

FORMS OF WORKER EXPLOITATION: A REPORT TO THE COMMUNITY

My name is Jeff Nieznanski. I am an attorney at Legal Assistance of Western New York. I am here today to present my findings on forms of low-wage worker exploitation in our community in anticipation of Saturday's testimony from workers, and proposed solutions to this serious problem.

I. Wage Theft

The forty hour work week became law with passage of the Fair Labor Standards Act of 1938, over 75 years ago. Yet lack of compliance with this law remains a bitter reality right here in the community of Monroe, giving unscrupulous employers an unfair competitive edge over their competitors, and leaving taxpayers to support underpaid workers with public benefits.

In 2010, Gov. David Paterson signed into law some of the nation's strongest protections against wage theft, the New York State Wage Theft Prevention Act.¹ The law quadrupled the penalties for employers who steal workers' pay, and enhanced whistleblower protection from retaliation.²

Despite the Wage Theft Protection Act, wage theft is still a real problem. In July, Governor Andrew Cuomo announced that during the first six months of 2014, investigators recovered and disbursed more than \$16 million in wages, interest and damages to over 21,000 workers cheated out of their proper pay and benefits, and that the state was on track to recover more stolen wages than ever in its history.³ While the governor cites these recoveries as evidence of improved enforcement, his critics see these recoveries as merely the tip of the iceberg.

Wage theft is probably the most pervasive form of low-wage worker exploitation. Wage theft occurs when workers do not receive wages that they have a right to - when an employer takes money that belongs to employees and keeps it.⁴ Common forms of wage theft are unpaid overtime and paying less than the minimum wage; not giving workers their last paycheck after they leave a job; not paying for all the hours worked; not paying vacation and holiday pay that an employer agreed to; and not paying wages at all.

Several forms of wage theft can be seen in the following story. In March 2012, an *upscale* Manhattan restaurant reached a settlement with New York State Attorney General Eric Schneiderman over its illegal theft of wages from 25 employees.⁵ The

¹ Workers' Safeguards Strengthened by N.Y. Law, Sam Dolnick, Dec. 13, 2010, http://www.nytimes.com/2010/12/14/nyregion/14wage.html?_r=0

² *Id.*

³ Governor Cuomo Announces \$16.4 Million Distributed to 21,000 Workers in Wage Theft Cases, <http://www.governor.ny.gov/press/72414-wage-theft>, July 24, 2014.

⁴ http://wagetheft.org/wordpress/?page_id=1511

⁵ <http://www.ag.ny.gov/press-release/ag-schneiderman-announces-nyc-restaurant-and-nightclub-will-pay-200000-retaliation>

restaurant did not pay for overtime work, paid less than the minimum wage, and withheld tips.⁶ Two immigrant busboys were paid no wages at all, and were subsisting solely on tips.⁷

After he was sued, the restaurant owner demanded the busboys' working papers, then retaliated by reducing their hours and then firing them.⁸ The Attorney General reached a settlement that required the restaurant to pay restitution of \$25,000 to each of the two busboys and \$150,000 to 23 other workers.⁹ In announcing the \$200,000 settlement of retaliation claims against employees and other illegal labor practices the Attorney General proclaimed that, "By scaring employees into silence, employer retaliation undermines basic labor law protections."¹⁰

Wage theft includes misclassification of employees as independent contractors. According to the NY Dept. of Labor,

Employee misclassification occurs when a worker is improperly denied the benefits and protections provided to "employees" as that term is defined by state and federal law. Workers who are classified as employees receive a wide range of legal protections including eligibility for unemployment insurance if they are laid off, eligibility for workers compensation if they are injured on the job and, where applicable, the right to be paid the minimum wage and overtime pay.¹¹

On February 1, 2014, the NYS Dept. of Labor's ANNUAL REPORT OF THE JOINT ENFORCEMENT TASK FORCE ON EMPLOYEE MISCLASSIFICATION included a recent study based on audits of New York employment records.¹² It found that up to 10% of the employees appear to have been misclassified.¹³ Misclassifying just 1% of workers as Independent Contractors costs the Unemployment Insurance Trust Fund \$198 million annually, and that 95% of workers who claimed they were misclassified as Independent Contractors were reclassified as employees following review.¹⁴

Still another form of wage theft involves employees who are paid "off-the-books" and are not reported at all for tax and other financial purposes. This form of exploitation robs the worker of many protections, including workers compensation, disability, Social Security, and unemployment compensation. Taxes that are not paid by such workers and employers adds to the overall tax burden the rest of us share.

Wage theft is not restricted to unskilled workers. Workers paid by a contractor or subcontractor of a federal government contract are entitled to receive what is known as a "prevailing wage" for that kind of work in the area where the work is done. Prevailing

⁶ *Id.*

⁷ <http://www.epi.org/publication/epidemic-wage-theft-costing-workers-hundreds/>

⁸ *Id.*

⁹ *Id.*

¹⁰ www.ag.ny.gov/press-release/ag-schneiderman-announces-nyc-restaurant-and-nightclub-will-pay-200000-retaliation

¹¹ <http://www.labor.ny.gov/agencyinfo/PDFs/Misclassification-Task-Force-Report-2-1-2014.pdf>.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

wages are calculated by the US Department of Labor, and are higher than the minimum wage. Many federal contractors, however, simply ignore this law.

Wage theft is not the only way low wage workers are exploited.

Workers are also exploited when employers fail to provide protections and safeguards required by law. I have personally seen recent cases in Rochester of employers who have failed to follow the law that requires a wage statement, commonly referred to as pay check stub, be given to employees.

Another form of worker exploitation is the subminimum wage. Companies in New York can still pay less than the minimum wage – as little as \$5.00 per hour – to restaurant servers, delivery workers, and nearly a quarter-million other workers in the food service industry who receive tips.¹⁵ Although employers are legally required to "top off" a tipped worker's pay when it doesn't meet the regular minimum wage, enforcement is often ineffective.

As a result, high poverty, low wages, and unstable paychecks are a common way of life for New York's tipped workers – roughly 70% of whom are women.¹⁶ Governor Cuomo has now called for a Wage Board to study the state's sub-minimum wage for tipped workers – and with the stroke of a pen, the Cuomo administration can end this unfair and outdated policy by issuing a wage order requiring employers to directly pay tipped workers the full minimum wage, with tips in addition.¹⁷

II. Scheduling

Scheduling is another way to exploit low wage, part-time workers by preventing them from working sufficient hours to earn a living wage. Many employers of part-time workers do not provide a consistent, regular schedule for employees, and instead demand that employees remain "flexible" to work at times most convenient to their employer.

Scheduling is now a powerful tool to bolster profits, allowing businesses to cut labor costs with a few keystrokes.¹⁸ "It's like magic," said Charles DeWitt, vice president for business development at Kronos, which supplies the software for Starbucks and many other chains.¹⁹

Virtually every major retail and restaurant chain rely on software that schedules workers using sales patterns, often without regard to workers' needs.²⁰ Starbucks, according to

¹⁵ <https://actionnetwork.org/petitions/end-the-sub-minimum-wage-for-tipped-workers-in-new-york>, Oct. 19, 2014.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Kantor, Jodi, Working Anything but 9 to 5: Scheduling Technology Leaves Low-Income Parents With Hours of Chaos, http://www.nytimes.com/interactive/2014/08/13/us/starbucks-workers-scheduling-hours.html?_r=0, August 13, 2014.

¹⁹ *Id.*

²⁰ *Id.*

a August NYTimes article, uses such software to determine which of its 130,000 baristas are needed in its thousands of locations and exactly when they will be needed.²¹ Using sophisticated scheduling software allows big retailers to bring in more workers in anticipation of need and sending workers home when real-time analyses show decreased sales.²² Managers are often compensated based on the efficiency of their staffing.²³

The Starbucks barista in the August NY Times article “rarely learned her schedule more than three days before the start of a workweek,” and “was scheduled to work until 11 p.m. on Friday, July 4; report again just hours later, at 4 a.m. on Saturday; and start again at 5 a.m. on Sunday.”²⁴

III. Other Forms of Exploitation

And there are still other forms of exploitation.

Preventing low-wage workers from taking better paying jobs is still another way to control and take advantage of low-wage workers. “Noncompete clauses are now appearing in far-ranging fields beyond the worlds of technology, sales and corporations with tightly held secrets, where the curbs have traditionally been used.²⁵” From event planners to chefs to yoga instructors, employees are increasingly required to sign agreements that prohibit them from working for a company’s rivals.²⁶

Daniel McKinnon, who had been a hairstylist in Norwell, Mass., lost a court battle with his former employer who claimed that Mr. McKinnon had violated the terms of his agreement when he went to work at a nearby salon. Mr. McKinnon said that he did not think the original restriction — to wait at least 12 months before working at any salon in nearby towns — still applied because he had been fired after years of friction with the manager there. Shortly after being fired, he went to work at a nearby salon.

But a judge issued an injunction ordering him to stop working at his new employer.

“It was pretty lousy that you would take away someone’s livelihood like that,” said Mr. McKinnon, who for the following year lived off jobless benefits of \$300 a week. “I almost lost my truck. I almost lost my apartment. Almost everything came sweeping out from under me.”²⁷

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵

²⁶ Noncompete Clauses Increasingly Pop Up in Array of Jobs STEVEN GREENHOUSE JUNE 8, 2014
://www.nytimes.com/2014/06/09/business/noncompete-clauses-increasingly-pop-up-in-array-of-jobs.html?_r=0

²⁷ *Id.*

And then there are the employers that find ways around the laws. Walmart again stirred up adverse publicity when it recently changed its "dress code" for employees. Although federal law requires employers to provide workers with uniforms, Walmart is instead requiring workers to supply their own clothes to meet its "dress code," which, as such, is not technically a "uniform."

The problem of wage theft and other forms of worker exploitation are by no means isolated. Right here in Rochester and Monroe County, similar types of wage theft and exploitation occur every day. In my work as an attorney, I have personally seen cases where employers do not pay wages to workers, instead providing only a room to stay in, in exchange for working as many as 12 hours a day, seven days a week.

And the law protecting workers from wage theft is under attack. In June of this year, both the New York State Assembly and Senate passed a bill to amend the New York State Wage Theft Prevention Act, eliminating the need for employers to provide annual wage notices to their existing employees.²⁸ Fortunately, the bill also imposes harsher penalties for wage law violations and imposes new liability on repeat offenders.²⁹ The bill awaits Governor Cuomo's signature.³⁰ Stay tuned!

²⁸ Amendments to New York State Wage Theft Prevention Act Await Governor Cuomo's Signature, <http://www.natlawreview.com/article/amendments-to-new-york-state-wage-theft-prevention-act-await-governor-cuomo-s-signat>, Sept. 16, 2014.

²⁹ *Id.*

³⁰ *Id.*