

# LABOR'S WAGE WAR

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## INTRODUCTION

Almost every growing sector in the bottom half of our economy—health care, child care, retail, building services, construction, and hospitality—is plagued by penurious employers who drag down working conditions for everyone. Common schemes emerge in jobs with sweatshop conditions: employers hide behind subcontractors, call their workers “independent contractors” not covered by workplace laws, and hire immigrant workers who are subjected to substandard conditions. Firms must adopt similar practices to stay competitive. Workers in many of these jobs make the minimum wage or less. Minimum wage for a full-time worker today translates into an annual income of only \$12,168. Consequently, many important jobs cannot bring people out of poverty and workers across the socio-economic spectrum are impacted.

Far from ramping up enforcement to combat these unlawful practices, federal and state public agencies have reduced staffing and enforcement efforts. Private enforcement is hampered by rules against class actions under the federal minimum wage law. The labor movement has stepped into this void, partnering with community organizations and law-abiding employers, creating relationships with state departments of labor and attorneys general, and supporting private labor standards enforcement models to shore up the wage floor for all workers.

Part I of this Article describes the trends that result in bad jobs, including the U.S. Department of Labor's inaction, employer dodges including subcontracting and independent contractor misclassification, and the barriers workers face to protesting their unpaid and underpaid wages. Part II showcases some of the more exciting of these new labor standards enforcement models, including: (1) labor and management-funded “Taft-Hartley Funds” such as the Maintenance Cooperation Trust Fund in California and the

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national network of Foundations for Fair Contracting, which use union and employer monies to police wage and hour violators; (2) the American Federation of Labor and Congress of Industrial Organizations' ("AFL-CIO")' national worker center partnership, creating new collaborations with community organizing groups in the day labor and faith-based communities; (3) the Service Employees International Union's wage and hour project, supporting private and public agency enforcement of fair pay rights for janitors, security guards, and home health-care workers across the country; and (4) the New York Civic Participation Project, a union-community collaboration that promotes worker justice and civic empowerment for new immigrants.<sup>1</sup> Part III briefly assesses these new models and suggests possible directions for continued success.

## I. TODAY'S TRENDS THAT MAINTAIN BAD JOBS

As we lose manufacturing jobs to overseas markets, the jobs left behind—health care, child care, retail, building services, construction, and hospitality—are not good jobs. In addition to providing paltry benefits, if any, employers in these sectors routinely violate bedrock employment rights like the right to be paid fully for work and the right to a safe workplace.<sup>2</sup> Employers in these industries maneuver to cut costs at any price: they hide behind subcontractors, call their workers “independent contractors” not covered by workplace laws, and hire immigrant workers who are vulnerable to

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1. This Article is not focused on community-based efforts that are not affiliated with organized labor, of which there are many vibrant examples, but rather on those partnerships where labor and community seek to collaborate on wage and hour campaigns or strategies. Nor does this Article describe important approaches by labor to ensure fair pay for workers by enhancing collective bargaining rights for all workers. *See, e.g.*, Cynthia Estlund, *Something Old, Something New: Governing the Workplace by Contract Again*, 28 COMP. LAB. L. & POL'Y J. 351, 357-58 (2007) (describing labor's support of neutrality agreements to gain collective bargaining rights). Finally, this Article does not describe the important private minimum wage litigation by the migrant farmworker bar, which, aside from the U.S. Department of Labor, has almost single-handedly established the existing case law under the Fair Labor Standards Act (“FLSA”) in this country. *See, e.g.*, Bruce Goldstein, Marc Linder, Laurence E. Norton & Catherine K. Ruckelshaus, *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983, 988 (1999) (chronicling leading migrant farmworker FLSA cases). These are separate but complementary ventures.

2. *See, e.g.*, Nat'l Employment Law Project, *Holding the Wage Floor: Enforcement of Wage and Hour Standards for Low-Wage Workers in an Era of Gov't Inaction and Employer Unaccountability*, Immigration & Nonstandard Worker Project Policy Update, Oct. 2006, <http://www.nelp.org/docUploads/Holding%20the%20Wage%20Floor2%20Epdf> [hereinafter *Holding the Wage Floor*] (containing studies and data discussing these employer violations).

exploitation.<sup>3</sup> As if that were not enough, workers face barriers to enforcing their basic job rights, including antiquated rules for bringing class actions in private litigation, and fear of reprisals that go unchecked when workers complain.

### **A. The United States Department of Labor (“DOL”) Is Not Enforcing Its Laws, and Interprets Its Role Narrowly**

Public enforcement of the Fair Labor Standards Act (“FLSA”) and other baseline workplace standards is down, with some notable exceptions; federal and state agencies charged with enforcing baseline wage and hour laws are not having an impact. Employers know that there is little to fear from public enforcement of workplace violations, and so do not change their practices.<sup>4</sup> In addition, the DOL has interpreted laws to exempt large classes of low-wage workers from basic wage and hour protections, including professional home health-care companions.<sup>5</sup> In general, despite the persistence of sub-par jobs, the DOL has not made it a priority to stem these abuses.

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3. For illustrations of subcontracting in lower-wage and service jobs, see NAT'L EMPLOYMENT LAW PROJECT & FARMWORKER JUSTICE FUND, INC., FROM ORCHARDS TO THE INTERNET: CONFRONTING CONTINGENT WORK ABUSE (2002), <http://www.nelp.org/docUploads/pub120.pdf> [hereinafter FROM ORCHARDS TO THE INTERNET]. Independent contractor abuses have been much-studied of late. See, e.g., *Providing Fairness to Workers Who Have Been Misclassified as Independent Contractors: Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Educ. & Labor*, 110th Cong. (2007), available at <http://edworkforce.house.gov/hearings/wp032707.shtml>; *The Misclassification of Workers as Independent Contractors: What Policies and Practices Best Protect Workers?: Hearing Before the Subcomms. on Health, Employment, Labor, and Pensions & Workforce Protections of the H. Comm. on Educ. And Labor*, 110th Cong. (2007), available at <http://edworkforce.house.gov/hearings/help072407.shtml>; *The Effects of Misclassifying Workers as Independent Contractors: Hearing Before the Subcomm. on Income Sec. and Family Support of the H. Comm. on Ways & Means*, 110th Cong. (2007), available at <http://waysandmeans.house.gov/hearings.asp?formmode=detail&hearing=556>. For analysis on employers' incentive to hire undocumented workers and then mistreat them, see, for example, Christopher Ho & Jennifer C. Chang, *Drawing the Line After Hoffman Plastic Compounds, Inc. v. NLRB: Strategies for Protecting Undocumented Workers in the Title VII Context and Beyond*, 22 HOFSTRA LAB. & EMP. L.J. 473, 492 (2005).

4. David Weil, *Compliance with the Minimum Wage: Can Government Make a Difference?*, 2-5 (Sloan Workshop Series in Industry Studies, 2004), [http://www.soc.duke.edu/sloan\\_2004/Papers/Weil\\_MinimumWagepaper\\_May04.pdf](http://www.soc.duke.edu/sloan_2004/Papers/Weil_MinimumWagepaper_May04.pdf) [hereinafter Weil, *Compliance*].

5. The recent U.S. Supreme Court case of *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339, 2351-52 (2007), upheld the DOL's regulation stating that home health-care workers employed by agencies to work in patients' homes are exempt from minimum wage and overtime under federal law.

The Wage and Hour Division (“WHD”) at the DOL enforces many laws, including the FLSA, which sets the minimum wage and overtime rules, prohibits retaliation against complaining workers, and restricts child labor.<sup>6</sup> The FLSA authorizes DOL lawsuits on behalf of employees, as well as lawsuits by individual employees.<sup>7</sup>

While public agencies are by their nature underfunded and understaffed, the DOL has been particularly undersubsidized in recent years. In addition, it has failed to use its resources strategically to have the broadest impact, as it has in the past with, for instance, targeted audits and affirmative task forces aimed at priority industries.<sup>8</sup>

From 1975 to 2004, the budget for DOL WHD investigators decreased by 14% (to a total of only 788 individuals nationwide), and enforcement actions decreased by 36%, while the number of businesses covered by the wage and hour law increased from 7.8 million to 8.3 million.<sup>9</sup> The DOL’s overall budget to enforce wage and hour laws is now 6.1% less than before President George W. Bush took office.<sup>10</sup>

DOL legal resources have also suffered, impacting its ability to enforce the laws. In fiscal year 1992, the Solicitor’s Office, responsible for enforcing all laws under the DOL’s jurisdiction, had 786 employees,<sup>11</sup> an increase of 59% since fiscal year 1966. But, since fiscal year 1992, despite the fact that two additional laws have been added to the responsibilities of the Solicitor’s Office, the Family and Medical Leave Act of 1993 and substantial amendments to the Mine Safety and Health Act in 2006, the number of employees of

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6. 29 U.S.C.A. § 201 et seq. (West 2007). The WHD also enforces the Davis-Bacon Act, 40 U.S.C. § 3141 (2006), requiring payment of prevailing wages on federal government contracts for the construction, alteration, or repair of public buildings or works, and the Service Contract Act, 41 U.S.C. § 351 (2006), another prevailing wage law covering service contracts, such as those for removal of debris and trash; custodial, janitorial, or guard service; cafeteria and food service; and packing and crating.

7. 29 U.S.C.A. § 216(b) (West 2007).

8. See *Adequacy of Labor Law Enforcement in New Orleans: Hearing Before H. Comm. on Oversight & Gov’t Reform*, 110th Cong. (2007) [hereinafter *Hearing on Oversight and Gov’t Reform*] (testimony of Catherine K. Ruckelshaus, National Employment Law Project), available at <http://domesticpolicy.oversight.house.gov/documents/20070703121612.pdf>.

9. ANNETE BERNHARDT & SIOBHÁN MCGRATH, BRENNAN CENTER FOR JUSTICE, *TRENDS IN WAGE AND HOUR ENFORCEMENT BY THE U.S. DEP’T OF LABOR, 1975-2004 1-2* (Sept. 2005), [http://www.brennancenter.org/dynamic/subpages/download\\_file\\_8423.pdf](http://www.brennancenter.org/dynamic/subpages/download_file_8423.pdf).

10. Judd Legum et al., *Labor—Bush Priorities Hurt Workers, Help Employers (Under the Radar)*, THE PROGRESS REPORT, June 14, 2006.

11. U.S. Dep’t of Labor, Budget Submission to Congress for Fiscal Year 1993 (on file with author).

the Solicitor's Office has declined markedly; in January 2007, it was down to 590 employees nationwide.<sup>12</sup>

The DOL has focused its attention on employer compliance and education in the last eight years, and has deemphasized audits and affirmative investigations.<sup>13</sup> Some of the few enforcement actions it did bring have been challenged as insufficient. For example, a celebrated settlement with Wal-Mart over child labor violations in Connecticut aroused the wrath of Congress members, who demanded that the DOL explain its decision to permit Wal-Mart to have fifteen days to fix any worker complaints before the DOL would investigate.<sup>14</sup>

Because it has not emphasized its ability to conduct audits or investigations generated internally, the DOL conducts its current wage and hour law enforcement based almost wholly on worker complaints.<sup>15</sup> This is a problem for low-wage and immigrant workers in particular, who face serious barriers to complaining to the DOL.<sup>16</sup>

In 2001, the WHD conducted as many as 55% of its investigations by fax or phone, and it is five times more likely to find violations of recordkeeping requirements when it visits a workplace.<sup>17</sup> When the risk of enforcement is small, systemic violations of wage and hour laws become the norm in these sectors.<sup>18</sup> When the DOL does enforce its workplace laws, it makes a difference in the wage

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12. U.S. DEP'T OF LABOR, FY 2008 CONGRESSIONAL BUDGET JUSTIFICATION DEPARTMENTAL MANAGEMENT DM-27 (2007), <http://www.dol.gov/dol/budget/2008/PDF/CBJ-2008-V3-02.pdf>. Although the Solicitor's office had 590 employees in January 2007, it had funding to pay for only 551 employees. *Id.* at DM-28.

13. *See, e.g.*, Press Release, Dep't of Labor, DOL Officials Travel to Provide Compliance Assistance on New Overtime Rules (June 14, 2004), <http://www.dol.gov/opa/media/press/esa/ESA20041081.htm>.

14. *See* Press Release, Representative George Miller, U.S. House of Representatives, Inspector Gen. Agrees to Review Deal Between Wal-Mart & Department of Labor, Says Miller (Feb. 18, 2005) (on file with author); *see also* Diane Stafford, *Wage and Hour Cases: Worker Advocacy Groups Object to Practice*, THE KANSAS CITY STAR, Oct. 1, 2006 (describing DOL settlements of half of unpaid wages owed).

15. *See Hearing on Oversight and Gov't Reform*, *supra* note 8, at 10.

16. For example, in 2004, seventy-four percent of all WHD enforcement was from worker complaints. David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 COMP. LAB. L. & POL'Y J. 59, 60 (2006).

17. U.S. GENERAL ACCOUNTING OFFICE (GAO), LABOR'S EFFORTS TO ENFORCE PROTECTIONS FOR DAY LABORERS COULD BENEFIT FROM BETTER DATA AND GUIDANCE 18-19 (2002), <http://www.gao.gov/new.items/d02925.pdf>.

18. David Weil, *Public Enforcement/Private Monitoring: Evaluating a New Approach to Regulating the Minimum Wage*, 58 INDUS. & LAB. REL. REV. 238, 238-57 (2005).

levels of workers in workplaces beyond those it chooses to bring enforcements actions against.<sup>19</sup>

In addition, in the context of fewer enforcement resources overall, the DOL has taken the unusual step of intervening in ongoing litigation on the side of employers. In one instance, the DOL supported the employer's argument in an opinion letter sought by a trade association during the pendency of litigation,<sup>20</sup> and in another, wrote an internal memorandum purporting to clarify the intent of its previously-enacted regulations regarding coverage of home health-care workers under minimum wage and overtime law, supporting the employer's argument while the case was pending before the U.S. Supreme Court.<sup>21</sup>

In another example of narrowly interpreting its own enforcement power, the current WHD administrator has stated on several occasions that it is not a violation of any of the laws enforced by the WHD to misclassify workers as independent contractors.<sup>22</sup> This is false, as the DOL can and should investigate any complaints by workers claiming unpaid wages, whether or not they are called independent contractors. If the DOL does not investigate workers who are called independent contractors, it will miss violations of the FLSA. In addition, it is a violation of the FLSA to fail to keep records of hours and pay for all workers. The WHD's view of its enforcement role is also unduly constricted, and sends a message to employers and employees that the WHD is not going to go out of its way to affirmatively seek out violations.

## **B. Employers Are Maneuvering in This Climate of Non-accountability**

With increasing frequency, employers misclassify employees as "independent contractors," either by giving their employees an IRS Form 1099 instead of a Form W-2, or by paying them off-the-

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19. See Weil, *Compliance*, *supra* note 4; Howard Wial, *Minimum Wage Enforcement and the Low-Wage Labor Market* 19-20 (MIT Task Force on Reconstructing America's Labor Market Institutions, Working Paper No. WP11, 1999).

20. Bureau of Nat'l Affairs, Inc., *Wage and Hour Official Faces Criticisms Over Opinion Letters Linked to Litigation*, 21 LAB. REL. WEEK 316, 316 (2007).

21. U.S. DEP'T OF LABOR, WAGE & HOUR ADVISORY MEMORANDUM, No 2005-1, APPLICATION OF SECTION 13(A)(15) TO THIRD PARTY EMPLOYERS (Dec. 1, 2005), <https://dol.gov/esa/whd/FieldBulletins/AdvisoryMemoranda2005.pdf>.

22. See, e.g., *Statement of Paul DeCamp, Administrator of the Wage & Hour Division, U.S. Dep't of Labor before the Subcomms. on Workforce Protections & Health, Employment, Labor & Pensions of the H. Comm. on Educ. & Labor*, 110th Cong. (2007), available at <http://edworkforce.house.gov/testimony/072407PaulDeCampTestimony.pdf>.

books and not reporting or paying taxes.<sup>23</sup> Businesses also insert subcontractors who are often undercapitalized, including temporary help firms and labor brokers, between them and their workers. This creates another layer of potentially-responsible entities and creates confusion among workers as to who is actually their employer.<sup>24</sup> While there are true independent business people not covered by labor and employment protections as “employees,” and while there is nothing inherently wrong with firms subcontracting-out labor, these mechanisms create barriers to enforcing the baseline work rules such as minimum wage and overtime and cost the government billions of dollars in lost tax and insurance revenues.<sup>25</sup>

### 1. *Subcontracting*

Outsourcing employees to labor intermediaries such as temporary or leasing firms or labor brokers allows companies to argue that the intermediate entity is the sole employer responsible for pay rules, and allows them to dodge responsibility.<sup>26</sup> Often, the subcontractor lacks the resources to pay legally-mandated wages.<sup>27</sup> Wal-Mart and leading restaurant chains such as Outback Steakhouses have recently come under fire for hiring cleaning services through fly-by-night labor brokers who underpay janitors.<sup>28</sup>

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23. See generally Nat'l Employment Law Project, 1099'd: Misclassification of Employees as Independent Contractors (2005), <http://www.nelp.org/docUploads/independent%20contractor%20misclassification%20Epdf> [hereinafter 1099'd].

24. See FROM ORCHARDS TO THE INTERNET, *supra* note 3; see also *Employment Arrangements: Improved Outreach Could Help Ensure Proper Worker Classification*, GAO-06-656 (July 2006).

25. See FISCAL POLICY INSTITUTE, NEW YORK STATE WORKERS' COMPENSATION: HOW BIG IS THE COVERAGE SHORTFALL? (Jan. 2007), [http://www.fiscalpolicy.org/publications2007/FPI\\_WorkersCompShortfall\\_WithAddendum.pdf](http://www.fiscalpolicy.org/publications2007/FPI_WorkersCompShortfall_WithAddendum.pdf) [hereinafter 'COVERAGE SHORTFALL'] (estimating that misclassification of workers amounts to a loss of \$500 million to \$1 billion annually in evaded workers' compensation premium); MICHAEL KELSAY ET AL., THE ECONOMIC COSTS OF EMPLOYEE MISCLASSIFICATION IN THE STATE OF ILLINOIS (Dec. 2006), [http://www.lecetchicagoarea.org/pdfs/Illinois\\_Misclassification\\_Study.pdf](http://www.lecetchicagoarea.org/pdfs/Illinois_Misclassification_Study.pdf) (estimating that misclassification of workers in 2005 resulted in a \$53.7 million loss of unemployment insurance taxes and a \$149 million to \$250 million loss of income tax, and that \$97.9 million in workers' compensation premiums were not paid properly in 2004).

26. See, e.g., Bruce Goldstein et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983, 988 (1999).

27. *Id.*; see also *Reyes v. Remington Hybrid Seed Co.*, 495 F.3d 403, 405 (7th Cir. 2007).

28. See Steven Greenhouse, *Among Janitors, Labor Violations Go with the Job*, N.Y. TIMES, July 13, 2005, at A2; *Restaurant Cleaning Company Agrees to \$63,800 Settlement*, THE BUS. REV. (ALBANY), Mar. 17, 2005, available at <http://albany.bizjournals.com/albany/stories/2005/03/14/daily41.html>.

Microsoft shifted handling of computer software programmers' pay checks to a leasing company and then argued the programmers were not entitled to Microsoft's benefits because they were not "employees" of Microsoft.<sup>29</sup>

Many companies seek to shift all employment-related responsibility to labor contractors.<sup>30</sup> When workers are fired unjustly or fail to receive the pay they are owed, companies often claim that they do not employ the workers and that the labor contractor is solely responsible.

In many settings, labor contractors need not acquire significant capital or skills to operate a business. Contractors compete for business with low bids that depend on driving labor costs lower and worker productivity higher. Many contractors do not earn enough money to pay business expenses and comply with minimum wage, overtime, workers' compensation premiums, unemployment compensation, Social Security deductions, and other basic standards, much less make a profit.<sup>31</sup> In many cases, the labor contractor accepts this scheme as the price of becoming the middleman.

A July 2007 decision from the Seventh Circuit Court of Appeals held a seed corn company responsible for the unpaid wages of workers hired and recruited by a labor broker. The court explained:

If everyone abides by the law, treating a firm . . . as a joint employer will not increase its costs. . . . Only when it hires a fly-by-night operator . . . is [the firm] exposed to the risk of liability on top of the amount it has agreed to pay the contractor. And there are ways to avoid this risk: either deal only with other substantial businesses or hold back enough on the contract to ensure that workers have been paid in full.<sup>32</sup>

## 2. *Misclassifying Workers as Independent Contractors*

In independent contractor schemes, firms argue they are off-the-hook for any violations of rules protecting "employees." This deprives workers of essential rights, including: minimum wage and overtime premium pay, a healthy and safe workplace, family and medical leave, equal opportunity, and the right to join a union and engage in collective bargaining.<sup>33</sup> Workers also lose out on safety-

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29. *Vizcaino v. Microsoft Corp.*, 97 F.3d 1187, 1190 (9th Cir. 1996).

30. See FROM ORCHARDS TO THE INTERNET, *supra* note 3.

31. *Remington*, 495 F.3d at 405.

32. *Id.* at 409.

33. See *Providing Fairness to Workers Who Have Been Misclassified as Indep. Contractors: Hearing Before the Subcomm. on Workforce Protection of the H. Comm.*



net benefits including unemployment insurance, workers' compensation, Social Security, and Medicare.<sup>34</sup> For example, FedEx calls its drivers "independent contractors," while UPS treats its drivers as employees.<sup>35</sup> By misclassifying its employees, employers stand to save upwards of 30% of their payroll costs, including employer-side FICA and FUTA tax obligations, workers' compensation and state unemployment, and disability taxes paid for "employees."<sup>36</sup> Businesses that "1099" and pay off-the-books can undercut competitors in labor-intensive sectors like construction and building services, which creates an unfair marketplace.

Labeling employees "independent contractors" is a broad problem and affects a wide range of jobs. A DOL study found that up to 30% of firms misclassify their employees as independent contractors.<sup>37</sup> At least eleven states have studied the problem and found high rates of misclassification. As many as four in ten construction workers were found to be misclassified.<sup>38</sup> An Illinois study completed in December 2006 found that nearly 20% of audited employers misclassified their employees as independent contractors. This was a 21% increase from 2001 to 2005.<sup>39</sup>

Independent contractor misclassification occurs with an alarming frequency in construction,<sup>40</sup> day labor,<sup>41</sup> janitorial and building services,<sup>42</sup> home health care,<sup>43</sup> child care,<sup>44</sup> agriculture,<sup>45</sup> poultry and

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*on Educ. & Labor*, 110th Cong. (2007) (testimony of Catherine K. Ruckelshaus, National Employment Law Project), *available at* <http://www.nelp.org/docUploads/IndependentContractorTestimony2007%2Epdf>.

34. *See id.*

35. Steven Greenhouse, *Teamsters Hope to Lure FedEx Drivers*, N.Y. TIMES, May 30, 2006, at A12 (cataloguing cases).

36. *See* 1099'd, *supra* note 23.

37. LALITH DE SILVA ET AL., PLANMATICS, INC., INDEPENDENT CONTRACTORS: PREVALENCE AND IMPLICATIONS FOR UNEMPLOYMENT INSURANCE PROGRAMS (2000), <http://wdr.doleta.gov/owsdrr/00-5/00-5.pdf> (prepared for U.S. Dep't of Labor Employment and Training Division).

38. *See* COVERAGE SHORTFALL, *supra* note 25; KELSAY ET AL., *supra* note 25; Peter Fisher et al., *Nonstandard Jobs, Substandard Benefits* (Iowa Policy Project 2005); FRANCOIS CARRE & J.W. McCORMACK, CONST. POLICY RESEARCH CTR., THE SOCIAL AND ECONOMIC COST OF EMPLOYEE MISCLASSIFICATION IN CONSTRUCTION 1 (2004); STATE OF N.J., COMMISSION OF INVESTIGATION, CONTRACT LABOR: THE MAKING OF AN UNDERGROUND ECONOMY 2 (1997).

39. KELSAY ET AL., *supra* note 25, at 4.

40. *See* CARRE & WILSON, *supra* note 38, at 2.

41. *See* Abel Valenzuela et al., *On the Corner: Day Labor in the United States* (2006), [http://www.sscnet.ucla.edu/issr/csup/uploaded\\_files/Natl\\_DayLabor-On\\_the\\_Corner1.pdf](http://www.sscnet.ucla.edu/issr/csup/uploaded_files/Natl_DayLabor-On_the_Corner1.pdf).

42. *See* Coverall N. Am., Inc. v. Comm'r of the Div. of Unemployment Assistance, 447 Mass. 852, 859 (2006); Vega v. Contract Cleaning Maint., 10 Wage & Hour Cas. 2d (BNA) 274 (N.D. Ill. 2004).

meat processing,<sup>46</sup> high-tech,<sup>47</sup> delivery,<sup>48</sup> trucking,<sup>49</sup> home-based work,<sup>50</sup> and the public sectors.<sup>51</sup>

Misclassification results in an enormous loss of revenue for federal and state governments in the form of unpaid and uncollectible income taxes, payroll taxes, unemployment insurance, and workers' compensation premiums. In 1996, a federal commission estimated that the annual loss in federal tax revenues from misclassification would be \$3.3 billion. That was more than ten years ago. Coopers & Lybrand (now PriceWaterhouse Coopers) estimated in 1994 that proper classification of employees could increase tax receipts by \$34.7 billion over the period from 1996 to 2004.<sup>52</sup>

Several states have recently collected data on the costs of misclassifying employees as independent contractors. The numbers of lost payroll and other taxes are staggering. A tally of the losses reported in just four of the state studies amounts to approximately \$1.6 billion in lost revenue annually.<sup>53</sup>

43. See *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983).

44. See, e.g., Ill. Exec. Order No. 1, Exective Order on Collective Negotiation by Day Care Home Providers (2005), available at <http://www.gov.il.gov.gov/execorder.cfm?eorder=34> (conferring bargaining status on child day-care workers otherwise called independent contractors).

45. See *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529 (7th Cir. 1988).

46. See *Employment Arrangements: Improved Outreach Could Help Ensure Proper Worker Classification*, 30 (GAO-06-656 2006) [hereinafter *Employment Arrangements*] (on file with the author).

47. See *Vizcaino v. Microsoft*, 97 F.3d 1187, 1196 (9th Cir. 1996).

48. See *Ansoumana v. Gristede's Operating Corp.*, 255 F. Supp. 2d 184, 192 (S.D.N.Y. 2003).

49. See *Greenhouse*, *supra* note 35.

50. See *Employment Arrangements*, *supra* note 46, at 31.

51. See *New Study Documents Systematic Effort by Offshore Contractors To Target State Government Work*, GOOD JOBS FIRST, July 14, 2004, [http://www.goodjobsfirst.org/publications/Offshoring\\_release.cfm](http://www.goodjobsfirst.org/publications/Offshoring_release.cfm) (citing a report by the Corporate Research Project of Good Jobs First entitled *Your Tax Dollars at Work . . . Offshore* which "spotlights the growing degree to which state governments are contracting with foreign outsourcing firms for public contracts and are funneling millions of state taxpayer dollars offshore").

52. See OFFICE OF THE SEC'Y SPECIAL REPORT, U.S. DEP'T OF LABOR, CONTINGENT WORKERS, [http://www.dol.gov/\\_sec/media/reports/dunlop/section5.htm](http://www.dol.gov/_sec/media/reports/dunlop/section5.htm) (citing a 1994 study by the accounting firm Coopers & Lybrand that estimated a \$3.3 billion loss) (last visited Feb. 18, 2008).

53. This rough tally of the loss estimates listed below uses the high-end for those estimates that reported a range of loss estimates. See *COVERAGE SHORTFALL*, *supra* note 25, at 2 (estimating that misclassification of workers amounts to a loss of \$500 million to \$1 billion annually in evaded workers' compensation premium); *KELSAY ET AL.*, *supra* note 25, at 6 (estimating that misclassification of workers in 2005 re-

Adding to the magnitude of the problem, most government-commissioned studies do not capture the so-called “underground economy,” where workers are paid off-the-books, sometimes in cash.<sup>54</sup> These workers are de facto misclassified independent contractors, because the employers do not withhold and report taxes or comply with other basic workplace rules. Immigrant and lower-wage workers fill many of these jobs.<sup>55</sup>

### **C. Workers Face Significant Barriers to Private Enforcement of Wage and Hour Standards**

Employees with wage and hour complaints face significant barriers to seeking redress for those violations. Because employment in the United States is at-will, most workers fear employer reprisals for complaining about wage and hour violations, including losing their jobs.<sup>56</sup> In addition, as illustrated above, public agency enforcement at the DOL has largely abandoned audit- and investigation-based enforcement, to become primarily reliant on worker complaints.<sup>57</sup> In the face of government non-involvement, private lawsuits have become more popular, but employees bringing private lawsuits cannot bring class actions because of a unique federal law limitation in the federal FLSA requiring each individual worker to affirmatively opt-in to a lawsuit by filing a written consent to sue with the court.<sup>58</sup> This mechanism, not found in almost all other labor and employment laws, hampers the workers' ability to stand up for their rights as a group.<sup>59</sup> Immigrant workers face an additional barrier to enforcing their rights if the employer threatens to or does in fact call in the Bureau of Immigration and Customs Enforcement (“ICE”), which has the power to detain and, in some cases, deport workers without work authorization.

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sulted in a \$53.7 million loss of unemployment insurance taxes and a \$149 million to \$250 million loss of income tax, and that \$97.9 million in workers' compensation premiums were not paid properly in 2004).

54. ANNETTE BERNHARDT ET AL., UNREGULATED WORK IN THE GLOBAL CITY (2007), [http://www.brennancenter.org/dynamic/subpages/download\\_file\\_49436.pdf](http://www.brennancenter.org/dynamic/subpages/download_file_49436.pdf).

55. See CARRE & MCCORMACK, *supra* note 38, at 8.

56. See Pauline T. Kim, *Privacy Rights, Public Policy, and the Employment Relationship*, 57 OHIO ST. L.J. 671, 671 (1996).

57. See *infra* Part I.A.

58. 29 U.S.C.A. § 216(b) (West 2007).

59. Only the Age Discrimination in Employment Act and the Equal Pay Act adopt the FLSA's opt-in mechanism for collective actions.

## 1. *Decline of Unions*

Unions are an important protective buffer for workers seeking to improve their jobs, and a lack of union presence in the workplace causes workplace standards to decline.<sup>60</sup> Ninety percent of workers in this country are not represented by a union, even though most workers (57%) would vote for a union if an election were held at their worksite.<sup>61</sup> Without the security a union offers, individual workers are much less likely to come forward to complain about or enforce their rights.

Additionally, without a union, employment is “at-will.” This means an employer may terminate its employee when it wishes, “for good cause, for no cause, or even for a reason that is morally wrong, without being legally wrong.”<sup>62</sup> Thus, the vast majority of workers may risk losing their jobs if they complain.

## 2. *Fear of Reprisals*

Workers fear retaliation (including termination) by their employers if they complain, which may cause them to quietly accept substandard conditions.<sup>63</sup> The United States General Accounting Office (“GAO”) observed in a report on day labor in the United States that government agencies are unable to do their job with respect to day laborers because they do not find out about violations.<sup>64</sup>

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60. See, e.g., Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319 *passim* (2005) (describing the important role unions play in monitoring worksite conditions in today’s era of “chronic under enforcement” of workplace standards); David Weil, *Enforcing OSHA: The Role of Labor Unions*, 30 INDUS. REL. 21, 22 (1991).

61. See Frank Swoboda, *Labor Unions See Membership Gains*, WASH. POST, Jan. 20, 2000, at E2; PETER D. HART RESEARCH ASSOCIATES, *THE PUBLIC VIEW OF UNIONS* (2005).

62. *Payne v. W. & Atl. R.R.*, 81 Tenn. 507, 519-20 (1884).

63. This fear persists despite the FLSA’s prohibition against retaliation, contained in 29 U.S.C. § 215(a)(3) (West 2007). See, e.g., *Mitchell v. Robert de Mario Jewelry*, 361 U.S. 288, 292 (1960); *Contreras v. Corinthian Vigor Ins. Brokerage, Inc.*, 25 F. Supp. 2d 1053, 1058-59 (N.D. Cal. 1998). See generally Jennifer Berman, *The Needle and the Damage Done: How Hoffman Plastics Promotes Sweatshops and Illegal Immigration and What to Do about It*, 13 KAN. J.L. & PUB. POL’Y 585, 588 (2004); Lora Jo Foo, *The Informal Economy: The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 YALE L.J. 2179, 2184 (1994); Christopher Ho & Jennifer Chang, *Drawing the Line after Hoffman Plastic Compounds, Inc. v. NLRB: Strategies for Protecting Undocumented Workers in the Title VII Context and Beyond*, 22 HOFSTRA LAB. & EMP. L.J. 473, 492 (2005).

64. See U.S. GENERAL ACCOUNTING OFFICE, *WORKER PROTECTION: LABOR’S EFFORTS TO ENFORCE PROTECTIONS FOR DAY LABORERS COULD BENEFIT FROM*

Undocumented workers are particularly vulnerable to workplace abuse, discrimination, and exploitation, as well as the fear of being turned over to ICE.<sup>65</sup> Recent ICE raids on workplaces with pending workplace violation investigations create confusion and fear among workers, and send a message that the U.S. government will enforce immigration laws against workers, but not labor standards laws against employers.<sup>66</sup>

When workers fear coming forward to complain of unpaid wages, it chills enforcement of the wage laws and financially rewards employers who illegally underpay their employees. Workers routinely must quietly accept violations of their rights.

### 3. *Private Enforcement Problems*

In recent years, in part due to the DOL's quiescence, workers have turned to the courts to enforce their fair pay rights in increasing numbers.<sup>67</sup> These lawsuits have brought important back wage remedies to large numbers of workers and, in some cases, lasting changes in firms' pay practices.<sup>68</sup> Even if massive DOL enforcement reform is achieved, private wage and hour enforcement by workers will continue to be an important supplement to ensure compliance.

The primary obstacle workers face is the requirement that each complaining worker affirmatively consents or "opts-in" to a lawsuit.<sup>69</sup> This condition blocks many workers from pursuing their claims privately, because workers fear reprisals, including job loss,

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BETTER DATA AND GUIDANCE, GAO 02-925 14 (2002), <http://www.gao.gov/new.items/d02925.pdf>.

65. See, e.g., *Rivera v. NIBCO*, 364 F.3d 1057, 1064 (9th Cir. 2004).

66. See Brent Hunsberger, *Fresh Del Monte Subject of Worker Safety Probes*, THE OREGONIAN, Jun. 13, 2007, available at [http://blog.oregonlive.com/business/2007/06/fresh\\_del\\_monte\\_subject\\_of\\_wor.html](http://blog.oregonlive.com/business/2007/06/fresh_del_monte_subject_of_wor.html) (describing an ICE raid on a Del Monte plant that had two pending OSHA investigations underway, where workers were rounded up and detained).

67. See *Wage Hour Collective Actions Jumped 70 Percent Since 2000*, DAILY LAB. REP. (BNA), Mar. 26, 2004; *Wage-Hour Actions Surpassed EEO in Federal Courts Last Year, Survey Shows*, DAILY LAB. REP. (BNA), Mar. 22, 2002, at C1; Admin. Office of the U.S. Courts, Federal Judicial Caseload Statistics, *Number of Wage and Hour Lawsuits Up Again in 2006* (2001-2006) (on file with author).

68. See, e.g., *Ansoumana v. Gristede's Operating Corp.*, 255 F. Supp. 2d 184 (S.D.N.Y. 2003) (retail chains eliminated middlemen labor brokers and hired delivery persons directly after FLSA lawsuit).

69. See 29 U.S.C.A. § 216(b) (West 2007). For an analysis of the problems that arise under Section 216(b), see Craig Becker & Paul Strauss, *Representing Low-Wage Workers in the Absence of a Class: The Peculiar Case of Section 16 of the Fair Labor Standards Act & the Underenforcement of Minimum Labor Standards*. 92 MINN. L. REV. (forthcoming Spring 2008).

often putting them in a job-or-pay situation. In addition, individual workers' claims for unpaid wages often do not amount to enough to make expensive litigation economically feasible, and thus, workers lose access to the courts.<sup>70</sup> The opt-in structure also means other worker representatives may not bring a lawsuit on behalf of a group of co-workers, as is the case in almost every other federal labor and employment law.<sup>71</sup>

Under the FLSA, workers must affirmatively opt-in to a collective action by filing a written "consent to sue" with the court or by signing their name to a complaint stating their intention to proceed collectively.<sup>72</sup> Until a worker opts-in, the statute of limitations runs, unlike a Federal Rule of Civil Procedure 23 class action, which tolls the statute of limitations once the lawsuit is filed for a putative class.<sup>73</sup> Because workers have only two years from the onset of any wage and hour violation to file a claim under federal law, time is of the essence. When workers are reluctant to come forward alone, and are more likely to complain with the protection of a group of co-workers, the FLSA's notice and consent-to-sue requirement further limits workers' ability to recover back wages because each week that is lost means less unpaid wages owed by the employer.

In contrast, nearly all other labor and employment laws, including Title VII of the Civil Rights Act of 1964,<sup>74</sup> ERISA,<sup>75</sup> and other federal workplace protective laws, use the Federal Rules of Civil Procedure class action procedures under rule 23, which allow workers to proceed as a group if all elements of the rule are met.<sup>76</sup> The statute of limitations clock is stopped for all workers in a potential class upon filing a lawsuit.<sup>77</sup> In rule 23 class actions, workers receive notice of a potential class action and are included in the class unless they affirmatively opt-out of the lawsuit.<sup>78</sup>

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70. See, e.g., *Ansoumana v. Gristede's Operating Corp.*, 201 F.R.D. 81, 85-86 (S.D.N.Y. 2001) (individual suits as an alternative to class actions are not practical because some claims are not large enough to provide an incentive for individual action.); *Bell v. Farmers Ins. Exch.*, 87 Cal. App. 4th Supp. 705, 745 (Cal. App. Dep't Super. Ct. 2001).

71. See *supra* note 59.

72. 29 U.S.C.A. § 216(b).

73. See *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 134 (1988); see also *FED. R. CIV. P.* 23.

74. 42 U.S.C.A. § 2000(e) (West 2007).

75. 29 U.S.C.A. § 1132(a) (West 2007).

76. See *FED. R. CIV. P.* 23.

77. See *Chardon v. Fumero Soto*, 462 U.S. 650, 662 (1983).

78. See *Crown, Cork & Seal v. Parker*, 462 U.S. 345, 351 (1983); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 181 (1974).

For several reasons, including fear of reprisal and an unwillingness to act, individuals typically do not respond to notices of collective action by taking affirmative steps to opt-in or opt-out of class action lawsuits. This means that an opt-in rule, like the FLSA's, tends to produce low participation rates while an opt-out rule tends to produce high participation rates relative to potential class size. The FLSA's opt-in rule thus results in smaller numbers of employees participating in a lawsuit and substantially less exposure to liability for employers, who then have less to fear and less incentive to change their pay practices when caught. The opt-in regime undermines wage and hour enforcement.<sup>79</sup>

As the Supreme Court has observed:

The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.<sup>80</sup>

For an individual employee to hire a private attorney to press a claim in court for unpaid overtime or minimum wages against an employer, a worker would likely have to spend a good part of his or her annual salary to retain the attorney. If the worker could convince the private attorney to represent him, the attorney would require periodic fee payments. While the FLSA permits recovery of attorneys' fees for successful plaintiffs, the actual amounts recovered in low-wage cases are often insufficient to tempt private attorneys to undertake the case.<sup>81</sup> As the fight in court against the employer progressed, the individual worker would have to continue to make periodic fee payments, pay for discovery, preliminary discovery motions, and any substantive legal motions filed by either side. For a relatively small amount of damages, this is not economically feasible for the vast majority of workers.

A district court in Minnesota, granting class action status in a wage and hour lawsuit against Wal-Mart, concluded:

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79. See Marc Linder, *Class Struggle at the Door: The Origins of the Portal-to-Portal Act of 1947*, 39 BUFF. L. REV. 53, 167 (1991) (noting that the opt-in requirement "has injured unorganized workers, who, deprived of the opt-out class action, are remitted to a very ineffectual means of pressuring employers to comply with FLSA").

80. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)).

81. See 29 U.S.C. § 216(b) (West 2007).

With individual claims of this size, members of the class have little practical ability to prosecute their claims in separate actions, in light of the substantial cost associated with gathering and presenting the evidence described above. If the class is not certified, individual claimants effectively would be denied any remedy because the expense of prosecuting individual claims likely would vastly exceed the amount in controversy for each claim.<sup>82</sup>

Private enforcement by workers and their representatives can serve an important deterrent effect. Individual lawsuits can recover attorneys' fees, liquidated damages at twice the amount of unpaid wages, and compensatory and even punitive damages in retaliation claims.<sup>83</sup> The statute of limitations is two years, but may be extended to three, if the employer's behavior is willful.<sup>84</sup> The DOL does not seek these full remedies often while private litigants often seek full recourse.

#### **D. Many Jobs Do Not Even Pay the Basic Minimum Wage and Overtime Pay**

Because of the confluence of these trends, it should come as no surprise that workplace standards are on the decline. Recent government and private studies show many of our fastest-growing service jobs have appalling minimum wage and overtime compliance rates:<sup>85</sup>

- A majority of restaurants in New York City are out of compliance;<sup>86</sup>
- Twenty-six percent of domestic workers in New York City earn below the poverty line;<sup>87</sup>

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82. *Braun v. Wal-Mart Stores, Inc.*, No. 19-CO-01-9790, 2003 WL 22990114, at \*12 (Minn. Dist. Ct. Nov. 3, 2003).

83. 29 U.S.C.A. § 216(b).

84. *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2176 (2007) (citing 29 U.S.C.A. § 255(a) (West 2007)).

85. For more statistics and information on the numbers of workers in the growing job sectors, see  *Holding the Wage Floor*, *supra* note 2.

86. RESTAURANT OPPORTUNITIES CENTER OF NEW YORK & NEW YORK CITY RESTAURANT INDUSTRY COALITION, *BEHIND THE KITCHEN DOOR: PERVASIVE INEQUALITY IN NEW YORK CITY'S THRIVING RESTAURANT INDUSTRY* (2005), <http://www.urbanjustice.org/pdf/publications/BKDFinalReport.pdf>.

87. DOMESTIC WORKERS UNITED AND DATACENTER, *HOME IS WHERE THE WORK IS: INSIDE NEW YORK'S DOMESTIC WORK INDUSTRY, EXECUTIVE SUMMARY 85* (2006), <http://www.datacenter.org/reports/homeiswheretheworkis.pdf>.



- Retail workers comprise three-fifths of the 2.2 million at-or-below-minimum-wage workers nationwide in the Bureau of Labor Statistics Survey of Households 2002 study;<sup>88</sup>
- Fifty percent of day laborers suffer wage theft;<sup>89</sup>
- Sixty percent of nursing homes are out of compliance;<sup>90</sup>
- One in five home health-care aides lives below the poverty level;<sup>91</sup>
- Poultry processing has a one hundred percent noncompliance rate;<sup>92</sup>
- Garment manufacturing has a fifty percent noncompliance rate.<sup>93</sup>

Workers in many of these jobs make the minimum wage or less. The federal minimum wage is currently \$5.85 per hour. For a full-time worker, that translates into an annual income of only \$12,168. The federal poverty level is \$13,690 for a family of two, meaning that minimum wage earners are not making enough to meet even that meager standard of sustainability and are otherwise eligible for public benefits.<sup>94</sup>

What does all of this mean? It means we have an underclass of hard-working men and women who cannot make ends meet for their families. In 2004, 7.8 million people in our country were classified as “working poor,” working at least twenty-seven hours per week but still making below the federal poverty level.<sup>95</sup> According to the Bureau of Labor Statistics, two million workers make at or below the minimum wage. The Urban Institute found that 2.2 mil-

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88. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, CHARACTERISTICS OF MINIMUM WAGE WORKERS: 2002 (2003), <http://www.bls.gov/cps/minwage2002.htm> [hereinafter CHARACTERISTICS].

89. Valenzuela et al., *supra* note 41, at 14.

90. Employment Standards Administration, U.S. Dep't of Labor, Nursing Home 2000 Compliance Fact Sheet, <http://www.dol.gov/esa/healthcare/surveys/nursing2000.htm> (last visited Jan. 25, 2008).

91. *Nursing Workforce, Recruitment and Retention of Nurses and Nurse Aides Is a Growing Concern: Testimony Before the S. Comm. on Health, Education, Labor & Pensions*, 107th Cong. (2001), available at <http://www.gao.gov/new.items/d01750t.pdf> (statement of William J. Scanlon, Director, Health Care Issues).

92. NAT'L EMPLOYMENT LAW PROJECT, LOW PAY, HIGH RISK: STATE MODELS FOR ADVANCING IMMIGRANT WORKERS' RIGHTS 2 (2003), <http://www.nelp.org/doc/Uploads/lphrintro112603.pdf>.

93. *Close to Half of Garment Contractors Violating Fair Labor Standards Act*, DAILY LAB. REP., May 6, 1996.

94. U.S. DEP'T OF HEALTH & HUMAN SERVICES, THE 2007 HHS POVERTY GUIDELINES (2008), <http://aspe.hhs.gov/poverty/07poverty.shtml>.

95. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, A PROFILE OF THE WORKING POOR, 2004 (2006), <http://www.bls.gov/cps/cpswp2004.pdf>.

lion immigrant workers make less than the minimum wage.<sup>96</sup> The employer-backed Employer Policy Foundation estimated that workers would receive an additional nineteen billion dollars annually if employers obeyed workplace laws.<sup>97</sup>

## II. FOUR LABOR-LED INNOVATIONS THAT MIGHT MAKE A DIFFERENCE

Labor organizations have stepped into this void and instigated several innovative efforts to reverse these trends, four of which are described below. These efforts seem promising, and could be replicated in other contexts to create an even larger impact in the war against unpaid wages and poor labor standards.

### A. Labor-management Funded “Taft-Hartley Funds”

Labor-management partnerships between the Maintenance Cooperation Trust Fund (“MCTF”) and a national network of fair contracting organizations affiliated with the National Alliance for Fair Contracting (“NAFC”) aim to stem wage and hour and other labor standards abuses in the janitorial and construction sectors. Also called “Taft-Hartley funds,” labor-management cooperation committees permit employers to finance labor-management organizations established for mutually-beneficial purposes.<sup>98</sup> The MCTF and construction industry fair contracting funds, jointly governed by the union and contributing employers, attempt to curb wage and hour abuses in their industries, promote fair competition, and uphold labor standards in their industries.

The MCTF and the NAFC affiliates confront common industry practices that drive pay lower. Property owners subcontract out labor-intensive work and encourage intense competition for bids by rewarding the lowest bidder, whose only real margin is in its labor costs. Worker pay and benefits (if any) are the fungible costs for these contractors, and they compete by chiseling payroll and related labor costs to subpar levels. Law-abiding contractors in

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96. See CHARACTERISTICS, *supra* note 88; RANDY CAPPS ET AL., A PROFILE OF THE LOW-WAGE IMMIGRANT WORKFORCE (2003), [http://www.urban.org/UploadedPDF/310880\\_lowwage\\_immig\\_wkfc.pdf](http://www.urban.org/UploadedPDF/310880_lowwage_immig_wkfc.pdf).

97. Suzanne M. Crampton et al., *The FLSA and Overtime Pay*, 32 PUB. PERSONNEL MGMT. 331, 331 (2003), available at <http://www.entrepreneur.com/tradejournals/article/print/160714654.html>.

98. In 1978, Congress passed the Labor Management Cooperation Act, adding section 302(c)(9) to the Labor Management Relations Act (also known as the Taft-Hartley Act), permitting jointly-funded and jointly-governed labor-management entities.

these fields cannot compete for business if these low-ball contractors are permitted to continue operating, and it is the latter group of contractors who joined together with the unions to create these innovative labor standards enforcement organizations.

### 1. *The Maintenance Cooperation Trust Fund*

MCTF, a janitorial watchdog,<sup>99</sup> was established in 1999 by Local 1877 of the Service Employees International Union (“SEIU”), a 25,000-member local in California,<sup>100</sup> and leading janitorial cleaning contractors that have collective bargaining agreements with Local 1877. Its mission is to abolish unfair business practices in the janitorial industry through education of workers and employers, investigating cleaning contractors’ labor conditions, and enhancing enforcement by public agencies and private attorneys.<sup>101</sup> Its purposes are to stop the “unacceptable treatment of janitors” and to promote high-road jobs in the industry by rewarding the law-abiding contractors.<sup>102</sup>

Signatory contractors pay between \$.01 and \$.05 for every hour worked by their employees to fund MCTF.<sup>103</sup> Currently, the organization has a staff of seven to cover all of California. According to a janitorial firm executive on MCTF’s Board, MCTF unionized signatory contractors want to “level the playing field.”<sup>104</sup>

MCTF arose out of and thus knows first-hand the structural enforcement challenges inherent in industries like janitorial services. Subcontracting firms argue they are not the responsible employer, pointing instead to the contractors.<sup>105</sup> This promotes confusion for workers, who often do not know who their “employer” is, and erects barriers to enforcement for public agencies and private litigants, who must first prove labor standards responsibility. Some

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99. See Leonel Sanchez, *Watchdog Group Helps Keep Janitorial Contractors Clean*, SAN DIEGO UNION, Jan. 28, 2004, at C1.

100. See Service Employees Int’l Union Local 1877, <http://www.seiu1877.org/> (last visited Jan. 25, 2008).

101. Telephone Interview with Lilia Garcia, Executive Dir., MCTF (July 24, 2007) (on file with author) [hereinafter Garcia Interview].

102. Lilia Garcia, *The Maintenance Cooperation Trust Fund: Collective Action with Responsible Employers to Prevent Worker Exploitation & Unfair Competition 15* (unpublished draft on file with author).

103. Garcia Interview, *supra* note 101.

104. Sanchez, *supra* note 99.

105. See *id.* (noting that in MCTF’s lawsuit against grocery stores, the stores claimed the janitors were not their employees under wage and hour laws).

firms call their janitors “independent contractors” or “franchisees,” seeking to evade basic labor and workplace protections.<sup>106</sup>

These same subcontracting firms encourage a race-to-the-bottom in pay. This creates an incentive for contractors to seek out and hire the most vulnerable workers, like immigrants, who need jobs and will be less likely to complain.<sup>107</sup> MCTF aims to educate and mobilize janitors to understand their industry and take steps to help combat sweatshop jobs. It seeks out former janitors fluent in Spanish to conduct the outreach and interviewing that is so crucial to its mission.<sup>108</sup> The janitorial industry has changed from a largely African-American unionized workforce to an immigrant-dominated, lower-paid, and non-unionized labor force in the last few decades.<sup>109</sup> Janitors typically work through the night in isolated buildings, making outreach and communication with workers difficult for union organizers and agency enforcement personnel.

When discussing outreach, MCTF’s Executive Director, Lilia Garcia, talks of reaching the “decision makers” in the industry, meaning all players, from the building owners and janitorial contractors, to the public agencies responsible for enforcing labor standards, like wage and hour, workers’ compensation, and health and safety rules.<sup>110</sup> Through the use of carrot and stick strategies, MCTF cajoles, exposes, and finally sues violators if they refuse to change. Bringing the state wage and hour enforcement agency or a private class action lawsuit to a problem contractor are important tools to encourage compliance, and one of the primary ways MCTF uses its scarce resources.<sup>111</sup> If the state agency is engaged, MCTF helps by investigating facts, bringing workers to the agency for interviews and follow-up, and continually monitoring ongoing agency enforcement. Private litigation proceeds in much the same way, with MCTF playing a close role with the workers.<sup>112</sup>

MCTF enters into monitoring agreements with trouble-prone contractors to ensure compliance beyond the initial enforcement activity.<sup>113</sup> After the MCTF sent the DOL to investigate janitors’

106. Nancy Cleeland, *Heartache on Aisle Three: Sweatshop for Janitors*, L.A. TIMES, July 2, 2000, at A1.

107. *See id.*

108. Garcia Interview, *supra* note 101.

109. *See* Garcia, *supra* note 102, at 2; Cleeland, *supra* note 106, at A1.

110. Garcia, *supra* note 102, at 4-5.

111. *See id.* at 8; *see also* Steven Greenhouse, *U.S. Wins Back Pay for Janitors*, N.Y. TIMES, Aug. 26, 2004, at A16 [hereinafter Greenhouse, *U.S. Wins Back Pay*].

112. Garcia Interview, *supra* note 101.

113. *Id.*

wages in Target stores and the DOL settled with Target for \$1,900,000, MCTF entered into a monitoring agreement with Target's cleaning contractor.<sup>114</sup> These monitoring agreements have their own limitations, including enforcement and fact-gathering, but are increasingly useful in nonunion workplaces in particular.<sup>115</sup> Garcia wants "sustainable compliance," and sees monitoring agreements as one potential source.<sup>116</sup>

MCTF has also succeeded on the legislative and regulatory fronts in California. It helped found a larger coalition of immigrant rights, labor and civil rights groups—Coalition of Immigrant Worker Advocates ("CIWA")—which ultimately successfully pushed for legislation and inter-agency collaborations at the state level to enhance enforcement and clean-up of underground economy jobs in California.<sup>117</sup>

Garcia identified the two primary challenges she faces in her work: there are never enough resources to respond to every problem MCTF encounters, and MCTF is decidedly not set up to be a legal services organization for individual workers with unpaid wages problems.<sup>118</sup> In addition, a worker's immigration status creates barriers to enforcement due to fear. In one high-profile case, MCTF helped to bring an action against grocery stores for underpaid janitors. The workers had to go to court to prohibit the stores from inquiring into the janitors' immigration status.<sup>119</sup> Garcia says MCTF has to be more strategic when using the media in today's harsh anti-immigrant climate. Long a primary tool of the organization, which has expertly worked with the press in bringing attention to the industry,<sup>120</sup> Garcia admits that her tactics have become quieter in her campaigns now, for fear that the ICE will raid

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114. See Greenhouse, *U.S. Wins Back Pay*, *supra* note 111.

115. See generally Estlund, *supra* note 1, at 353.

116. Garcia Interview, *supra* note 101.

117. See Victor Narro, *Impacting Next Wave Organizing: Creative Campaign Strategies of the Los Angeles Worker Centers*, 50 N.Y.L. SCH. L. REV. 465, 504-07 (2005) (describing California SB 1818, affirming that immigration status is not relevant for purposes of coverage under and remedies available for wage and hour, health and safety, and other state laws; California SB 179, the financially responsible contractor law; and MCTF and CIWA's advocacy for those laws). MCTF as part of CIWA also successfully supported a bill (AB 613) to add janitorial services to the California Targeted Industries Partnership Program, a joint enforcement task force that addresses workplace abuses in low-wage industries. See Cleeland, *supra* note 106.

118. Garcia Interview, *supra* note 101.

119. See Sanchez, *supra* note 99.

120. See, e.g., Steven Greenhouse, *Illegally in U.S., and Never a Day Off at Wal-Mart*, N.Y. TIMES, Nov. 5, 2003; Steven Greenhouse, *Among Janitors, Labor Violations Go with the Job*, N.Y. TIMES, July 13, 2005, at A1.

worksites where janitors are calling attention to unfair labor practices. MCTF is now working on a community-wide response to the recent aggressiveness in concert with its partners in CIWA.<sup>121</sup>

Can MCTF change business practices? Going after subcontractors, no matter how big, doesn't stop subcontracting firms from ceasing to do business with the cleaning contractor once it becomes a target of wage enforcers. Target Stores did just that to its big cleaning contractor, Global Building Services, so MCTF's enforcement results were short-lived because MCTF's agreement was with Global.<sup>122</sup> Targeting worksite building owners or tenants who engage the cleaning contracting firms, as SEIU's "Justice for Janitors" campaign did, has longer lasting impacts because the building owner or tenant has to comply with the agreement, regardless of the cleaning contractor it uses.

Creating lasting change in the public agencies is an additional hurdle to success for MCTF in Garcia's eyes; the state agencies are susceptible to political pressures not to over-enforce labor standards laws, and MCTF constantly fights that countervailing urge. A good portion of MCTF's limited resources are spent educating and working closely with state agency investigators and Garcia wonders whether that intensity pays off.<sup>123</sup> Garcia responds modestly that her organization is "by no means a success," because she's just fighting for the floor, essentially the minimum wage and overtime, not a living wage.<sup>124</sup>

## 2. *National Alliance for Fair Contracting ("NAFC")*

NAFC is a national network of labor-management organizations founded in the late 1990's, whose members include fair contracting organizations, labor-management groups, contractors, contractor associations, international and local unions, and building and construction trade councils.<sup>125</sup> Its mission is to promote fair contracting approaches to create a level playing field for responsible bidders on publicly-financed construction projects.<sup>126</sup> NAFC brings together labor, management, and government to enforce the Davis-Bacon Act and related prevailing wage acts by bringing the

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121. Garcia Interview, *supra* note 101.

122. See Estlund, *supra* note 1, at 363 n.45.

123. See *id.*

124. Garcia Interview, *supra* note 101.

125. Nat'l Alliance for Fair Contracting, <http://www.faircontracting.org> (last visited Jan. 25, 2008).

126. Telephone Interview with Phillis Payne, Gen. Counsel, Nat'l Alliance for Fair Contracting (July 30, 2007) (on file with author) [hereinafter Payne Interview].

perspective of both contractors and workers to the public contract process. It serves as a clearinghouse for information on prevailing wages and public works, and it sponsors educational seminars on public works compliance. Recently, NAFC has become active in combating independent contractor misclassification, a rampant problem in construction jobs, and has sponsored studies to determine the costs of independent contractor abuses.<sup>127</sup> NAFC currently has over twenty-five affiliated fair contracting groups around the country.<sup>128</sup>

Fair contracting groups in the construction industry arose in the 1980s, after the national highway construction boom in the 1950's where publicly-funded heavy highway construction projects began in earnest, the rise of the building and construction trades in the AFL-CIO, and the Taft-Hartley labor-management committee addition in 1978.<sup>129</sup>

Karen Courtney, the Executive Director of the NAFC-affiliated Foundation for Fair Contracting Massachusetts ("FFCM"), established in 1992, described her organization's job as helping unionized construction firms to compete in a low-bid scenario when government oversight is limited.<sup>130</sup> FFCM educates and provides direct assistance to non-unionized construction workers with wage and hour violations. It meets these mostly-immigrant workers through its connections to community groups and its access to certified payroll reports. FFCM also works directly with the state agencies charged with enforcing the prevailing wage law, provides site-specific information on payroll problems, gathers evidence of violations, and keeps track of any investigations or cases the agencies opened.<sup>131</sup> Courtney believes that this kind of intensive work is key to effective enforcement.

Like the MCTF, employer contributions to labor-management committees fund NAFC affiliates.<sup>132</sup> FFCM is funded by a \$0.2 per "man-hour worked" fee, and is jointly governed by construction contractors and partner unions representing laborers, carpenters,

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127. See Prevailing Wage Studies, Nat'l Alliance for Fair Contracting, <http://www.faircontracting.org/NAFCnewsite/prevwage.htm> (last visited Jan. 25, 2008).

128. See Fair Contracting Groups, Nat'l Alliance for Fair Contracting, <http://www.faircontracting.org/NAFCnewsite/faircontgroups.htm> (last visited Jan. 25, 2008).

129. Payne Interview, *supra* note 126.

130. Telephone Interview with Karen Courtney, Executive Dir., Found. for Fair Contracting Mass. (Aug. 29, 2007) (on file with author).

131. *Id.*

132. *Id.*

electricians, roofers, and other trades.<sup>133</sup> With a staff of six, the biggest challenge FFCM faces, according to Courtney, is finding resources.<sup>134</sup> FFCM's strength is its credibility in the field. State agency inspectors know and respect its work, as do workers and contractors. Contractors see that a lack of enforcement of wage laws impacts their business.<sup>135</sup>

NAFC and its affiliate the Indiana, Illinois & Iowa Foundation for Fair Contracting were instrumental in helping pass Illinois' landmark Employee Classification Act, which plugs loopholes in construction contractors' abuse of "independent contractor" misclassifications.<sup>136</sup>

## **B. AFL-CIO's New National Worker Center Partnership**

Since the mid-1990's, the AFL-CIO has worked more closely with community groups and immigrant worker communities outside the federation's membership ranks. These collaborations have spawned new partnerships with leading worker center networks.

Community-based organizing groups aimed at improving the work lives of lower-wage and often immigrant workers have become an important educational, advocacy, and mobilizing force in our country. Loosely called "worker centers," they are often established to organize workers in specific jobs, like restaurant workers<sup>137</sup> or day laborers.<sup>138</sup> Others organize immigrant and low-wage workers in a city or locality, targeting campaigns at a variety of "bad apple" employers from a variety of job sectors. Examples include the various worker centers in the Interfaith Worker Justice ("IWJ") network of faith-based worker centers,<sup>139</sup> the Chinese

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133. *Id.*

134. *Id.*

135. *Id.*

136. For a copy of the bill, see <http://www.ilga.gov/legislation/> (search "HB1795"; then follow "Full Text" hyperlink).

137. A leading example is the Restaurant Opportunity Center of New York, created by workers employed by the restaurant Windows on the World after the September 11, 2001 attack on the World Trade Center. See Restaurant Opportunities Center of New York (ROC-NY), <http://www.rocny.org> (last visited Jan. 25, 2008).

138. There are many day laborer organizing groups around the country. Many of these groups have joined together to create a national network, the National Day Laborer Organizing Network ("NDLON"). See National Day Laborer Organizing Network, <http://www.ndlon.org/> (last visited Jan. 25, 2008).

139. As of November 14, 2007, the Interfaith Worker Justice, based in Chicago, has fifty-two affiliated worker centers around the country, advocating for the rights of employees in such varied jobs as nail salon employees, day laborers, car wash work-



Staff and Worker Association,<sup>140</sup> La Raza Centro Legal,<sup>141</sup> and the newly-founded New Orleans Worker Center for Racial Justice, created during the Hurricane Katrina clean-up effort to advocate for fair treatment of workers in New Orleans.<sup>142</sup>

Worker centers conduct research, mobilize and educate workers, and advocate for policy reforms. The number of worker centers is growing; ten years ago, there was less than a dozen and now there are over 139 centers in 31 states.<sup>143</sup> Worker centers have often viewed themselves as an alternative to traditional labor organizations.<sup>144</sup> For their part, unions have at times challenged worker centers' hiring halls that send lower-paid workers to non-union contractors, undermining labor's position in the local labor market. Mostly, the two communities did not overlap much. A leading survey undertaken in the early 2000's found that only 14% of worker centers had a direct connection to unions.<sup>145</sup>

In 2006, the AFL-CIO's Executive Council passed a resolution permitting formal ties with worker centers. This decision conferred worker centers with the rights to join central labor councils or state labor federations as associate non-voting members to work on issues together.<sup>146</sup> The National Day Laborer Organizing Network ("NDLON") was the first to partner officially with the AFL-CIO in August 2006.<sup>147</sup>

ers, and poultry processors. See Interfaith Worker Justice, <http://www.iwj.org/outreach/lg.html> (last visited Jan. 25, 2008).

140. See Chinese Staff & Workers' Association, <http://www.cswa.org/www/index.asp> (last visited Jan. 25, 2008). The Chinese Staff & Workers' Association is one of the oldest worker centers in the U.S., and has led successful campaigns for restaurant, construction, delivery, and garment workers, among others. See Chinese Staff & Workers' Association Campaigns, <http://www.cswa.org/www/campaigns.asp> (last visited Jan. 25, 2008).

141. See Centro Legal de la Raza, <http://www.centrolegal.org/> (last visited Jan. 25, 2008).

142. See, e.g., *SPLC Exposes Exploitation of Immigrant Workers*, SOUTHERN POVERTY LAW CENTER (Aug. 16, 2006), [http://www.splcenter.org/legal/news/article.jsp?site\\_area=1&aid=205](http://www.splcenter.org/legal/news/article.jsp?site_area=1&aid=205).

143. See Janice Fine, *Worker Centers: Organizing Communities at the Edge of the Dream*, 50 N.Y.L. SCH. L. REV. 417, 421 (2005-2006); *A National Worker Center—AFL-CIO Partnership*, AFL-CIO (Aug. 9, 2006), <http://www.aflcio.org/aboutus/thisistheaflicio/ecouncil/ec08092006j.cfm> [hereinafter *National Worker Center*].

144. See Hilary Russ, *Making Change: Union Schmooze*, CITY LIMITS MAGAZINE, Feb. 2003.

145. See Fine, *supra* note 143, at 421; *National Worker Center*, *supra* note 143.

146. See *National Worker Center*, *supra* note 143.

147. See Press Release, AFL-CIO & NDLON, Largest Organization of Worker Centers, Enter Watershed Agreement to Improve Conditions for Working Families (Aug. 9, 2006), <http://www.aflcio.org/mediacenter/prsptm/pr08092006.cfm>.

AFL-CIO President John Sweeney, calling it a “watershed partnership,” noted in making the announcement that it was time to bring worker centers and unions closer together.<sup>148</sup> Pablo Alvarado, the executive director of NDLON, added,

The growing worker center movement shows that the fight for change at work has never been as vibrant, varied and urgent. Yet the end goal remains the same: to ensure that the rights and freedoms of workers aren’t reserved just for a few, but extended to the many—regardless of where you were born, the color of your skin, your gender or migratory status.<sup>149</sup>

The collaboration is aimed at combining the respective strengths of the partners for a greater good. Both Alvarado and Sweeney note the benefits of the union’s access and political expertise and the worker center’s close ties to community, to workers, and the movement overall.<sup>150</sup>

Worker centers allow immigrant and low-wage communities to take advantage of the union’s access to policy-makers and legislators. They also have other tools at their disposal, not permitted by unions, including the ability to use pressure tactics on users of goods or services, which are prohibited by unions under the secondary boycott provisions of labor law.<sup>151</sup>

The stated policy aims of the partnership were to work together to enforce existing rights and new laws in wage and hour standards, health and safety rules, immigrant rights, and independent contractor abuses.<sup>152</sup> The partnership also aimed to work together for comprehensive immigration reform, including a path to citizenship and workplace rights for all workers, regardless of their immigration status.<sup>153</sup>

On the heels of the partnership with NDLON, the AFL-CIO and the Interfaith Worker Justice network’s fourteen faith-based worker centers joined forces in December 2006, outlining nearly identical collaboration policy aims.<sup>154</sup>

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148. *Id.*

149. *Id.*

150. *Id.*

151. *See* 29 U.S.C.A. § 141 (West 2007) (ruling secondary boycotts are illegal). This charge has now been leveled at some worker centers, who are starting to look more like unions. *See* David Rosenfeld, *Worker Centers: Emerging Labor Organizations—Until They Confront the National Labor Relations Act*, 27 BERKELEY J. EMP. & LAB. L. 469 (2006).

152. *See id.*

153. *See id.*

154. *See* Press Release, AFL-CIO, AFL-CIO & Interfaith Worker Justice, A National Coalition of Faith-Based Worker Rights Groups, Enter Agreement to Improve

Since these partnerships were announced, the AFL-CIO has hired several full-time persons in a variety of departments dedicated to implementing the collaboration.<sup>155</sup> Around its one-year anniversary, six worker centers affiliated with local central labor councils in New York City,<sup>156</sup> Alameda, California,<sup>157</sup> and elsewhere.<sup>158</sup> Worker centers have joined with the AFL-CIO on local campaigns, including the recent New York City-based campaign by the taxi workers to oppose the City's imposition of costly global positioning systems and credit card machines in all taxicabs, for the taxi driver's purchase.<sup>159</sup> An Austin, Texas collaboration has generated a city-level Day Labor Advisory Committee to recommend policies for day laborers.<sup>160</sup>

Determining what to do about immigration reform continues to challenge worker centers and the partnership.<sup>161</sup> NDLO worked with the AFL on comprehensive immigration reform, which has presently stalled at the federal level. NDLO's immigration reform goals differed slightly from the AFL-CIO's, but the federations were sufficiently in agreement on the basics to make collaboration worthwhile.<sup>162</sup> Getting institutional support on both sides will take time, but it is early. Although concrete projects on a larger scale have not yet emerged, there are options, including col-

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Conditions for Marginalized Workers (Dec. 11, 2006), <http://www.aflcio.org/media-center/prsptm/pr12112006a.cfm>.

155. Interview with Milo Mumgaard, Assoc. Gen. Counsel, AFL-CIO, in New York, NY (Aug. 22, 2007) (on file with author).

156. See James Parks, *Taxi Drivers Line Up to Join CLC*, AFL-CIO NOW BLOG NEWS, Nov. 28, 2006, <http://blog.aflcio.org/2006/11/28/taxi-drivers-line-up-to-join-new-york-clc>.

157. Centro Legal de la Raza joined the Alameda County Central Labor Council in California. See John J. Sweeney, President of the AFL-CIO, Remarks at the NDLO Assembly, Washington D.C. (Aug. 3, 2007), <http://www.aflcio.org/mediacenter/prsptm/sp08032007.cfm> [hereinafter Sweeney Remarks] (discussing the relationship between Centro Legal de la Raza and the Alameda County Central Labor Council in Oakland, California).

158. See *id.*

159. See James Parks, *New York Taxi Drivers Oppose Constant GPS Monitoring*, AFL-CIO NOW BLOG NEWS, July 26, 2007, <http://blog.aflcio.org/2007/07/26/new-york-taxi-drivers-oppose-constant-gps-monitoring>.

160. See James Parks, *Worker Center Alliances: The Austin Example*, AFL-CIO NOW BLOG NEWS, July 2, 2007, <http://blog.aflcio.org/2007/07/02/worker-center-alliances-the-austin-example>.

161. See Sweeney Remarks, *supra* note 157.

162. See, e.g., Declaration from the Day Laborer Community Regarding Legalization, <http://www.ndlon.org/old/docs/legalizaEN.htm> (last visited Feb. 18, 2008); What Union Members Should Know About the AFL-CIO Policy on Immigration, <http://www.aflcio.org/issues/civilrights/immigration/upload/AFLCIOPO.pdf> (last visited Jan. 25, 2008).

laborations on prevailing wage enforcement in construction, cross-cultural trainings and education on health and safety protections, and encouraging worker center members to enroll in union apprenticeship programs.<sup>163</sup>

### C. The SEIU's Wage and Hour Project

The SEIU organizes workers in several low-wage sectors where it encounters serious wage and hour violations, including janitors, home health care, security officers, and nursing home workers, to name a few.

To stem the fair pay abuses it observes and build on its earlier work engaging in direct wage and hour litigation including in its Justice for Janitors campaign, in the early 2000's, SEIU instituted a wage and hour enforcement project to support direct wage and hour cases for workers in these sectors.<sup>164</sup> The project engages in direct litigation by SEIU counsel and sometimes outside private firms with expertise in wage and hour laws.<sup>165</sup> SEIU identifies and then examines high-priority problems it learns of from its researchers and organizers.<sup>166</sup> The union then investigates violations that come to its attention, and if warranted, puts together a team of lawyers to handle the enforcement action.<sup>167</sup>

As part of this project, SEIU has brought high-impact cases to recover unpaid travel time for home health-care workers in Illinois and Pennsylvania, unpaid overtime and off-the-clock pay for nurses in Ohio, unpaid waiting time for security guards, and overtime for janitors around the country.<sup>168</sup> SEIU also supports direct wage and hour litigation by its counsel. The recent United States Supreme Court case *Long Island Care at Home Ltd. v. Coke*,<sup>169</sup>

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163. See Jayesh M. Rathod, *The AFL-CIO-NDLON Agreement: Five Proposals for Advancing the Partnership*, 14 HUM. RTS. BRIEF 8, 12 (2007).

164. Telephone Interview with Judy Scott, Gen. Counsel, SEIU (Oct. 23, 2005) (on file with author).

165. *Id.*

166. Telephone Interview with Janet Herold, Assoc. Counsel, SEIU (Aug. 29, 2007) (on file with author) [hereinafter Herold Interview].

167. *Id.*

168. See, e.g., *Vega v. Contract Cleaning Maint., Inc.*, No. 03 C 9130, 2004 WL 2358274, at \*3 (N.D. Ill. Oct. 18, 2004); *Colburn v. Albertson's, Inc.*, No. B185198, 2006 WL 2686654, at \*1 (Cal. Ct. App. Sept. 20, 2006).

169. *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2341 (2007); see also, Press Release, SEIU, Supreme Court Case Could Affect Availability of Quality Home Care for Growing Senior Population (Apr. 10, 2007), [http://www.seiu.org/media/pressreleases.cfm?pr\\_id=1386](http://www.seiu.org/media/pressreleases.cfm?pr_id=1386).

challenging the exemption from minimum wage and overtime for home health-care companions, is one high-profile example.

The wage and hour project is strategic, choosing its enforcement actions carefully and with an eye toward long-term impact. In addition to recovering unpaid wages for the workers, these cases have influenced the targeted sectors' business practices and clarified legal standards. For example, janitors hired by contractors sued retail grocery stores in southern California for off-the-clock work and changed the way the stores view their contractors' labor practices; home health-care employers in Pennsylvania now understand more clearly that their workers' travel time must be compensated; and employers in Oregon must now pay security guards for waiting time. Because the cases are often brought on behalf of lower-wage workers, the litigation helped to dismantle barriers to enforcing fair pay rights as well, including clarifying the right to equitable tolling for workers receiving a notice of a FLSA action, and limiting mandatory arbitration of wage and hour claims by lower-wage workers.<sup>170</sup>

SEIU's efforts to promote fair pay do not stop with private litigation. It is a major partner in the newly-established States Attorneys General Program at Columbia University, which encourages state attorneys general to engage in affirmative protective enforcement actions in several substantive areas, including labor and employment.<sup>171</sup> SEIU, along with other unions and the AFL-CIO, also work closely with state departments of labor to identify key workplace standards problems in the states and develop targeted enforcement priorities, and has worked with advocates around the country to draft new legislation and regulations targeting minimum wage and overtime abuses in the states.<sup>172</sup>

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170. See Herold Interview, *supra* note 166.

171. See National State Attorneys General Program at Columbia Law School, [http://www.law.columbia.edu/center\\_program/ag/](http://www.law.columbia.edu/center_program/ag/); see also Peter Romer-Friedman, *Eliot Spitzer Meets Mother Jones: How State Attorneys General Can Enforce State Wage and Hour Laws*, 39 COLUM. J.L. & SOC. PROBS. 495 (2006) (exploring the various roles that state governments have assigned to state attorneys general and labor departments to enforce state wage and hour laws).

172. For an example of some of these innovations, see NAT'L EMPLOYMENT LAW PROJECT, JUSTICE FOR WORKERS: STATE AGENCIES CAN COMBAT WAGE THEFT, A NELP GUIDE FOR ADVOCATES (2006), [http://www.nelp.org/docuploads/Justice\\_for\\_Workers.pdf](http://www.nelp.org/docuploads/Justice_for_Workers.pdf) [hereinafter JUSTICE FOR WORKERS].

### D. New York Civic Participation Project

The New York Civic Participation Project (“NYCPP”) is a coalition of New York City local unions, community groups, and worker advocates that was formed after September 11, 2001 to organize union and community members around common issues, including education, health care, housing, and immigrant rights.<sup>173</sup> Inspired by models of community organizing and worker centers, the NYCPP aims to make unions not just providers of job benefits but rather a locus for social movements. NYCPP develops leaders, sets policy goals, performs outreach and education, and partners with other organizations in campaigns on labor and immigrant rights. NYCPP encourages active union members to engage other members of their communities in NYCPP activities, and organizes union members from a variety of unions in immigrant neighborhoods in New York City.<sup>174</sup>

According to Gouri Sadhwani, the organization’s former director of organizing and campaigns, “[t]he goal is to increase participation among new immigrants, legal or not, in political, economic and civil processes from the neighborhood level on up—the project aims to merge the concepts of union activism with community advocacy, but on an individual level.”<sup>175</sup>

NYCPP promotes workers’ human rights by supporting access to health care, public safety, fair pay, good working conditions, education, immigration reform, and voters’ rights.<sup>176</sup> With over a thousand members, its neighborhood committees have developed campaign priorities and then partnered with organized labor to promote their campaigns. Many of the recent campaigns, centered around access to drivers licenses for immigrants, safe and usable city parks, and for Muslim school holidays in New York City public

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173. See New York Civic Participation Project, <http://nycpp.org/en/index.html> (last visited Jan. 25, 2008) [hereinafter New York Civic Project]. NYCPP is a project of La Fuente, a non-profit organization founded in New York. NYCPP founding members were the SEIU Local 32BJ, the Hotel Employees and Restaurant Employees International Union (Unite Here! HERE) Local 100, the American Federation of State, City and Municipal Employees (AFSCME) District Council 37, the National Employment Law Project (NELP), and Make the Road By Walking. See New York Civic Participation Project Partners, <http://www.nycpp.org/en/partners.html> (last visited Jan. 25, 2008).

174. See New York Civic Participation Project Mission, <http://nycpp.org/en/aboutus.html> (last visited Jan. 25, 2008) [hereinafter New York Civic Mission].

175. Russ, *supra* note 144.

176. See New York Civic Mission, *supra* note 174.

schools, have not been only about pure workplace rights.<sup>177</sup> NYCPP gets union members and immigrant communities together working on issues of common concern, and in turn teaches the partners about the relative value of the other. By emphasizing civil participation and community empowerment, NYCPP aims to energize and mobilize a base of active immigrant community members from unions and immigrant neighborhoods. It uses the media, street protests, and old-fashioned cajoling to bring in unions and public figures.<sup>178</sup> It is as much about organizing unions as it is about organizing community and neighborhood members.<sup>179</sup>

A high-profile example of the organization's muscle was the 2006 "Day Without Immigrants" rally in April 2006. Hundreds of thousands of immigrants in New York City and around the country turned out to protest a draconian immigration bill proposed by Representative Sensenbrenner and passed by the House that would have criminalized undocumented aliens present in the U.S.<sup>180</sup> Carrying signs saying, "Today we March, Tomorrow we Vote," the march brought together unions organizing some of the lowest-paid workers in the City, immigrants, politicians, and community activists.<sup>181</sup> While they have not agreed on an adequate comprehensive immigration reform policy at the federal level, many of these immigrant groups and unions have agreed on basic principles, like fighting anti-immigrant measures, family reunification of immigrant families, workplace protections, and civil rights for all, regardless of immigration status.<sup>182</sup>

NYCPP is a recent example of "social unionism," where unions go beyond serving their members on the job and branch out into non-workplace issues. The NYCPP's goal is to enliven the grassroots voices of immigrants at the local level and pair them with the institutional power of unions and advocates to change policy. Its focus on union members builds support for neighborhood concerns within the unions themselves.

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177. See New York Civic Participation Project Campaigns, <http://www.nycpp.org/en/campaigns.html> (last visited Jan. 25, 2008).

178. See, e.g., Jennifer Manley, *Immigration Bill Gone But Not Forgotten*, QUEENS CHRONICLE, July 5, 2007, available at <http://nycpp.org/en/documents/QueensChronicleJuly122007.pdf>.

179. See Russ, *supra* note 144.

180. See generally Jarrett Murphy, *Under One Flag*, VILLAGE VOICE, Apr. 25, 2006.

181. See *id.*

182. See *id.*; see also AFL-CIO Basic Principles (adopted Dec. 5, 1955), [http://www.unitedwaywb.org/Labor/AFL-CIO\\_Basic\\_Principles/afl-cio\\_basic\\_principles.html](http://www.unitedwaywb.org/Labor/AFL-CIO_Basic_Principles/afl-cio_basic_principles.html) (last visited Jan. 25, 2008).

These recent attempts to cast a wider net are strategic. As union membership declines, immigrants comprise a growing percentage of the labor force, and as more union members are foreign-born, unions like SEIU 32 BJ have no choice.<sup>183</sup> Hector Figueroa, SEIU 32 BJ's Secretary-Treasurer, remarked, "[d]emographics are changing. The immigrant workforce is going to be an increasing share of who the union members are."<sup>184</sup>

### III. CURRENT SUCCESS AND HOPE FOR THE FUTURE

The four examples profiled here have key elements for success: they aim to create rooted institutions with close ties to communities, they have clear goals and situate themselves strategically within a broader advocacy field, and they see that change will not happen instantaneously and intend to keep at it beyond the short term.

Each of the innovators has already had impressive success: the MCTF and NAFC affiliates have amassed a deep understanding of the challenges confronting wage enforcers and have become key partners in those efforts. The AFL-CIO's worker center partnership had an important role in the federal comprehensive immigration reform debate and currently invests countless hours of staff time to solidify the relationships between the members of both partners to pave the way for future projects. The SEIU's wage enforcement project has delivered tangible law reform results, not to mention money to underpaid workers in lower-wage jobs. The NYCPP led a campaign to convince New York's Governor Spitzer to permit undocumented persons to get drivers licenses, despite a federal mandate on national identification, permitting the thousands of immigrants in New York to drive safely to get to work.<sup>185</sup>

Are these innovations sustainable? Will they result in lasting change and provide important supports for the ever-crumbling wage floor? First, any model for gaining lasting change in the quality of jobs and in particular the pay of those jobs must have collaboration with others as a core component. Labor cannot prevent the dismantling wage floor alone, nor can worker centers, immigrant, women's, or consumer groups. Progressive workplace change throughout history has occurred through strong partner-

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183. Two-thirds of SEIU 32BJ's members were foreign-born in 2003. See Murphy, *supra* note 180.

184. Russ, *supra* note 144.

185. See New York Civic Participation Project, *supra* note 173.



ships between labor and community, and between labor and law-abiding employers. The AFL-CIO's worker center partnership and NYCPP are defined by their union-community collaborations, as MCTF and the NAFC affiliates are defined by their union-employer-government ones. While the unions' partners may change due to shifting allegiances, financial, and other outside pressures faced by most community groups, the strategy of collaboration should not. These groups must also figure out how to become financially self-sustaining, as MCTF and NAFC have begun to do. Without strong institutional (union, employer, or government) support from partners with resources, these models will fizzle.<sup>186</sup>

Second, the projects must have a goal of establishing institutions that will outlast the immediate campaigns or short-term purposes of the collaboration. This means institutions with resources and a mandate to keep policing the workplace. Establishing offices for immigrant community outreach within the federal and state departments of labor and state attorney generals' offices, where ongoing and changing needs of lower-wage and immigrant workers can be brought to the attention of government wage enforcers is one example.<sup>187</sup> Another example is assigning staff persons within the AFL-CIO and leading affiliate unions with responsibility for tending to and promoting the partnerships, as the AFL-CIO and SEIU have done with their respective projects. Establishing a union in a previously unorganized workplace is another example. When unions are present, minimum wage and overtime pay become the bare minimum demands, and ongoing monitoring of workplace conditions with protections for workers who stand up and report abuses becomes standard. Day laborer groups have increasingly begun to seek public financing for day labor centers, where law-abiding employers can hire workers in a safe environment and workers can learn English and receive assistance with a variety of life needs.<sup>188</sup>

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186. See Estlund, *supra* note 1, at 366-67. Without unions, resources, and the ability to follow through with long-term monitoring, the code of conduct model will fail.

187. These offices exist in several state departments of labor and the New York State Attorney General's office, for instance. For examples of similar government-infused institutions, see generally JUSTICE FOR WORKERS, *supra* note 172.

188. See, e.g., Nat'l Employment Law Project, Statement of Amy Sugimori, Hearing on Day Laborers Before the Council of the City of New York Committee on Immigration (Mar. 31, 2005), <http://www.nelp.org/docUploads/day%20labor%20testimony%20city%20council%20march%2031%202005.pdf>; Testimony of Siobhán McGrath, Hearing before the New York City Temporary Commission on Day Laborer Job Centers (June 28, 2006), [http://www.brennancenter.org/dynamic/subpages/download\\_file\\_39232.pdf](http://www.brennancenter.org/dynamic/subpages/download_file_39232.pdf).

Finally, these innovators must continue to support and build a social consciousness in our country focused on the importance of treating all workers with dignity, regardless of race or ethnicity. Paying a fair wage and supporting unionization and good jobs in turn support our economy and all of us.<sup>189</sup> The recent failure of comprehensive immigration reform at the federal level and the corresponding anti-immigrant initiatives at the state and local level have exacerbated immigrant and low-wage workers' fear and despair. It has emboldened employers who exploit these workers with impunity. Lilia Garcia at the MCTF says the recent ICE raids have forced MCTF to be "quieter" campaigns, and worker centers and SEIU encounter low-wage and immigrant workers afraid to come forward to complain of unpaid wages because of employer retaliation and threats related to the workers' immigration status. These partnerships must combat the political and social ignorance causing this debilitating fear and its effects.

The decline of unions and employer aggression against labor organizing of any kind shows that labor and its allies face mounting obstacles to maintaining a foothold in the struggle for fair wages and good jobs. Thomas Kochan, a leading expert on today's workplaces, concludes that "[u]nions have declined for several mutually reinforcing reasons: deregulation, industrial change, globalization, and increased employer resistance."<sup>190</sup> To create entrenched change, the efforts profiled here must contend with these broader factors and aim for deep-seeded organizing in workplaces and across communities.

The organizations modeled in this Article have varied contexts and chosen strategies; some are adversarial and do not court collaborative relationships with their opponents, like the SEIU wage enforcement project, the NYCPP, and the AFL-CIO and worker center campaigns. Others, like NAFC and MCTF, partner with powerful employers whose market-share is dropping due to the fierce undercutting by low-ball contractors, thus creating a more intimate relationship with "the other side." This combination of efforts is necessary to combat the undercutting of jobs. All use lawsuits, the media, and pressure tactics to move their agenda, and

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189. Some argue that we need a whole-scale political, social, and economic reversal to effect change today, and that labor is poised to help in that transformation, if it ceases to be isolated and joins with other social movements, as it did in the 1930s. See DAN CLAWSON, *THE NEXT UPSURGE: LABOR AND THE NEW SOCIAL MOVEMENTS* ix-xi (2003).

190. Thomas Kochan, *Wages and the Social Contract*, AMERICAN PROSPECT, May 2007, at A22.

all are engaged in this war. If the projects can be brought up to scale and modeled in more places, real and lasting change for workers, their jobs, and our economy is within reach.

