



Strengthening the Role of State and Civil Society in Labor Standards Enforcement

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The Problem from Hell...

Large percentages of businesses in low wage industries are violating wage and hour laws...

Non-compliance with minimum standards is at historic levels

- 26% of low wage workers in the nation's three largest cities suffered minimum wage violations in the week prior to a 2009 national survey by Bernhardt, DeFilippis, Milkman and Theodore
- 76% of low wage workers who labored more than 40 hours in the prior week were not paid according to overtime laws according to the same survey
- Regional non-compliance levels over 50% in nursing homes, poultry-processing, daycare, restaurants and healthcare according to USDOL's own surveys

The Fair Labor Standards Act of 1938: covers businesses whose annual gross volume of sales made or business done is not less than \$500,00 and that put goods into the stream of interstate commerce

- Minimum wage
- Forty hour work week as national norm: mandated overtime pay
- Abolished child labor in manufacturing
- Required employer record-keeping on wages and hours

Why Isn't Enforcement Working?

- Decreasing Funding with an Expanded Mandate
- Growth in the Hardest to Police Sectors and Among the Hardest to Protect Workers

Why Isn't Enforcement Working?

Decreasing Funding with an Expanded Mandate

- Steep decline in ratio of resources for enforcement even as the number of covered workplaces increased (from 20% in 1938 to 65% in 1996)
- 1978: 1300 federal inspectors
- 2008: 709 federal inspectors/7,601,160 establishments/119,917,165 workers
(plus aggregated state inspectorate= approx. 700)

Why Isn't Enforcement Working?

Growth in the Hardest to Police Sectors and Among the Hardest to Protect Workers

- *Shifts in dominant industries and structures of work from manufacturing to service...construction, retail, landscaping, restaurant, property services, healthcare*
- *Rise of the "Glove's Off Economy" certain employers increasingly breaking, bending or evading long-established laws and standards designed to protect workers*
- *Decline in the size of the average business establishment means increase in the number of firms and establishments*
- *Most of the 33 industries at highest risk of wage and overtime violations are overwhelmingly composed of establishments of fewer than 20 employees*

Why are wage and hour violations concentrated in smaller firms and establishments of the low wage sector?

- Tighter profit margins
- Less likely to have sophisticated HR departments and centralized record-keeping
- Less likely to be embedded in ongoing regulatory communities
- More likely to be mobile, short-lived and unregulated

Rise of network supply chain makes labor standards enforcement more difficult

- Hypercompetitive market puts pressure on businesses and contractors to lower costs by competing on the basis of wages
- When small firms are embedded in subcontracting networks in which one large firm or a few firms dominate often the employers of record aren't really the ones setting the terms of exchange
- Firms sometimes misclassify employees as independent contractors

High percentage of immigrants in industries most at-risk for violations

- In 2008 immigrants made up 15.6% of the US workforce and over 20% of the low wage workforce
- 2 of every 5 low wage immigrant workers are undocumented
- Immigrant workers may be unaware of their rights, hesitant to cooperate with government officials or afraid of deportation
- US government as a whole has implemented a policy of workplace raids and employer sanctions enforcement that makes workers hesitant to come forward

Why isn't enforcement working?

...Flawed systems or "logics" of enforcement

Our research identifies 4 “Logics of Enforcement”

- 1-**complaint-driven**: workers would complain when they had a problem and the complaint would trigger inspection
- 2-**proactive investigation**: certain industries would be prioritized for proactive interventions
- 3-**comprehensive coverage**: in high wage states there was a large inspectorate systematically patrolling turf
- 4-**self-regulation**: employers monitor themselves

The Logic of Complaint-Driven Investigation

“If they have a problem, they’ll complain...”

- But research by Weil and Pyles found little overlap between the industries with the highest FLSA complaint rates and those with the highest wage and overtime non-compliance rates

...WHD’s investigative resources have remained over 70% complaint-driven since 1960

The Logic of Proactive Investigation:

Targeting specific industries in particular geographic areas

- Since the 1950's WHD has occasionally complemented its reliance on complaints with a focus on proactive inspections
- 1990's: WHD launched initiatives in garment, agriculture, nursing homes and poultry processing

...

But this second logic has almost always been a "sideshow" to complaint-driven investigation

The Logic of Comprehensive Coverage

Some State DOL's divided up turf geographically and systematically patrolled it; assumption was that firms would comply because they were anticipating inspection at some point

Comprehensive Coverage

"In those days, we actually did door to door inspections of every establishment...one by one. I would start on one block and work my way down and we would do each and every place. As a routine matter, we inspected every establishment in the state of New York. It took us seven or eight years to get to it but if you owned a business, you could be sure that seven or eight years after you saw an investigator you would see another one."

-Carmine Ruberto, NYS Wage and Hour

The Logic of Comprehensive Coverage

...But resource constraints resulted in contraction of state inspectorates and a shift to an overwhelmingly complaint-based approach

The Logic of Self-Regulation

Employers monitor themselves

- Made its first appearance at DOL in 1969, largely abandoned by the 1980's
- Employer cooperation re-established under Bush II, approaching firms as primary partners and reducing reliance on penalties and court actions

...But scholars and regulators now largely agree not viable for low wage industries where unions are not present and establishment sizes are often small

Over the past 70 years, WHD has struggled to find an effective logic of enforcement

- State-based “beat cops on labor market patrol” systems deteriorated
- Complaint-based enforcement alone doesn’t work for vulnerable workers in low wage industries but eats up majority of resources
- Industry-based enforcement was never given sufficient resources, time or teeth
- Firms under private monitoring arrangements still have a lot of non-compliance among their contractors

If the current model of workplace enforcement in low wage sectors is failing... what should replace it?

Four legs of our regulatory stool:

- **Reactive triage:** Incoming complaints are prioritized and resources allocated based upon how serious and widespread the problems are
- **Proactive investigation:** Enforcement strategies are specifically tailored to particular targeted industries
- **Meaningful penalties** are collected with enough frequency to generate real deterrence, and...

A return to the original system envisioned by FLSA's architects for enforcement

**Unions, high road firms and worker centers
patrolling their labor markets so that
government can investigate and swiftly punish
firms engaged in unethical and illegal practices**

What was the original logic of enforcement?

- While much of the debate about the Fair Labor Standards Act and its subsequent amendment had to do with the impact of minimum wage on employment levels, exclusion of particular industries and occupations and increases in the wage itself *at the time of its drafting there were major debates about **institutional design and modes of enforcement...***

The Second New Dealers and the Fair Labor Standards Board

“public control of competition, rather than protection of work conditions would be more effective in establishing fair work standards. A quasi-judicial agency, in which enlightened employers and unions could band together and help police sweatshop employers, who would then be tried by the FLSB, would be the most effectual type of agency...”

They had a logic of how enforcement would work but the debate about institutional design was lost...

What happened to the original “logic”?

- Others in the Roosevelt Administration wanted to write a bill that had no chance of being overturned by the Supreme Court for violating the Interstate Commerce Clause so *unfair trade* provisions were dropped
 - Pressure from Southern Democrats and Western Republicans for a watered down bill
 - Opposition from AFL and CIO who feared wage-fixing powers would weaken private collective bargaining agreements
- ...Meant that this approach was dropped before the bill was ever finalized and sent to congress**

When FLSA finally passed the congress...

- One overall minimum wage as opposed to industry and geographically specific wage standards
- Unfair trade provisions were removed
- Provided no regulatory role to unions or firms
- Established a weak quasi-legislative body under the DOL
- Made the Wage and Hour Division dependent upon funds from the general budget of the DOL

When FLSA finally passed, cont'd:

- Appointed inspectors through the civil service rules which gave WHD administrator little control over them
- WHD given no authority to issue cease and desist orders against employers
- Set fines that were extremely low

Our proposal: Tripartism: formal partnerships with worker organizations
(Ayres and Braithwaite)

Along with the government regulator and the firm, a public interest group such as a union, worker center or other community organization is given a formal role in the regulatory process.

Under Tripartism organizations are given:

- access to the same information that is available to regulators
- an equal seat at the table when the firm and regulator are engaged in negotiations about liability for violations
- the same standing to sue or prosecute under the regulatory statute as the regulator
- the resources necessary to fully carry out its role

Why tripartism?

- There will simply never be enough government labor inspectors to cover the labor market...where government is unable to monitor compliance because the affected sites are just too diverse, numerous or unstable
- Unions and worker centers have a strong interest, access to information and the ability to monitor behavior and promote cooperation among private actors

Our vision for the partnerships: 3 conditions

- **Formalized**: parties openly negotiate and discuss expectations, produce written agreement
- **Sustained**: ongoing not one-off campaign
- **Vigorous**: meaningful activities fully integrated into life of the agency

4 Criteria

- ***Adequately resourced***: state must allocate enough staff to be able to mount a credible effort and must provide threshold level of financial support to partner orgs that need it so they can participate
- They must provide mechanisms for gaining access to ***accurate, complete and timely information***
- ***Match strategies to the characteristics of particular sectors***
- Establish and strongly encourage the exercise of ***strong deterrence measures***

Sounds good, but could it ever work?

We went looking for cases of tripartism on the ground...Here is what we found:

Three Cases

- LA Unified School District and Public Works Deputization Programs
- Partnership between the California Labor Commission's Janitorial Enforcement Team and the Maintenance Cooperation Trust Fund
- NY Wage and Hour Watch

LA Unified School District (LAUSD)

Since 1996, LAUSD has administered a program that **trains** and **deputizes** business representatives of building trades unions to enforce the prevailing wage on District projects which are funded by nearly \$30 billion in school construction bonds

LAUSD

- Work Preservation Volunteers (WPV's) are trained every year by LAUSD
- Provided with identification badges and business cards
- Authorized to "conduct labor compliance site visits, interview workers on District property and to assist with audits, hearings and review conferences"
- WPV's can initiate visits but have to get prior permission from LAUSD, contractors are not notified of their visits ahead of time
- WPV's complete observation forms, interview forms and carry wage complaint forms that they help workers fill out on the spot

LAUSD

- WPV's must review and sign an agreement that prohibits them from using their visit promote the union or disparage non-union contractors or reviewing project data not associated with a pending or active complaint
- WPV's do not determine violations or assess penalties, they provide raw data that city inspectors use to put together their cases

LAUSD

“The authorization is everything. Going out on a jobsite as an industry representative is one thing—contractors tell you they are not going to give you anything, but if you go out there badged by the agency responsible for enforcing prevailing wage, they have to cooperate.”

-Richard Slawson, Executive
Secretary

LA Building and Construction Trades

LADPW: very similar program

“I was initially the biggest opponent, however the program has been very successful and there have been very few and very minor problems. I will tell you I was wrong.”

-Chris Jenson

Bureau of Contract Administration

LAUSD and LADPW

- “When the program began, one of the inspectors said to me there is no way in hell I will ever let one of those guys come onto my jobsites...The opinions of the inspectors have changed so much that now I get calls from them asking can you send one of those guys out? Can you send someone who speaks Spanish or Korean?”
 - “In a case of a drywall contractor doing work on 4 large DPW contracts, for example, CGR’s were able to expand a case of underpayment of wages from two workers to twelve. My case went from fair to phenomenal...”
- Chris Jenson, Bureau of Contract Administration

LAUSD and LADPW

- Programs benefit from industrial knowledge of the WPV's and CGR's who have worked in the tools and know the intricacies of their individual trades
- WPV's know what they are looking for on the jobsites
- WPV's and CGR's have provided training to city inspectors about each individual trade
- WPV's and CGR's provide a proactive capacity
- Public nature of the construction means they have access to vast quantities of information due to requirement that contractors register with the City and submit copies of payroll weekly
- Public nature of bidding process means there is detailed data available regarding labor and materials costs for each bid, often on-line

LAUSD and LADPW

- Program has significantly extended capacity of LAUSD and LADPW inspectorates (which primarily focus on quality of workmanship not labor compliance and has been shrinking)
- In 2009, 85 CGR's expanded LADPW inspectorate by 30%
- City inspectors work closely with the WPV's
- In five years out of 2,000 contracts less than 12 complaints of WPV's abusing their positions
- 1/3 of repeat contractors working with LAUSD are non-union

Partnership between the California Labor Commission's Janitorial Enforcement Team and the Maintenance Cooperation Trust Fund

There are more than 12,000 janitorial companies in California but only half are registered with the state as legitimate businesses.

CA DIR JET and MCTF

- Janitorial Enforcement Team is comprised of 1 attorney, 1 criminal investigator, 3 deputy labor commissioners and 3 partners from the Employment Development Department (EDD).
- Maintenance Cooperation Trust Fund is a janitorial watchdog organization funded by SEIU #1877 and union signatory contractors who contribute 2-5 cents per worker/ per hour (Taft-Hartley Trust Fund) has a team of 12 investigators, most of whom are former janitors
- JET and MCTF work together on cases:

MCTF provides inspectors with specialized knowledge of industry structures and sub-contracting arrangements, strong contacts with workers and well-documented case materials

CA JET and MCTF

- MCTF investigators visit worksites at night during peak hours of work
- MCTF investigators do home visits
- MCTF investigators do systematic reconstruction in cases where workers do not have pay stubs or records
- MCTF investigators identify and interview each worker, determine which contractor employed them, the dates and hours they worked, whether or not they had meal or rest breaks or days off and use the state's formula to put together a detailed payroll record for each worker employed by a contractor as well as a "wage audit" which is their estimate of what a worker is owed
- MCTF provides all of this to JET inspectors

CA JET and MCTF

- Criminal investigators on JET now accept cases directly from MCTF and are willing to rely on its audits rather than insisting on doing their own complete reconstructions from scratch
- While the criminal investigators must still carry out their own independent investigations, MCTF provides much of the raw material they need

JET and MCTF

- “Sometimes employers will put up a lot of barriers in allowing us to obtain contracts or records so you have to go through the formal process of obtaining these records and it can be very time-consuming. MCTF does everything. They prep the case for filing so once we get it they have already done the audit, interviewed the employee and provided the information...”

Frank Capetillo, JET Coordinator

JET and MCTF

- “Usually I do field work in many different industries. When they told me I was assigned specifically to janitorial, it made me an expert compared to my colleagues. I understand the industry a lot more and the schemes that are behind the violations that employers are doing because I have concentrated on this program...if it were just another one of my cases it would be difficult for me to understand the industry the way I do now.”

Frank Capetillo

CA JET and MCTF

- According to Lilia Garcia, MCTF Executive Director:
“In the course of negotiating our cases, a lot of times our biggest challenge is convincing an employer they have done something wrong. This means deconstructing for the employer how their business operates and showing them what was wrong with what they did...”
- As MCTF’s reputation for bringing successful cases has grown, employers have been approaching them more and more to evaluate their operations and make recommendations about how they can restructure their businesses to address the problems identified.

CA JET and MCTF

- Since the partnership began, there have been an unprecedented number of administrative, civil and criminal actions brought against unscrupulous employers amounting to more than \$38 million in back pay for janitorial workers.
- In 2007, the State Labor Commissioner and the Attorney General filed charges for \$5 million against two janitorial contractors for failing to pay cleaners at several restaurant chains including Cheesecake Factory, Yard House and Elephant Bar.

CA JET and MCTF

- In 2008 the Labor Commissioner filed the first suit under CL 2810 against a major building service company for close to \$2 million for failing to provide adequate funding to its subcontractors leading to multiple violations
- in 2009, the Labor Commissioner filed suit against Corporate Building Services and its subcontractors for approximately \$7.4 million.

NY Wage and Hour Watch

The Wage and Hour Watch program of the New York State Department of Labor is a formal partnership between the DOL and six organizations to conduct oversight in specific geographic areas with heavy concentrations of low wage employers.

The 6 groups are:

Make the Road New York

The Workplace Project

Centro del Derechos

Chinese Staff and Workers Association

RWDSU

UFCW Local #1500.

NY Wage and Hour Watch

- In the summer of 2009, DOL and the groups signed a memorandum of agreement committing the organizations to identify and train at least six individuals to serve as “Wage and Hour Watch Members” for a period of two years.
- Members engage in a set of discrete activities in their “Wage and Hour Watch Zone,” including providing at least 50 businesses per quarter with written labor law compliance brochures, and holding seminars and informational sessions about labor laws for the public in “formal” settings such as festivals, group meetings, and other organized events, and “informal” settings such as bus and subway stops, libraries and supermarkets.

NY Wage and Hour Watch

- W&HW groups are also charged with obtaining information regarding potential labor law violations from parties familiar with the violations, filling out special referral forms, and passing them on to the DOL.
- Members will not conduct trainings for the employers they visit or carry out inspections
- Groups are required to submit quarterly plans to the Department's Wage and Hour Watch liaison

NY Wage and Hour Watch

- The memorandum of agreement commits the DOL to providing W&HW Members with training, outreach materials with space for the organizations to include their contact information.
- DOL has a designated W&HW contact within the Division of Labor Standards to help administer the program, take complaints and communicate with organizations regarding the status of investigations “to the extent allowable by law”
- DOL provides a page on the DOL’s website describing project participants and their areas of work, participates in quarterly telephone calls with the groups, and produces an annual report.

NY Wage and Hour Watch

- There is no plan to prioritize cases that originate through W&HW, because the Department says it has already instituted a triage system meant to ensure that the most serious cases are given priority.
- There is likewise no explicit plan for DOL to follow up W&HW Members' neighborhood canvasses of employers with any kind of formal sweep (although this could change as the program develops),
- but employers receiving brochures through W&HW will be considered to have been educated about the law, facilitating the DOL's ability to consider them willful violators subject to monetary penalties on top of the money they owe to workers.

NY Wage and Hour Watch

DOL and the groups describe their effort as a “neighborhood watch” model.

“We imagined it to be people who live in a neighborhood, and care about the safety of the neighborhood, having some sort of infrastructure and to be organized to keep tabs on what is happening in the neighborhood, to keep an eye out for danger and have some sort of training and direct pipeline to the police or authority figures to be able to trigger some enforcement activities by government.”

-Deborah Axt, Director of the Legal Program at Make the Road New York

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Goals of WHW:

- Educate employers
- Raise the profile of wage violations
- Increase the number of workers coming forward with strong cases
- Send a message to a community of employers who will respond by coming into compliance

These cases embody many of the features of the robust partnerships we propose:

- All have potential to be sustained rather than tied to one time-limited campaign
- All involve groups in carrying out important activities
- All require substantive collaboration with government inspectors on an ongoing basis
- Two out of three are officially chartered projects with clear administrative agreements signed by all parties

Observations

- These partnerships exceeded the limits of prevailing wisdom regarding acceptable and appropriate roles for worker and community organizations to play.
- Deputization was dismissed out of hand by top New York and New Jersey labor department officials, but for twenty-five years in L.A. union representatives have been deputized and vested with formal authority to inspect non-union job sites and speak with non-union workers and it has by all accounts worked very well.

Observations

- There has been similar resistance to the idea that workers' organizations can play a meaningful role in preparing cases for the government to pursue. Yet for three years, also in California, MCTF's investigators have been reconstructing payroll records and putting together cases for use by government inspectors against prevailing norms.
- There is no indication thus far that they have provided incorrect information or acted inappropriately with workers or contractors.
- They have worked well with the inspectors on the team and their efforts have contributed to the effective substantiation of claims and ultimately to a change in employer behavior in the industry.

Answering Objections

- Objection #1: Political Infeasibility
- Objection #2: The Public/Private Distinction
- Objection #3: Only Unions are Suited for the Partnership Role But Unions are Scarce

Conclusion: Marginal increases in the WHD inspectorate alone will be insufficient to solve the problem.

Enforcement Strategies must be nested within clear logics of detection and deterrence.

Worker centers and unions have:

- strong incentives to police their labor markets
- access to information about hard to monitor sectors
- knowledge about industry structures
- capacity to reach workers
- ability to document complicated cases
- willingness to wield authority responsibly