 1998). It stipulated that neither agency would take action that compromised their respective missions of worker protection (US DOL) and immigration enforcement (INS). It affirmed INS policy not to interfere in labor disputes. In addition, it precluded US DOL from inspecting for employment verification violations in investigations prompted by complaints "alleging labor standards violations" but not in investigations initiated by the agency.[27]

The MOU also called for reasonable efforts to ensure that arrested unauthorized workers would not be "deprived of appropriate compensation for the work performed, thereby affording an economic benefit to the employer from employment of unauthorized workers." It did *not* preclude INS/DHS immigration enforcement activities during and following labor organizing activities, and these activities, in fact, continued (Kerwin and McCabe 2011, 38).

On March 31, 2011, ICE and US DOL entered a MOU that superseded the earlier agreement, but affirmed its goals. The MOU seeks to prevent conflicts between the DHS and US DOL in their "civil work-site enforcement activities," to advance their respective missions, and to insulate enforcement from "inappropriate manipulation by other parties" (DHS and DOL 2011). Under the MOU, ICE must assess whether "tips and leads" related to immigration violations involve work sites with pending labor disputes or "are motivated by an improper desire to manipulate a pending labor dispute, retaliate against employees for exercising their labor rights, or otherwise frustrate the enforcement of labor laws." The

25 INS Operating Instruction 287.3a, revised December 4, 1996, redesignated as 33.14(h) of INS Special Agent's Field Manual, March 13, 1998, 74 *Interpreter Releases* 199-201, January 27, 1997.
26 *In the Matter of Herrera-Priego*, US DOJ EOIR (Lamb, IJ, July 10, 2003).
27 INA § 274A(b)(3).

MOU is subject to the same criticism as its predecessor because it allows ICE to engage in work-site enforcement during a labor dispute in a broad range of circumstances.[28] In cases involving immigration enforcement during a labor dispute, ICE must:

- notify US DOL of its activities unless to do so would violate a federal law or compromise an ICE investigation;
- produce detainees for interviews with US DOL if it does not interfere with or delay removal proceedings;
- consider US DOL requests to provide temporary immigration status to unauthorized immigrants who are needed as witnesses in US DOL investigations.

The agencies also agreed to exchange information on "abusive employment practices against workers regardless of status" and on labor standards violations, human smuggling and trafficking, child exploitation, extortion and forced labor. The MOU creates a joint committee on implementation and it requires DHS and US DOL to notify and train their employees on its requirements. The MOU stipulates that it does not create any right or benefit to outside parties.

US DOL and DHS have long recognized the need to coordinate their work so that the enforcement activities of one agency do not compromise the operations and goals of the other. The two agencies should regularly evaluate the effectiveness of their March 2011 MOU, should issue regulations that codify its main provision, and should make it a high priority to train and instruct their staffs on its requirements.[29]

The agencies should also certify victims of severe labor violations for "U" non-immigrant visas and promote the use of "U" visas in these circumstances (Smith and Cho 2013). "U" visas can be granted to victims of crimes who cooperate in the investigation and prosecution of crimes. Allowing such workers to pursue their claims will diminish threats of retaliation and deportation by bad-faith employers. Finally, as one scholar has argued, DOL's role in reviewing *planned* DHS/ICE enforcement actions should be strengthened and enhanced (Lee 2011). In particular, DHS should rely far more heavily on DOL to determine whether a labor dispute is in progress at a DHS-targeted worksite or if an employer is retaliating against an employee's attempt to exercise his or her labor rights. DHS/ICE will often have no way of knowing if their activities might "frustrate the enforcement of labor laws" without stronger *ex ante* collaboration with DOL. The alternative is DHS/ICE complicity in labor standards violations, as has been amply documented in several cases (Cho and Smith 2013).

28 These include investigations related to national security, critical infrastructure, or federal crimes other than illegal employment, or when directed by the secretary of DHS or the secretary of Labor or a designee.
29 Section 274A(b)(3) of IRCA required employers to retain employment verification records and make them available to the INS or DOL. It contemplated a role for DOL in checking whether employers had adequately screened employees to determine their legal eligibility to work. Congress may need to revisit this provision in order to ensure "status-blind" enforcement.

Status Blind Enforcement and Challenges Created by Disparate Remedies for Labor Standards Violations

The Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB* represents the most consequential blurring in recent years of the line between immigration and labor standards enforcement.[30] In a five-to-four decision, the court held that unauthorized workers illegally fired for union organizing did not qualify for back pay. In dissent, Justice Stephen Breyer criticized the majority for allowing employers to "conclude that they can violate the labor laws at least once with impunity" and by providing an "incentive to find and to hire illegal-alien employees."[31]

While it is difficult to assess the extent to which the denial of back pay to unauthorized workers has stifled labor organizing or has led to increased labor violations, commentators have argued that the *Hoffman* decision exemplifies how labor standards, if not extended to unauthorized workers, can undermine the purposes of both immigration and labor laws (Developments 2005, 2171-2290, 2229). According to Human Rights Watch:

> [t]he *Hoffman* decision … promotes new and perverse forms of discrimination. It creates an incentive for employers to hire undocumented workers because of their new vulnerability in union-organizing efforts, rather than hiring documented workers or citizens …. The resulting discrimination is two-fold: first, discrimination against documented workers and citizens who are not hired because of their status, followed by discrimination against undocumented workers who are hired because of their status. (Human Rights Watch 2004, 119)

The court's reasoning—that labor protections should not be extended to workers who cannot legally work—has subsequently been adopted by courts in sexual discrimination, nonpayment of overtime, and workers' compensation cases (Moran 2007; Smith and Ruckelshaus 2007, 565-566). It has also been used to deny the recovery of future earnings to injured workers under state statutes and common law (Developments 2005, 2229-2231).

At the same time, one scholar has described a "pattern of regulatory" resistance to *Hoffman* in federal labor standards and civil rights agencies that has taken the form of minimizing *Hoffman*'s application, expanding remedies for workplace abuse, facilitating the participation of workers in labor standards enforcement actions, and strengthening their ability to collect the wages owed them (Chen 2012). The Equal Employment Opportunity Commission (EEOC), for example, has affirmed its commitment to status-blind enforcement, vigorous application of the law, and protection of unauthorized workers (Chen 2012). In addition, US DOL continues to enforce the FLSA and the Migrant and Seasonal Protection Act without regard to immigration status (US DOL 2008b). It distinguishes *Hoffman* on the ground that the NLRA *allows* but does not require back pay and *Hoffman* involved an employee who sought back pay not for time he had worked, but for time he would have worked had he not been illegally discharged. By contrast, the FLSA and MSPA *require* back pay for unreimbursed hours that employees actually work. In distinguishing *Hoffman* in these ways, regulators seem to be affirming that discriminatory enforcement practices undermine the core goals of labor and workplace protection laws.

30 535 U.S. 137, 122 S. Ct. 1275 (2002).
31 535 U.S. at 154-155, Breyer, J., dissenting.

Prioritizing Misclassification of Employees as "Independent Contractors"

Effective enforcement requires the identification of industries, industry sectors, and business clusters with high rates of labor standards violations. It also requires that regulators possess thorough and timely information on how employers attempt to evade the law and avoid legal liability. The misclassification of employees, particularly low-wage immigrants, has been an enduring problem. While not a violation of federal law, misclassification is often prompted by a desire to avoid payment of Social Security, Medicare, workers' compensation or unemployment insurance premiums. In addition, independent contractors do not receive FLSA, OSHA, NLRA and other statutory protections.

Standards used to classify workers as "employees" vary by federal and state statute, but they generally turn on an assessment of whether the employer controls and directs the employee's work or, conversely, whether the employee/contractor exercises autonomy in the performance of their work (Planmatics 2000, 2, 14-22). Under section 530 of the Revenue Act of 1978, a worker can be treated as a non-"employee" for the purposes of employment taxes if the employer files federal tax returns in a manner that does not treat the worker as an employee, if the employer treats individuals in substantially similar positions as non-employees, and if there is a reasonable basis for treating the worker as a non-employee.[32]

Although difficult to quantify, misclassification appears to be widespread. In 1984, the Internal Revenue Service (IRS) estimated that 3.4 million persons were misclassified. IRS plans to revisit this issue, reviewing the extent of misclassification as part of a broader study on employment tax compliance (GAO 2009, 10-11). A study conducted for US DOL in 1998 and 1999 on the impact of misclassification on unemployment insurance programs found substantial misclassification in the construction, manufacturing, home healthcare, and retail industries (Planmatics 2000, 91). It noted the pervasive misclassification and exploitation of low-wage immigrant workers who are "unaware of American worker arrangements, ethics, rights and laws" and who do not protest misclassification "owing to fear of deportation, language barriers and ignorance of worker rights" (Planmatics 2000, 35-36).

State labor officials have similarly reported that "immigrants are less likely to know their rights and more likely to be misclassified than other types of workers" (GAO 2009, 19). Several studies and at least one government task force have found high rates of misclassification in the construction industry, which employs substantial numbers of authorized and unauthorized immigrants (GAO 2009, 14; New York State Department of Labor and Joint Enforcement Taskforce 2009, 3). The National Employment Law Project identified 20 studies on the incidence and costs of misclassification in particular states (Leberstein 2010). Most of these studies rely on audits of unemployment insurance and workers compensation programs.

Many employers misclassify employees as independent contractors to avoid the requirements of federal laws. Others do so by mistake. Congress, the US Department of Justice, and relevant federal and state agencies should attempt to harmonize the standards and definitions governing "employees" and independent contractors. WHD, in

32 Pub.L. No. 95-600, 92 Stat. 2763 (November 6, 1978).

coordination with the US DOL Office of the Solicitor, should bring legal actions to clarify the boundaries of the employer/employee relationship in major industries (Weil 2010, 80). US DOL, IRS, and other federal agencies should coordinate a nationwide effort to educate workers, employers, and the general public on these standards. As US DOL has proposed, Congress should pass legislation to shift the burden of proof to employers, requiring them to demonstrate that their employees are correctly classified. As the GAO recommended in 2009 WHD should increase its focus on misclassification during its investigations; WHD and OSHA should share information on misclassification cases; US DOL and the IRS should establish an interagency, federal/state partnership to address misclassification; and US DOL and IRS should develop a standard document on misclassification that employers can provide to new workers (GAO 2009, 41-42). WHD should also continue to prioritize joint federal-state initiatives to combat misclassification.

Conclusion

While far from perfect, US labor standards embody enduring national goals. They reflect a national consensus that all workers should be paid the agreed upon wages, none should be paid below a certain minimum level, and certain workers should be paid additional amounts for extra hours that they work. In addition, they provide that workers should be able to organize and bargain collectively for better pay and working conditions; should be able to work in safe and healthy conditions; and that children should not work, except in very limited circumstances. Employers, in turn, should not be able to deny core labor protections to their workers, whatever their skills, backgrounds, or immigration status. Strengthened and well-enforced standards would safeguard all workers, while ensuring that bad-faith employers do not benefit at the expense of their law-abiding competitors.

REFERENCES

Bernhardt, Annette, and Siobhán McGrath. 2005. "Trends in Wage and Hour Enforcement by the US Department of Labor, 1975-2005." *Economic Policy Brief 3*. New York, NY: Brennan Center for Justice.

Bernhardt, Annette, Siobhán McGrath, and James DeFilippis. 2007. *Unregulated Work in the City: Employment and Labor Law Violations in New York City*. New York, NY: Brennan Center for Justice. http://nelp.3cdn.net/cc4d61e5942f9cfdc5_d6m6bgaq4.pdf.

Bernhardt, Annette, Ruth Milkman, Nik Theodore, Douglas Heckathorn, Mirabai Auer, James DeFilippis, Ana Luz González, Victor Narro, Jason Perelshteyn, Diana Polson, and Michael Spiller. 2009. *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*. Center for Urban Economic Development, National Employment Law Project, UCLA Institute for Research on Labor and Employment. http://nelp.3cdn.net/1797b93dd1ccdf9e7d_sdm6bc50n.pdf.

Brown, David J., Julie L. Hotchkiss, and Myriam Quispe-Agnoli. 2009. "Undocumented

Worker Employment and Firm Survival." *IZA Discussion Paper No. 3936*. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1329574.

Browne-Dianis, Judith, Jennifer Lai, Marielena Hincapie, and Saket Soni. 2006. *And Injustice for All: Workers' Lives in the Reconstruction of New Orleans*. New Orleans: National Immigration Law Center, Advancement Project, and New Orleans Worker Justice Center. http://archive.uua.org/news/gulfcoastrelief/pdf/And_Injustice_for_All_Report.pdf.

Chen, Ming H. 2012. "Where You Stand Depends on Where You Sit: Bureaucratic Incorporation of Immigrants in Federal Workplace Agencies." *Berkeley Journal of Employment and Labor Law* 33. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2019181##.

Cho, Eunice H., and Rebecca Smith. 2013. *Workers' Rights on ICE: How Immigration Reform Can Stop Retaliation and Advance Labor Rights*. http://nelp.3cdn.net/79a636339c0c2dcf72_l7m6b8j1i.pdf

"Developments in the Law: Jobs and Borders." 2005. *Harvard Law Review* 118(7).

DHS (United States Department of Homeland Security). 2012. *FY 2013 Budget in Brief*. http://www.dhs.gov/xlibrary/assets/mgmt/dhs-budget-in-brief-fy2013.pdf.

DHS and DOL (United States Department of Homeland Security and United States Department of Labor). 2011. "Revised Memorandum of Understanding Between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites." http://www.dol.gov/asp/media/reports/DHS-DOL-MOU.pdf.

GAO (Government Accountability Office). 2002. *Collective Bargaining Rights: Information on the Number of Workers with and without Bargaining Rights*, GAO-02-835. Washington, DC: GAO. http://www.gao.gov/new.items/d02835.pdf.

———. 2009. *Employee Misclassification: Improved Coordination, Outreach and Targeting Could Better Ensure Detection and Prevention*. Washington, DC: GAO. http://www.gao.gov/new.items/d09717.pdf.

Greenhouse, Stephen. 2000. "Immigrants in the Middle of Union Push at Bakery." *New York Times*, October 9.

Hotchkiss, Julie L., and Myriam Quispe-Agnoli. 2008. "The Labor Market Experience and Impact of Undocumented Workers." *Working paper 2008-7c*. Atlanta, GA: Federal Reserve Bank of Atlanta. www.frbatlanta.org/filelegacydocs/wp0807c.pdf.

———. 2009. "Employer Monopsony Power in the Labor Market for Undocumented Workers." *Working paper 2009-14a*. Atlanta, GA: Federal Reserve Bank of Atlanta. www.frbatlanta.org/filelegacydocs/wp0914a.pdf

Human Rights Watch. 2000. *Unfair Advantage: Workers' Freedom of Association in the United States Under International Human Rights Standards*. New York, NY: Human Rights Watch. http://www.hrw.org/legacy/reports/2000/uslabor/.

———. 2004. *Blood, Sweat, and Fear: Workers' Rights in U.S. Meat and Poultry Plants*. New York, NY: Human Rights Watch. http://www.hrw.org/reports/2005/usa0105/usa0105.pdf.

INS, DOJ, and DOL (United States Immigration and Naturalization Service, United States Department of Jusice, United States Department of Labor). 1998. "Memorandum of Understanding, Between the Immigration and Naturalization Service, Department of Justice, and the Employment Standards Administration, Department of Labor."

Interstate Labor Standards Association. n.d. "State Contacts." http://www.ilsa.net/contacts/contact007.htm.

Just Pay Working Group. 2010. *Just Pay: Improving Wage and Hour Enforcement at the United States Department of Labor*. New York, NY: National Employment Law Project. http://www.nelp.org/page/-/Justice/2010/JustPayReport2010.pdf?nocdn=1.

Kerwin, Donald M. and Kristen McCabe. 2011. *Labor Standards Enforcement and Low-Wage Immigrants: Creating an Effective Enforcement System*. Washington, DC: Migration Policy Institute.

Kutz, Gregory D., and Jonathan T. Meyer. 2009. *Wage and Hour Division's Complaint Intake and Investigative Processes Leave Low Wage Workers Vulnerable to Wage Theft.* Testimony Before U.S. House of Representatives, Committee on Education and Labor, GAO-09-458T. Washington, DC: GAO. http://www.gao.gov/new.items/d09458t.pdf.

Kwong, Peter. 1997. *Forbidden Workers: Illegal Chinese Immigrants and American Labor*. New York: W.W. Norton & Company.

Lasowski, Anne-Marie. 2008. *Fair Labor Standards Act: Better Use of Available Resources and Consistent Reporting Could Improve Compliance*. Testimony Before U.S. House Committee on Education and Labor, GAO-08-962T. Washington, DC: GAO. http://www.gao.gov/new.items/d08962t.pdf.

Leberstein, Sarah. 2010. *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*. New York, NY: National Employment Law Project. http://www.nelp.org/page/-/Justice/2010/IndependentContractorCosts.pdf?nocdn=1

Lee, Stephen. 2011. "Monitoring Immigration Enforcement." *Arizona Law Review* 53: 1089-1121.

Lofstrom, Magnus, Sarah Bohn, and Steven Raphael. 2011. *Lessons from the 2007 Legal Arizona Workers Act*. San Francisco, CA: Public Policy Institute of California. http://www.ppic.org/content/pubs/report/R_311MLR.pdf.

Lurie, Irene. 2010. *Enforcement of State Minimum Wage and Overtime Laws: Resources, Procedures, and Outcomes*. Albany, NY: Nelson A. Rockefeller Institute of Government, State University of New York.

Meissner, Doris, Donald Kerwin, Muzaffar Chishti and Claire Bergeron, 2013. *Immigration Enforcement in the United States: The Rise of a Formidable Machinery*. Washington, DC: Migration Policy Institute. http://www.migrationpolicy.org/pubs/enforcementpillars.pdf.

Mississippi Department of Employment Security. n.d. "About Us." http://www.mdes.ms.gov/Home/AboutUs.html.

New York State Department of Labor, New York State Department of Taxation and Finance, New York State Workers' Compensation Board, New York State Workers' Compensation Board – Fraud Inspector General, New York State Attorney General, Comptroller of the City of New York. 2009. *Annual Report of the Joint Enforcement Task Force on Employee Misclassification, To David Paterson, Governor, State of New York*. New York, NY: New York State Department of Labor and Joint Enforcement Taskforce. http://www.labor.state.ny.us/agencyinfo/PDFs/Misclassification_TaskForce_AnnualRpt_2008.pdf.

NLRB (United States National Labor Relations Board). 2012. *Justification of Performance Budget for Committee on Appropriations: Fiscal Year 2013*. http://www.nlrb.gov/sites/default/files/documents/188/cj_2013.pdf.

Moran, Tyler. 2007. Statement to the House Committee on the Judiciary, Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law, Hearing on Proposals for Improving the Electronic Verification and Worksite Enforcement System. http://v2011.nilc.org/immsemplymnt/cir/eevs_testimony_nilc_2007-05-03.pdf

OSHA (Occupational Safety and Health Administration). 2011. OSHA Instruction CPL 02-00-051, "Enforcement Exemptions and Limitations under the Appropriations Act." Washington, DC: United States Department of Labor. http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=1519

———. n.d. "Frequently Asked Questions about State Occupational Safety and Health Plans." http://www.osha.gov/dcsp/osp/faq.html#establishingyourown.

Passel, Jeffrey, and D'Vera Cohn. 2009. *A Portrait of Unauthorized Immigrants in the United States*. Washington, DC: Pew Hispanic Center. http://pewhispanic.org/files/reports/107.pdf.

Planmatics, Inc. 2000. *Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs*. Report for the US Department of Labor, Employment and Training Administration. http://wdr.doleta.gov/owsdrr/00-5/00-5.pdf.

Preston, Julia. 2007. "Immigration Raid Draws Protest From Labor Officials." *New York Times*, January 26.

Schiller, Zach, and Sarah DeCarlo. 2010. *Investigating Wage Theft*. Cleveland, OH: Policy Matters Ohio.

Schmitt, John. 2010. "Unions and Upward Mobility for Immigrant Workers." Washington, DC: Center for Economic and Policy Research. http://www.cepr.net/documents/publications/unions-immigrants-2010-03.pdf.

Smith, Rebecca, and Eunice Hyunhye Cho. 2013. "Workers' Rights on ICE: How Immigration Reform Can Stop Retaliation and Advance Labor Rights." Oakland, CA: The National Employment Law Project. http://nelp.3cdn.net/79a636339c0c2dcf72_l7m6b8j1i.pdf.

Smith, Rebecca, and Catherine Ruckelshaus. 2007. "Solutions, Not Scapegoats: Abating Sweatshop Conditions For All Low-Wage Workers As a Centerpiece of Immigration Reform." *New York University Journal of Legislation and Public Policy* 10(3): 555-602. http://www1.law.nyu.edu/journals/legislation/issues/vol10num3/smith_ruckelshaus.pdf.

Taylor, R.H. 1999. "Undocumented Hotel Workers Who Formed Union Are Released." *Star Tribune* (Minneapolis), October 20.

USCIR (United States Commission on Immigration Reform). 1993a. "Enforcement in the Underground Economy." In *Curbing Unlawful Migration*. Unpublished appendix.

———. 1993b. "Options for Enhancing Worksite Enforcement." In *Curbing Unlawful Migration*. Unpublished appendix.

US DOL (United States Department of Labor). 1991. *Employer Sanctions and US Labor Markets: Second Report*. Washington, DC: US Department of Labor, Division of Immigration Policy and Research, Bureau of International Labor Affairs.

———. 2001. *1999-2000 Report on Initiatives*. Washington, DC: US Department of Labor, Employment Standards Division. http://nelp.3cdn.net/a5c00e8d7415a905dd_o4m6ikkkt.pdf.

———. 2004. *FY 2004 Performance and Accountability Report*. Washington, DC: US Department of Labor. http://www.dol.gov/_sec/media/reports/annual2004/annualreport.pdf.

———. 2008a. "2008 Statistics Fact Sheet." http://www.dol.gov/whd/statistics/2008FiscalYear.htm.

———. 2008b. "Fact Sheet #48: Application of US Labor Laws to Immigrant Workers: Effect of Hoffman Plastics decision on laws enforced by the Wage and Hour Division." Washington, DC: US Department of Labor, Wage and Hour Division. http://www.dol.gov/whd/regs/compliance/whdfs48.pdf.

———. 2011. "FY 2012 Budget in Brief" http://www.dol.gov/dol/budget/2012/PDF/FY2012BIB.pdf.

———. 2012a. "FY 2013 Congressional Budget Justification: Occupational Safety and Health Administration." http://www.dol.gov/dol/budget/2013/PDF/CBJ-2013-V2-12.pdf.

———. 2012b. "FY 2013 Congressional Budget Justification: Wage and Hour Division." http://www.dol.gov/dol/budget/2013/PDF/CBJ-2013-V2-09.pdf.

———. 2013. "FY 2014 Congressional Budget Justification: Wage and Hour Division." http://www.dol.gov/dol/budget/2014/PDF/CBJ-2014-V2-09.pdf.

Weil, David. 2007. "Crafting a Progressive Workplace Regulatory Policy: Why Enforcement Matters." *Comparative Labor Law and Policy Journal* 28(2): 125-154. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=996901.

———. 2010. *Improving Workplace Conditions Through Strategic Enforcement: A Report to the Wage and Hour Division.* http://www.dol.gov/whd/resources/strategicEnforcement.pdf.

Weil, David, and Amanda Pyles. 2005. "Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace." *Comparative Labor Law and Policy Journal* 27(1): 59-92.

Wishnie, Michael J. 2004. "The Border Crossed Us: Current Issues in Immigrant Labor." *New York University Review of Law & Social Change* 28: 389-95.