

August 27, 2013

## Preventing Wage Theft in Texas

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Native-born workers and immigrants—both authorized and undocumented—routinely face financial abuses in the workplace. Wage theft and misclassification of workers as independent contractors deny them their rights to earn a decent wage, overtime pay, and other basic labor rights. While the vast majority of Texas employers comply with the law, some employers are violating basic labor laws, thereby creating an unfair competitive advantage over other employers and harming Texas workers and their families.

Although workplace abuses affect all Texas workers and occur in all types of occupations, immigrants in lower-wage and blue-collar occupations are often disproportionately affected by these violations.

The Texas Payday Law protects employees from non-payment of wages, and provides for penalties for employers who fail to pay wages, including wages for:

- labor or services rendered by an employee, whether computed on a time, task, piece, commission, or other basis;
- commissions and bonuses according to the agreement between the parties; and
- vacation pay, holiday pay, sick leave pay, parental leave pay, or severance pay owed to an employee under a written agreement with the employer or under a written policy of the employer.<sup>1</sup>

Even with these basic protections under the law, Texans, regardless of their immigration status, suffer from employer abuses. This policy paper will explore the problem of workplace violations in Texas and propose recommendations to ensure all Texas workers, regardless of their legal status or occupation, have safe and fair working conditions.

### Wage Theft in Texas

In Texas, non-payment of wages or “wage theft” is a problem that has consequences for all Texas workers and the broader public.

Workers are harmed by employers that illegally deny them their paycheck, pay below the minimum wage, force them to work off the clock, make illegal deductions from their paycheck, or deny overtime pay, or other employee benefits. An unexpected loss to a person’s income creates an economic hardship on both the worker and their family. The economic losses also

extend to the larger community by reducing the spending power of workers in the local economy, reducing payroll tax revenues, and creating an unfair business environment for businesses that comply with the law.

Wage theft affects all types of workers, but it disproportionately impacts immigrants, people of color, women and lower-wage workers.<sup>2</sup> And although wage theft occurs in all types of occupations, it is more likely to occur in low-wage occupations such as retail, residential construction, and home health care.<sup>3</sup>

In Texas, undocumented immigrants in the construction industry are more likely to be victims of wage theft and suffer from poor working conditions compared to native-born workers.<sup>4</sup> Undocumented immigrants also are less likely to report abuses due to a lack of knowledge of their workplace rights. Others may not report violations because they fear their employer will retaliate against.

## Snapshot of Immigrants in Texas

Immigrants and their children are a growing economic and political force as consumers, workers, taxpayers, and entrepreneurs. One in six Texans is an immigrant, and one-third (33 percent) of the foreign-born population are naturalized U.S. citizens who are eligible to vote.<sup>1</sup> Immigrants make up 21 percent of the Texas workforce, and 23 percent of Texas' small business owners are immigrants.<sup>2</sup> Immigrants in Texas are young, with a full 83 percent or 3.5 million in their prime working age—ages 18-64. And their labor force participation rate is 67 percent compared to 64 percent for their U.S.-born counterparts.<sup>3</sup>

An estimated 1.7 million immigrants in Texas are unauthorized—7 percent of the total population in Texas. And an estimated 1.1 million unauthorized immigrants make up 9 percent of the Texas labor force.<sup>4</sup>

With the exception of immigrants with advanced degrees, immigrants in Texas are more likely to earn a lower wage than their U.S.-born counterparts. Overall, immigrants earn 34 percent less than their U.S.-born counterparts.<sup>5</sup>

Immigrant workers in Texas dominate the construction and service occupations. Immigrants account for 59 percent of all construction laborers in Texas, and 64 percent of workers in housekeeping and personal services occupations.<sup>6</sup>

<sup>1</sup> Economic Policy Institution analysis, State of Working Texas, 2011 American Community Survey (ACS)

<sup>2</sup> EPI 2011 ACS; and 2009-2011 American Community Survey.

<sup>3</sup> EPI, 2011 ACS.

<sup>4</sup> Pew Hispanic Center, 2010 data, **Notes:** Labor force estimates include both employed and unemployed workers. Percentages are computed from unrounded data. **Sources:** Pew Hispanic Center estimates based on residual methodology applied to March Supplements to the Current Population Survey.

<sup>5</sup> EPI, 2007-2011 ACS.

<sup>6</sup> EPI, 2007-2011 ACS.

## Texas' Wage Claims On The Rise

While the federal minimum wage, the Fair Labor Standards Act, and Texas' state labor laws are designed to protect workers from workplace abuses, evidence of violations in state and national reports indicate that the system is not working in many cases.

In a National Employment Law Project survey of workers in three U.S. cities—Los Angeles, Chicago and New York—26 percent of workers experienced minimum wage violations, one in five were underpaid or unpaid, and 44 percent of workers reported experiencing at least one type of payday violation such as working off the clock, receiving a late payment, underpayment or were not paid at all in the previous 12-month period.<sup>5</sup>

In Texas, data is limited on the nature and scope of wage theft and payroll fraud violations, however, data from the Texas Workforce Commission (TWC) shows that wage claims are on the rise. TWC received over 17,000 wage claims in 2012, an increase of 8 percent from 2011.<sup>6</sup>

TWC is charged with implementing Texas' Payday Law, including processing and investigating wage claim cases, and assessing "bad faith" penalties on employers who fail to pay their workers, pay less than minimum wage, fail to pay for overtime work, or otherwise misclassify employees as independent contractors.

Between 2011 and 2012, the number of bad faith penalties TWC assessed nearly doubled—from 533 to 1,028—a 93 percent increase.<sup>7</sup> Even with the increase in penalties, this figure represents only a fraction—16 percent—of total TWC wage claim cases that were awarded wages in 2012. And in recent years, the proportion of penalties on wage claims awarded has been even lower, with only 1 percent in 2009, and 2 percent in 2010.<sup>8</sup> To better understand why so few affirmative wage claim cases are assessed penalties, the Legislature should review TWC's current process and standards for investigating and processing claims. A further review of TWC standards also will provide new information on the scope and extent of wage theft in Texas.

## Misclassification of Workers

Workplace abuses also often occur when an employer misclassifies a worker as an independent contractor. Misclassification enables employers to avoid paying Social Security, Medicare, and unemployment insurance taxes, and covering workers' compensation.<sup>9</sup>

Misclassification harms workers by denying them the right to overtime pay, workers compensation and other worker protections.<sup>10</sup> Misclassified workers lose out on employee benefits such as health care coverage, retirement benefits and paid leave generally offered to regular employees. They also experience a higher federal income tax burden as they pay the self-employed tax rate.<sup>11</sup>

The Texas Labor Code does not provide specific penalties on employers for misclassifying workers as independent contractors. As such, limited data exist on the prevalence of misclassification in the state. So far, the limited data available indicates high misclassification rates, particularly in the construction industry. An independent study by the University of Texas at Austin found that 41 percent of Texas construction workers are misclassified as independent contractors or paid under the table.<sup>12</sup> Other national and state studies indicate that misclassification rates are disproportionately high in construction and other industries, including real estate, home care, trucking, janitorial and high tech jobs.<sup>13</sup>

## Wage Theft & Worker Misclassification in the Texas Construction Industry

**\$117 million** lost wages

**\$8.8 million** lost sales tax revenue

**\$54.5 million** lost unemployment insurance tax revenue

*Source: Workers Defense Project, Build a Better Texas: Construction Workers in the Lone Star State, January 2013.*

## Legislative Update

During the 2013 legislative session, lawmakers considered more than a dozen bills to improve conditions for Texas workers, including efforts to prevent wage theft, to step up enforcement for non-payment of wages, and to impose penalties for misclassification of employees as independent contractors. Unfortunately, the Legislature passed few measures to protect workers.

One step in the right direction was the passage of House Bill 2015, creating penalties for employers who misclassify their employees as independent contractors on state contracts. This bill will ensure that workers are properly classified and receive the wages, benefits and worker protections, including worker's compensation, that are necessary to ensure fair and safe working conditions for Texas workers.

Several bills filed to enhance enforcement and penalties against employers who fail to pay their employees did not pass during the legislative session.

- HB 494/SB 741 would have extended the filing deadline for wage claims with TWC to ensure workers have sufficient time to file a claim. Many low-wage workers, including construction laborers, are not aware of their workplace rights. According to the Workers Defense Project, 77 percent of construction workers have not heard of the Texas Workforce Commission and many miss the 180-day deadline to file a claim for lost wages.<sup>14</sup>
- SB 340 would have strengthened the penalty that the TWC could impose on employers who fail to pay their workers.

- HB 1131 would have created a registry of employers who have a criminal wage theft conviction.
- HB 298/SB 1743 would have prohibited retaliation against workers who file a wage claim or seek to recover unpaid wages from their employer. The bill would have provided penalties against employers in violation of Texas' payday law.
- HB1925/SB 676 would have created meaningful penalties for construction companies that commit payroll fraud by misclassifying their workers.

## Recommendations

### **State**

The Legislature should conduct interim studies on the following:

#### **Review Standards for Wage Claim Investigations:**

To better address the problem of wage theft in Texas, state policymakers must take steps to better understand the scope and scale of the problem, including identifying what types of wage theft are occurring, and where wage theft is taking place.

The House Small Business and Economic Development Committee and the Senate Committee on Economic Development should undertake the following interim charges:

- Study and evaluate current data available on wage claims in Texas and make recommendations for improving data collection and reporting of wage claim cases.
- Review TWC's current process for investigating and processing wage claims, including how penalties are assessed and enforced. The committees should make recommendations to the 2015 Legislature on any needed adjustments to Texas' payday law to ensure stronger standards for investigating and assessing penalties on wage claim cases to deter future violations of the law.

By strengthening and streamlining data collection and standards for investigating wage claim cases, TWC can ensure that employers are in compliance with Texas law and are paying a proportionate share of their unemployment insurance taxes as required under the Texas Unemployment Compensation Act.

#### **Review the scope of the Texas Labor Code's investigation and enforcement mechanisms of payroll fraud, including misclassification of employees as independent contractors:**

The House Small Business and Economic Development Committee and the Senate Committee on Economic Development should review the Texas Labor Code guidelines for investigating and enforcing payroll fraud violations. The committees should also study the impact of misclassification of workers on the UI Trust Fund and the increased tax burden for employers who comply with Texas' labor laws.

The committees should make recommendations to the 2015 Legislature on how to strengthen the Texas Labor Code to ensure that TWC has the necessary tools for investigating and enforcing payroll fraud, including misclassification of workers as independent contractors.

## ***Federal***

### **Ensure Federal Immigration Reform Strengthens Worker Protections**

As Congress considers immigration reform, financial protection for low-wage workers is critically important and should be a part of any immigration strategy.<sup>15</sup> An essential component to protecting immigrant workers is providing a pathway out of the shadows and towards U.S. Citizenship.

An immigrant workforce with full protection and representation under the law will guard against widespread abuse of immigrant workers, especially those in lower-wage occupations. By focusing on stronger labor law enforcement, high-skilled job training, and economic development, we can improve working conditions for native workers and immigrants at the same time.<sup>16</sup> These protections will promote better wages and stronger labor standards for all workers, especially low-wage workers. Additional workplace protections also will ensure that immigrants will be more likely to report workplace abuses and ensure a fair and safe work environment for all workers in Texas and across the country.

### **Common-Sense Principles for Immigration Reform:**

Immigrants and their children can play a key role in shaping our economic future. In support of this goal, reform of our immigration policy should:

- Bolster, not undermine, the contributions that immigrants make to our economy;
- Improve labor standards and increase wages for all workers;
- Enhance our national security and safety; and
- Respect human rights.

*Source: Center for Public Policy Priorities, Common-Senses Principles for Immigration Reform, April 29, 2010.*

## Endnotes

- <sup>1</sup> Texas Labor Code, Title II. Subtitle C. Chapter 61.Subchapter A.
- <sup>2</sup> Annette Bernhardt, et. al, Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities, Center for Urban Economic Development, National Employment Law Project, UCLA Institute for Research on Labor and Employment, 2009.
- <sup>3</sup> Annette Bernhardt, et. al, Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities, Center for Urban Economic Development, National Employment Law Project, UCLA Institute for Research on Labor and Employment, 2009.
- <sup>4</sup> Workers Defense Project, Build a Better Nation: A Case for Comprehensive Immigration Reform, February 2013.
- <sup>5</sup> Annette Bernhardt, et. al, Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities, Center for Urban Economic Development, National Employment Law Project, UCLA Institute for Research on Labor and Employment, 2009.
- <sup>6</sup> CPPP Analysis, Texas Workforce Commission, Labor Law Complete Statistical Report FY91-FY12.
- <sup>7</sup> CPPP Analysis, Texas Workforce Commission, Payday Bad Faith Penalty Recap, FY2008-FY2012.
- <sup>8</sup> CPPP Analysis, TWC, Payday Bad Faith Penatly.
- <sup>9</sup> IRS Publication 15-A, Misclassification of Employees, p. 6.
- <sup>10</sup> Linda Donahue, James Ryan Lamare, and Fred B. Kotler, J.D., Cornell University ILR School, February 2007, "Cost of Worker Misclassification in New York State."
- <sup>11</sup> Linda Donahue, p. 6.
- <sup>12</sup> Workers Defense Project, *Build a Better Texas: Construction Workers in the Lone Star State*, January 2013.
- <sup>13</sup> National Employment Law Project, Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries, August 2012.
- <sup>14</sup> Workers Defense Project, 2013 Legislative Priorities to Protect Texas Construction Workers.
- <sup>15</sup> CPPP, Common-Sense Principles for Immigration Reform, April 29, 2010.
- <sup>16</sup> CPPP, Common-Sense Principles for Immigration Reform, April 29, 2010.

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