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# Is Wage Theft the New Civil Rights Issue for Workers?

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If you have seen recent headlines about major wage-and-hour class actions, such as the FedEx misclassification case, *Alexander v. FedEx Ground Package System*, \_\_\_ F. 3d. \_\_\_ (9th Cir. 8/27/14), or the *Wal-Mart* decision about off-the-clock work here in Pennsylvania, *Braun v. Wal-Mart Stores*, 616 Pa. 354, 47 A.3d 1174 (2012), then you would know there is a growing problem of wage theft in the low-wage economy all over the country.

You may be wondering what wage theft even is. Wage theft is the preferred term used by employee advocates to encompass a range of corner-cutting activities by employers that come at the expense of their employees. The cases include nonpayment of overtime, withholding of the last few paychecks, worker misclassification, requiring work "off the clock" and unlawful deductions from pay. Although wage theft occurs in a variety of workplaces, it tends to occur more often in the low wage, nonunion and immigrant workforce where the workforce is perceived as more reliant on the job and therefore less likely to complain. Wage theft harms affected families, but communities also suffer when those families cannot pay the rent and from uncollected revenues caused by nonpayment of wages.

Most victims of wage theft do not formally complain, thus, it is hard to pinpoint the exact size of the problem. But the studies that have attempted to quantify the scope of wage theft have found enormous problems. The National Employment Law Project, together with the University of California, Los Angeles, Institute for Research on Labor and Employment, found in the 2009 report, "Broken Laws, Unprotected Workers," that 26 percent of low-wage workers had been paid less than the minimum wage in the week prior, and 76 percent of those who had worked more than 40 hours had not been paid proper overtime. The total annual wage theft from frontline workers in low-wage industries in the three cities studied approached \$3 billion. If these findings are generalized to the rest of the U.S. low-wage workforce of 30 million, wage theft costs workers more than \$50 billion a year. A recent report from Kentucky shows that losses from wage theft greatly exceed money stolen in robberies—\$4.5 million is collected annually in wage-theft investigations by the state, while \$2 million is the annual damage from robberies.

Nationwide, the Economic Policy Institute estimates about \$1 billion in wages recovered for

workers in 2012 between the U.S. Department of Labor, state agencies and private lawsuits. Amazingly, the total value of property stolen in robberies that same year was far less: only \$340.8 million. Court cases have also grown to match the problem: The number of Fair Labor Standards Act (FLSA) cases filed in federal court each year has been rising rapidly, from 5,302 in 2008 to 7,764 in 2013, according to Federal Judicial Caseload Statistics reported by Seyfarth Shaw. The number of case filings is more than five times the number 20 years ago, the report said.

In Pennsylvania, employers with more than \$500,000 in annual revenue are subject to the FLSA, which requires payment of the minimum wage and overtime and imposes penalties of 100 percent of wages due. All Pennsylvania employers are covered by the Pennsylvania Minimum Wage Act of 1968, which requires payment of the minimum wage and overtime, and the Wage Payment and Collection Law (WPCL), 43 P.S. Section 260.1 et seq. The WPCL requires payment of the promised rate of pay and benefits, not just the minimum wage. But the penalties are smaller than the FLSA at 25 percent of wages owed, or \$500 per violation. Importantly for readers of this column, the WPCL also provides for payment of attorney fees. Although both Pennsylvania wage laws provide for criminal penalties, they are typically not enforced. The law hardly provides for a strong deterrent, especially when not all affected workers complain.

The Department of Labor enforces the FLSA against certain employers, while the Pennsylvania Department of Labor and Industry (DLI) enforces the Pennsylvania wage laws. Both agencies are under-resourced. The DOL has 1,100 investigators for 7 million workplaces. The Pennsylvania DLI has about 30 investigators around the state who enforce these laws for a workforce of 6.1 million; these investigators are responsible for enforcing a number of other laws as well, such as the Child Labor Act, the Underground Utility Line Protection Act and the Prevailing Wage Act. The state DLI does not have the power to levy fines and must enforce the law in the court system, county by county. It is complaint-driven and does not seek out violations of the laws.

Workers do have the right of private action under the Pennsylvania wage laws and under the FLSA. Community Legal Services' Employment Unit serves hundreds of clients every year in Philadelphia who suffered wage theft. This is without doing any outreach to affected communities. CLS is a nonprofit legal aid organization, founded in 1968, that represents low-income individuals in a range of civil matters, free of charge. CLS's typical wage client comes from restaurant or construction work and has not been paid his or her last paycheck. When the cases are investigated, it is often found that overtime has never been paid. Many, but not all, of the workers are immigrants. After taking the claims to court, workers receive backpay, small amounts in penalties, and attorney fees from these cases. Outside of Philadelphia, free legal-services programs do not typically take wage cases, so those workers must seek help from the private bar or from the state and federal enforcement agencies.

The problem of wage theft is not going to go away unless there is a concerted effort to end it. The cost to employers for committing wage theft must be increased. Cheating employers are made to pay only wages due and occasional small penalties. Pennsylvania laws should provide for at least treble damages, as already done in 12 states. This would not only serve as a deterrent, but would bring additional private attorneys to this work. Government enforcement of wage laws is tepid and should be improved by not just hiring more investigators but also targeting enforcement efforts to problematic industries, allowing agencies to levy fines, providing access to the system by extending the statute of limitations, improving retaliation provisions, and providing access to non-English speakers to the system. In addition, repeat violators should have licenses taken away or be

criminally prosecuted. Only when employers feel the heat of both private and public enforcement will we make a dent in the problem of wage theft.

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