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## SAME LAW, DIFFERENT DAY: A SURVEY OF THE LAST THIRTY YEARS OF WAGE LITIGATION AND ITS IMPACT ON LOW-WAGE WORKERS

*Nantiya Ruan\**

### I. INTRODUCTION

There can be little doubt that actions to recover lost wages from employers have increased dramatically in the last thirty years. Since the 1970s, American workers have become subject to a “24/7 marketplace workweek.”<sup>1</sup> Off-the-clock work, misclassification, contingent jobs, and wage theft have become far more prevalent in the last three decades. A few snapshots in time reflect this trend. In 1997, some 1,600 wage suits were filed in federal court.<sup>2</sup> In 2007, just ten years later, the number of wage suits jumped to 7,310.<sup>3</sup> In just one year, 2006-2007, the number of filed wage cases increased by 73 percent.<sup>4</sup>

Strangely, this increase was not brought about by an expansion of wage rights, either statutorily or judicially. Wage and hour protections have remained mostly unchanged since the Fair Labor Standards Act’s enactment in 1938.<sup>5</sup> Instead, this increase suggests that protecting low-wage workers has taken on a new urgency.

This Article surveys the major trends in wage litigation over the last thirty years. Common threads of vulnerability, scarce resources,

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1. See Scott Miller, *Revitalizing the FLSA*, 19 HOFSTRA LAB. & EMP. L. J. 1, 4 (2001).

2. See Nantiya Ruan, *Facilitating Wage Theft: How Courts Use Procedural Rules to Undermine Substantive Rights of Low-Wage Workers*, 63 VAND. L. REV. 727, 735 (2010) [hereinafter Ruan, *Facilitating Wage Theft*] (citing LEONIDAS RALPH MECHAM, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 1997 ANNUAL REPORT OF THE DIRECTOR 133 tbl.C-2A (1997), available at [http://www.uscourts.gov/judicial\\_business/contents.html](http://www.uscourts.gov/judicial_business/contents.html)).

3. *Id.*

4. *Id.*

5. 29 U.S.C. §§ 201–219 (2006).

insecure jobs, and economic disadvantage run throughout the three decades. In honor of the low-wage workers who are most affected by these hallmarks of American wage and hour jurisprudence, this Article aims to survey these themes to showcase the deep schism that continues to divide the economically secure and insecure of our workers.

Part I describes the changing American workplace and phenomena that allow wage violations to go unredressed, including contingent workers, the misclassification and exemption of workers from wage protection, persistent unpaid work, and the under-enforcement by the government agencies tasked with upholding our wage laws.

Part II focuses on immigrant labor and the challenges these workers face in our workforce, including the lasting effects of attempted immigration reform, the explosion of the day labor phenomenon, and the continued isolation of migrant farm workers.

Part III turns to the need for collective action to remedy wage abuses, and outlines the newest jurisprudence in collective wage litigation, including hybrid federal and state wage and hour class actions, the importance of the certification and notice process to vindication of FLSA rights, and the need for representational evidence and statistical sampling.

Part IV turns to the next thirty years: what is on the horizon for workers hoping to vindicate their wage rights? This section highlights four potential trends, including the impact of mandatory arbitration and class action waivers on wage claims, the growing trend of unpaid internships, the increased use of labor laws for non-union workers, and the role of non-lawyer advocacy for wage rights vindication.

## II. THE MODERN AMERICAN WORKPLACE

Paid work looks very different today from how it did thirty years ago. Mobile workers, telecommuting workers, and dual-worker families have all grown to be commonplace today but were rare or nonexistent before 1980.<sup>6</sup> Since the 1970s, American workers have been chronically

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6. See generally, Linda Wiese, *Preface to: Virtual Ghostly Mobile Workers*, EXAMINER.COM (Oct. 29, 2009), <http://www.examiner.com/article/preface-to-virtual-ghostly-mobile-workers> (discussing the rise in mobile workers since 1980 and the changes in the workplace since then); Wendell Cox, *Improving Quality of Life Through Telecommuting*, INFO. TECH. & INNOVATION FOUND. 1, 2 (Jan. 14, 2009), [www.itif.org/files/Telecommuting.pdf](http://www.itif.org/files/Telecommuting.pdf) (stating the amount of telecommuters in 2000 has risen to 4.2 million, a 92 percent increase from 1980); Anne E Winkler, *Earnings of Husbands and Wives in Dual Earner Families*, 121 MONTHLY LAB. REV. 42, 42 (Apr. 1998), [www.wallnetwork.ca/inequality/3winkler.pdf](http://www.wallnetwork.ca/inequality/3winkler.pdf) (discussing the increase of married women in the workforce and the replacement of traditional married-couples with dual earner

“overworked,” facing a “time squeeze” as they are required to work longer hours for fewer benefits.<sup>7</sup> One study found that almost one in five workers is required to work paid or unpaid overtime once or more a week with little or no notice.<sup>8</sup> Another scholar calculates that Americans in the 1990s worked the equivalent of a month per year more than their 1960s counterparts,<sup>9</sup> while another team of experts found that, in this same time period, workers added sixty-six hours to their annual work.<sup>10</sup> This increase in work occurred during a period of unprecedented growth in technology and efficiency that was supposed to *lessen* the amount of work in a standard workweek.<sup>11</sup>

Today’s workforce is also filled with contingent workers who are at the mercy of their supervisors in the number of hours they work.<sup>12</sup> The number of part-time workers has steadily increased over the last decade, with involuntary part-time workers (those forced to downgrade from full-time to part-time when they lose their jobs) numbering 8.2 million, and the total number of part-time workers exceeding 27 million.<sup>13</sup>

While our workplaces and work tasks have changed dramatically over the last several decades, the federal statutory regime that regulates the wages and hours of American workers, the Fair Labor Standards Act of 1938 (“FLSA”), has hardly changed at all.<sup>14</sup> Passed as part of the New Deal legislation of the early twentieth century, the FLSA was enacted during a time when workers desired more leisure time away from their jobs but also wanted protection from job insecurity and unemployment.<sup>15</sup> Congress hoped that employers would “spread the work” by employing more people working non-abusive hours.<sup>16</sup> As President Franklin D. Roosevelt said in encouraging the enactment of the Act: “Overwhelming workloads, job insecurity, and conflicting job

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couples).

7. See Miller, *supra* note 1, at 4-5.

8. Shirley Lung, *Overwork and Overtime*, 39 IND. L. REV. 51, 52 (2005).

9. JULIET B. SCHOR, *THE OVERWORKED AMERICAN: THE UNEXPECTED DECLINE OF LEISURE* 4, 29 (1991).

10. Barry Bluestone & Stephen Rose, *Overworked and Underemployed: Unraveling an Economic Enigma*, AM. PROSPECT (March 1997), available at <http://www.prospect.org/print/V8/31/bluestone-b.html>.

11. See SCHOR, *supra* note 9, at 4.

12. Martha McCluskey et al., *At the Company's Mercy: Protecting Contingent Workers from Unsafe Working Conditions*, CENTER FOR PROGRESSIVE REFORM 1 (Jan. 2013), [http://www.progressivereform.org/articles/Contingent\\_Workers\\_1301.pdf](http://www.progressivereform.org/articles/Contingent_Workers_1301.pdf).

13. See BUREAU OF LABOR STATISTICS, USDL-13-0389, *EMPLOYMENT SITUATION SUMMARY*, tbl. A8 (2013), available at <http://www.bls.gov/news.release/pdf/empst.pdf>.

14. See Miller, *supra* note 1, at 25, 36-7, 44.

15. See *id.*, at 23-24.

16. *Id.* at 2.

responsibilities in the nation's workplaces pose a threat to the health of workers."<sup>17</sup>

The FLSA established: (1) a minimum wage; (2) a requirement of premium overtime pay for work exceeding forty hours in a workweek; (3) a prohibition on child labor; and (4) a mandate that employers keep accurate time records.<sup>18</sup> Notably, seventy-odd years post-enactment, the FLSA remains the primary wage protection law of our country. It continues to be the beacon for American workplace fairness, expressing basic principles of just treatment for all workers.<sup>19</sup>

Or mostly all workers. For many low-wage earners, the FLSA simply does not apply. For example, home health care workers subject to the FLSA's companionship exemption are not covered by the minimum wage protection.<sup>20</sup> Similarly, agricultural workers and live-in domestic workers are not subject to overtime requirements.<sup>21</sup> And tipped employees can have their wages reduced by half of the minimum floor with only minimum tip generation.<sup>22</sup>

Workplace scholars have disputed and questioned the continued viability of the FLSA, juxtaposing the need for employer flexibility, worker compensatory time, and the need to expand its protections to new categories of workers.<sup>23</sup> But such calls to action have gone unheeded, as the FLSA's wage protections have only been significantly amended once (in the 1940s).<sup>24</sup> Instead, because the FLSA contains numerous narrow

17. *Id.*

18. 29 U.S.C. §§ 206, 207, 211(c), 212 (2006).

19. David J. Walsh, *The FLSA Comp Time Controversy: Fostering Flexibility or Diminishing Worker Rights?*, 20 BERKELEY J. EMP. & LAB. L. 74, 77 (1999).

20. See Rebecca Smith & Catherine Ruckelshaus, *Solutions, Not Scapegoats: Abating Sweatshop Conditions for All Low-Wage Workers as a Centerpiece of Immigration Reform*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 555, 561 (2007).

21. *Id.* (citing U.S.C. § 213(b)(12) (2000); 29 U.S.C. § 213(b)(21) (2000)).

22. *Id.* (citing 29 U.S.C. § 203(m) (2006)).

23. Compare Walsh, *supra* note 19, at 79–110, 126–136 (discussing the major arguments for and against comp time reform and concluding comp time reform might diminish workers' rights), with Miller, *supra* note 1, at 46–77 (examining the "Overworked American" thesis and the maximum hours permissible under the FLSA), Daniel V. Yager & Sandra J. Boyd, *Reinventing the Fair Labor Standards Act to Support the Reengineered Workplace*, 11 LAB. LAW 321, 331–41 (1996) (analyzing various exemptions under the FLSA used by employers to minimize the use of over-time, and the need for reform in this area), Gretchen Agena, Comment, *What's So "Fair" About It?: The Need to Amend the Fair Labor Standards Act*, 39 HOUS. L. REV. 1119, 1126–56 (2002) (commenting on the need to reform the FLSA's Duties Test and Salary Test), and Ashley M. Rothe, Comment, *Blackberrys and the Fair Labor Standards Act: Does a Wireless Ball and Chain Entitle White-Collar Workers to Overtime Compensation?*, 54 ST. LOUIS U. L. J. 709, 726–732 (2010) (articulating the need for reform in the FLSA exemptions to cover employees who utilize modern technology and work more from home).

24. 29 U.S.C. §§251–262 (2006) (Portal to Portal Act).

exemptions,<sup>25</sup> fitting new workers into (or out of) these exemptions has been the cause for increased litigation as modern American workers attempt to fit within the confines of a law seven decades old.

### A. *Contingent Workers: Less Security and Growing Inequality*

The U.S. General Accounting Office issued a report in 2000 finding that while contingent workers were a growing sector of the working population, their income lagged behind the rest of the workforce.<sup>26</sup> Five percent of the workforce is contingent if counting only temporary or on-call workers, and almost 30% when including independent contractors, self-employed workers, and part-time employees.<sup>27</sup> Many employers turn to these forms of “nonstandard” work by converting full-time positions into either part-time, temporary, or contract jobs, while others outsource these positions to third-party contractors (“temp” agencies) that offer, typically, lower wages without benefits, including lack of health insurance, pensions, and job security.<sup>28</sup>

Outsourcing workers to third-party contractors or “subcontracting” allows companies to argue that it is the intermediary “temp agency” or “subcontractor” who is the sole employer on the hook for wage violations, such as unpaid minimum wage or overtime.<sup>29</sup> Because these agencies are often “fly by night” operations without resources to pay for back wages,<sup>30</sup> without a legal argument that they are joint employers with the companies who primarily benefit from workers’ labor, contingent workers can be shut out of recovery.<sup>31</sup>

Studies show that contingent work is largely staffed by low-wage workers who are left without permanence, stability, or promotion

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25. Yager & Boyd, *supra* note 23, at 331-41 (discussing employee exemptions under the FLSA, including the White Collar Exemption, Professional Exemption, and the Administrative Exemption).

26. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/HEHS-00-76, CONTINGENT WORKERS: INCOME AND BENEFITS LAG BEHIND THOSE OF REST OF WORKFORCE 10 (2000).

27. *Id.* at 4.

28. Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1925 (2000) (citing ARNE L. KALLEBERG ET AL., NONSTANDARD WORK, SUBSTANDARD JOBS: FLEXIBLE WORK ARRANGEMENTS IN THE U.S. 6 (1997); LAWRENCE MISHEL ET AL., THE STATE OF WORKING AMERICA, 1998-99, at 8, 246-47 (1999)).

29. Catherine Ruckelshaus, *Labor's Wage War*, 35 FORDHAM URB. L.J. 373, 379 (2008).

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

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

opportunities.<sup>32</sup> Related to the increase in our contingent workforce is the continued wage inequality between men and women,<sup>33</sup> and between white workers and workers of color.<sup>34</sup> While “[b]oth men and women in all types of nonstandard work (except contracting) are more likely to receive poverty-level hourly wages than workers with similar personal and job characteristics employed in regular full-time jobs,”<sup>35</sup> it is women (of all races) and minority men who occupy the lowest-paying contingent jobs.<sup>36</sup>

These wage gaps show the impact contingent work has on earnings. Two-thirds of part-time workers are women,<sup>37</sup> and the Congressional Joint Economic Committee has recognized that the gender pay gap is partly driven by the earning penalty for part-time work, which pays less per hour than the same or equivalent work done by full-timers.<sup>38</sup> We also know that in America, there is a growing gap between the top and bottom of the income ladder: in 2011, “median household income for the bottom tenth of the income spectrum fell by 12 percent from a peak in 1999, while the top 90th percentile dropped by only 1.5 percent.”<sup>39</sup> The problem is that the working contingent poor are not getting ahead as a group: while top hourly earners grew, the bottom stagnated, widening the wage gap even among hourly workers.<sup>40</sup> Scholars agree: the wage inequality of the working poor remains the largest threat Americans face in today’s economy.<sup>41</sup>

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32. See KALLEBERG ET AL., *supra* note 28, at 18–19 tbl.9.

33. See Martina Morris & Bruce Western, *Inequality in Earnings at the Close of the Twentieth Century*, 25 ANN. REV. SOCIOLOGY 623, 627–28, 640–41 (1999).

34. See *id.*

35. Schultz, *supra* note 28, at 1925.

36. *Id.* at 1926.

37. See STAFF OF J. ECONOMIC COMM., 111TH CONG., THE EARNINGS PENALTY FOR PART-TIME WORK: AN OBSTACLE TO EQUAL PAY (2010), available at [http://www.jec.senate.gov/public/?a=Files.Serve&File\\_id=74203874-3824-44e4-b369-4efbe14d8745](http://www.jec.senate.gov/public/?a=Files.Serve&File_id=74203874-3824-44e4-b369-4efbe14d8745).

38. See *id.*

39. Sabrina Tavernise, *Poverty Rate Soars to Highest Level Since 1993*, N.Y. TIMES (Sept. 14, 2011), <http://www.nytimes.com/2011/09/14/us/14census.html?pagewanted=all>; see also CARMEN DENAVAS-WALT ET AL., U.S. DEP’T OF COMM., INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2010, at 5 (2011), available at <http://www.census.gov/prod/2011pubs/p60-239.pdf>.

40. See CONG. BUDGET OFFICE, Pub. No. 2745, CHANGES IN LOW-WAGE LABOR MARKETS BETWEEN 1979 AND 2005, at 2–3 (2006), available at <http://cbo.gov/sites/default/files/cbofiles/ftpdocs/76xx/doc7693/12-04-laborforce.pdf>.

41. See LAWRENCE MISHEL ET. AL., ECONOMIC POLICY INSTITUTE: THE STATE OF WORKING AMERICA 6–9 (Cornell U. Press, 12th ed. 2012).

### B. Misclassified and Exempt “White-Collar” Workers

The FLSA’s overtime provisions were put into place to encourage spreading employment to more workers by placing financial pressure on employers and compensating workers for the burden of extra hours beyond the considered norm to keep at bay the “evil” of “overwork.”<sup>42</sup> In doing so, Congress exempted executive, administrative, and professional employees, perhaps because they already enjoyed higher wages and benefits, and therefore required less protection than their lower-wage earning comrades.<sup>43</sup>

But in the early twentieth century, these “white collar” employees looked much different from the workers employers are attempting to fit within this exemption today. In 1938, when the FLSA was enacted, there were approximately 3.7 million professional American workers, comprising roughly 3% of the workforce.<sup>44</sup> In the late 1940s to early 1970s, only the top-earning professional employees worked over forty hours a week and the “middle management” executives and administrative employees confined their work to the typical nine-to five workday.<sup>45</sup> In contrast, in 2008, nearly a quarter of all jobs are deemed professional, requiring an Associate’s degree or higher.<sup>46</sup> And working more than forty hours a week is no longer reserved for the top earners.<sup>47</sup>

An early misclassification case provides a good example. In 1982, low-paid assistant managers working for Burger King sued for overtime wages, arguing they were misclassified as exempt executives under the FLSA.<sup>48</sup> The First Circuit found that although they spent more than 40% of their time in food preparation duties and had little discretion in any decision making responsibilities, because they were “in charge” during their shifts, they were properly classified as exempt executives.<sup>49</sup>

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42. See *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 577-78 (1942).

43. See *Agena*, *supra* note 23, at 1222.

44. See *Miller*, *supra* note 1, at 34 (citing ROBERT WILLIAM FOGEL, *THE FOURTH GREAT AWAKENING & THE FUTURE OF EGALITARIANISM* 67 (2000)).

45. See *id.*

46. See Olivia Crosby & Roger Moncarz, Miller, U.S. Dep’t of Labor, *The 2004–14 Job Outlook for College Graduates*, 2006 OCCUPATIONAL OUTLOOK QUARTERLY, Fall 2006, at 45 (Between 2004 and 2014, [the U.S. Bureau of Labor Statistics] projects 55 million job openings for workers who are entering an occupation for the first time. Of these, at least 13.9 million are expected to be filled by college-educated workers.”); see also *Miller*, *supra* note 1, at 35 (citing Douglas Braddock, *Occupational Employment Projections to 2008*, 122 MONTHLY LAB. REV. 54, 52–53 (1999)).

47. *Miller*, *supra* note 1, at 85.

48. *Donovan v. Burger King Corp.*, 672 F.2d 221, 223 (1st Cir. 1982).

49. *Id.* at 227–28.



Wage litigation over the last decade or so has shown that employers will also misclassify workers as “independent contractors,” and not employees, to avoid paying minimum wage or overtime.<sup>50</sup> By doing so, employers save up to 30% of their payroll costs and can undercut competitors in labor-intensive industries.<sup>51</sup>

The FLSA has not been amended to address these changing times.<sup>52</sup> Instead, with growing pressure to modernize the regulations, and facing massive misclassification litigation in federal courts, the Department of Labor, the body charged with wage and hour enforcement, recently revised their regulations in 2004.<sup>53</sup> While employers still bear the burden of establishing an exemption, and exemptions are interpreted narrowly, the employer must still satisfy a (modified) three part test: the salary level test, the salary basis test, and the duties test, while not resting solely on title.<sup>54</sup> The changes were deemed “modest”<sup>55</sup> but the effect is that six million workers likely have lost their right to overtime pay.<sup>56</sup>

### C. Off-the-Clock Work: Flexibility to Workers' Detriment

As technology evolves, its advancement challenges courts as they attempt to apply long-standing legal doctrines to modern workplaces. Emerging technological advances, such as laptops, smartphones, and Internet-capable devices, have become relatively inexpensive investments for companies that want their workers available and accessible to work around the clock.

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50. See *Lang v. DirecTV, Inc.*, No. 10-1085 G(I), 2011 WL 6934607, at \*8 (E.D. La. Dec. 30, 2011), *Abushalieh v. Am. Eagle Exp.*, 716 F. Supp. 2d 361, 363 (D.N.J. 2010), *Ansoumana v. Gristede's Operating Corp.*, 255 F. Supp. 2d 184, 190 (S.D.N.Y. 2003), and *Somers v. Converged Access, Inc.*, 911 N.E.2d 739, 746–50 (Mass. 2009).

51. Ruckelshaus, *supra* note 29, at 381.

52. There has been one recent legislative effort to amend the FLSA, solely focused on eliminating and curtailing overtime premium pay. The confusingly named “Working Families Flexibility Act,” or H.R. 1406, would allow employers to pay their workers nothing extra for overtime work, other than the potentially empty promise of compensatory time that can only be used at the employer's discretion. See <http://www.govtrack.us/congress/bills/113/hr1406/text>. As of the date of this Article, the bill passed the House but remained in the Senate for consideration.

53. See 29 C.F.R. § 541 (2005).

54. 29 C.F.R. § 541.2 (2005).

55. See Adam T. Klein et. al., *The DOL's New FLSA White Collar Exemption Regulations and Working with the DOL on FLSA Actions*, 10 EMP. RTS. & EMP. POL'Y J. 459, 460 (2006); see also Avena, *supra* note 23, at 1128–29.

56. Smith & Ruckelshaus, *supra* note 20, at 561 (citing ROSS EISENBREY, ECON. POLICY INST., BRIEFING PAPER NO. 152, LONGER HOURS, LESS PAY 1 (2004), available at <http://www.epi.org/page/-/old/briefingpapers/152/bp152.pdf>).

Our workforce is increasingly mobile, with many workers able to do some or all of their work from virtually anywhere. In 2013, it is expected that 75.5% of the American workforce will be working from somewhere other than a standard office at some point of their workweek.<sup>57</sup> The world's mobile worker population is expected to reach nearly 1.2 billion by 2013.<sup>58</sup> This "boundaryless workplace"<sup>59</sup> allows for work to be completed outside the purview of management at the same time that workers have nearly constant access to their work through corporate servers, Internet usage, and home computers. But it also makes for rampant overtime work, which often goes unpaid.<sup>60</sup>

Even before the "boundaryless workplace" became widespread in the last decade, workers have increasingly gone to the courts to claim unpaid overtime.<sup>61</sup> Workers from various industries (including call centers, retail stores, restaurants, and meat processing plants) claim that they were required to meet employers' performance goals that could not be performed in a normal forty-hour workweek, and that the employers knew or should have known so in setting those expectations.<sup>62</sup> Others, including multitudes of Wal-Mart workers from numerous states, claim that they were forced to "clock out" so that their time records would reflect no overtime hours, but then forced by their managers to continue working.<sup>63</sup>

Another sub-set of such "off-the-clock" unpaid wages relates to work done before or after one's shift that is related to one's job but unpaid. For example, in "donning and doffing" litigation, workers

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57. *More Than One Billion Mobile Workers Worldwide by Year's End, According to IDC*, BUS. WIRE (Feb. 19, 2010, 8:00 AM), <http://www.businesswire.com/news/home/20100219005085/en/Billion-Mobile-Workers-Worldwide-Years-IDC>.

58. *Id.*

59. Professor Kathy Stone is attributed with coining this phrase to represent the changing workplace norms. See, e.g., KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 197 (2004); Katherine V.W. Stone, *Employee Representation in the Boundaryless Workplace*, 77 CHI.-KENT L. REV. 773 *passim* (2002); Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, *passim* (2001).

60. See Rothe, *supra* note 23, at 715.

61. See Shirley Lung, *Overwork and Overtime*, 39 IND. L. REV. 51, 65 (2005).

62. See, e.g., *Myles v. Prosperity Mortg. Co.*, No. Civ. CCB-11-1234, 2012 WL 1963390, at \*4 (D. Md. May 31, 2012); *Binks v. Grand Canyon Educ. Inc.*, No. 2:10CV00571 DS, 2011 WL 4527418, at \*1 (D. Utah Sept. 28, 2011); *Epps v. Oak St. Mortg. LLC*, No. 5:04-CV-46-OC-10GRJ, 2006 WL 1460273, at \*9 (M.D. Fla. May 22, 2006); *Horne v. United Servs. Auto. Ass'n*, 279 F. Supp. 2d 1231, 1234 (M.D. Ala. 2003).

63. See Steven Greenhouse, *Wal-Mart to Pay \$54 Million to Settle Suit Over Wages*, N.Y. TIMES, (Dec. 9, 2008), <http://www.nytimes.com/2008/12/10/business/10walmart.html>.

allege that they are required to put on protective gear and perform other work-related functions prior to one's shift (such as walk to their station and acquire work-related tools), and additional duties after one's shift (such as remove gear, shower, and return tools), without being compensated for that time.<sup>64</sup> The Supreme Court clarified in *IBP, Inc. v. Alvarez* that any "integral and indispensable" duties performed after the start of one's workday must be compensated.<sup>65</sup>

Together, these wage suits reflect the larger conundrum facing American workers: keep working longer hours for less pay or try to find a private attorney willing to bring a legal claim and then risk termination or other retaliatory action for enforcing one's rights. Private civil litigation is often the only available remedy because filing a complaint with the federal or state labor regulatory agency that has jurisdiction over one's wage claim is unavailing for the average worker.<sup>66</sup>

#### D. Under-Enforcement by Government Agencies

A worker who wishes to recover unpaid wages may file a complaint to the Wage and Hour Division (WHD) of the United States Department of Labor (DOL).<sup>67</sup> In 2008, the WHD received 23,845 complaints; as private litigation has increased, WHD complaints have decreased each year since 2002.<sup>68</sup> The WHD must decide whether to conduct an investigation based on the information in the worker's wage complaint.<sup>69</sup> If, during an investigation, the WHD determines that the employer violated the FLSA, it may seek FLSA enforcement by filing a civil suit.<sup>70</sup> Scholars agree that wage and hour enforcement has been hampered by a lack of resources and "political will to investigate low-wage workers' claims."<sup>71</sup>

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64. *IBP, Inc. v. Alvarez*, 546 U.S. 21, 24 (2005).

65. *Id.* at 37.

66. *See infra* Part I.D.

67. *See* LES A. SCHNEIDER & J. LARRY STINE, 2 WAGE AND HOUR LAW: COMPLIANCE AND PRACTICE § 19:2 (2012).

68. WAGE AND HOUR DIV., U.S. DEP'T OF LABOR, WAGE AND HOUR DIVISION COLLECTS OVER \$1.4 BILLION IN BACK WAGES FOR OVER 2 MILLION EMPLOYEES SINCE FISCAL YEAR 2001, at 1 (2008), available at <http://www.dol.gov/whd/statistics/2008FiscalYear.pdf>.

69. *See* SCHNEIDER & STINE, *supra* note 67 (summarizing the criteria used by the Wage and Hour Division to select employers for investigation).

70. *See id.* § 19:10 (2012) (outlining the Wage and Hour Division's options when it has found violations of the Act, which include taking no action, settling the matter with the employer, notifying the employees of their private right of action, referring the file for litigation, or closing the file after unsuccessful attempts at settlement).

71. *See* Rita J. Verga, *An Advocate's Toolkit: Using Criminal "Theft of Service" Laws to*

DOL statistics from 2008 reflect that the WHD concluded 28,242 cases and recovered roughly \$185 million dollars in backpay for 228,645 employees.<sup>72</sup> This is the fewest number of resolved cases and fewest number of employees receiving recovery for lost wages since 2002.<sup>73</sup> During this time period, one study found that the WHD suffered significant declines in staffing, with only 732 investigatory agents, the lowest number in 30 years.<sup>74</sup> While at first blush, a decline in complaints to the DOL might be interpreted as evidence of a decreasing unpaid wage problem, this conclusion is at odds with the concurrent increase in FLSA litigation filings and the decrease in WHD staffing. The decrease in WHD complaints and successes therefore reflects a deliberate choice of employees and their attorneys to vindicate wage rights through litigation and not government enforcement.

Moreover, low-wage workers who wish to make a complaint to the DOL are often unsuccessful because of WHD mishandling, not because their claims lack merit.<sup>75</sup> In a report released in March 2009, the Government Accountability Office found that the WHD mishandled nine of the ten cases brought by a team of undercover agents posing as aggrieved workers.<sup>76</sup> The report provides a stark example: a GAO undercover agent posing as a dishwasher called four times to complain about not being paid overtime for nineteen weeks, however, the DOL's Miami office failed to return his calls for four months, and when it did, an official told him it would take eight to ten months to begin

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*Enforce Workers' Right to be Paid*, 8 N.Y. CITY L. REV. 283, 286 (2005) (citing Jennifer Gordon, *Campaign for the Unpaid Wages Prohibition Act: Latino Immigrants Change New York Wage Law* 3-4 (Carnegie Endowment for International Peace, Paper No. 4,1999), available at [http://carnegieendowment.org/files/imp\\_wp4gordon.pdf](http://carnegieendowment.org/files/imp_wp4gordon.pdf)); see also NAT'L EMP'T LAW PROJECT, *WINNING WAGE JUSTICE* 6 (2011), available at <http://www.nelp.org/page/-/Justice/2011/WinningWageJustice2011.pdf>.

72. WAGE AND HOUR DIV., U.S. DEP'T OF LABOR, *supra* note 68, at 1.

73. See *id.*

74. Irene Lurie, *Enforcement of State Minimum Wage and Overtime Laws: Resources, Procedures, and Outcomes*, 15 EMP. RTS. & EMP. POL'Y J. 411, 412 (2011) ("Only 732 investigators were on board in 2007 to enforce compliance with minimum wage and overtime laws across the country, fewer investigators than thirty years earlier."); see U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-962T, *FAIR LABOR STANDARDS ACT: BETTER USE OF AVAILABLE RESOURCES AND CONSISTENT REPORTING COULD IMPROVE COMPLIANCE* 6 (2008), available at <http://www.gao.gov/assets/130/120636.pdf>.

75. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-458T, *DEPARTMENT OF LABOR: WAGE AND HOUR DIVISION'S COMPLAINT INTAKE AND INVESTIGATIVE PROCESSES LEAVE LOW WAGE WORKERS VULNERABLE TO WAGE THEFT* 4 (2009) [hereinafter WHD INVESTIGATIVE PROCESSES], available at <http://www.gao.gov/assets/300/291496.pdf>.

76. *Id.*; Steven Greenhouse, *Labor Agency Is Failing Workers, Report Says*, N.Y. TIMES (Mar. 24, 2009), [http://nytimes.com/2009/03/25/washington/25wage.html?\\_r=0](http://nytimes.com/2009/03/25/washington/25wage.html?_r=0).

investigating his case.<sup>77</sup>

Based on this evidence, workers are left with a bleak choice: stay quiet and forego needed wages, try to find a private attorney willing to litigate a modest individual claim or complex class claim, or wait for one's wage claim at a government agency that might never be answered.

### III. IMMIGRANT LABOR AND THE CHANGING AMERICAN WORKFORCE

The face of work in America, especially low-wage work, also looks much different today than it did three decades ago. As manufacturing jobs move overseas, America needs more workers in healthcare, childcare, retail, building services, construction, and hospitality.<sup>78</sup> Typically, employers in these industries offer fewer benefits and often cut costs by exploiting its workforce.<sup>79</sup> To fill the demand, immigrant workers, many unauthorized to work, have continued to look for work in the United States due to the need to staff these jobs.<sup>80</sup>

Near the end of the 1980s, there were an estimated four million undocumented persons present in the United States; roughly two decades later, there were approximately twelve million undocumented immigrants.<sup>81</sup> The workforce participation rates for undocumented workers are high, particularly for men, yet are mostly concentrated in low-wage jobs.<sup>82</sup> The workplace abuses faced by immigrants are well documented and severe,<sup>83</sup> including physical intimidation,<sup>84</sup>

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77. WHD INVESTIGATIVE PROCESSES, *supra* note 75, at 6 tbl.1.

78. See Ruckelshaus, *supra* note 29, at 374.

79. See generally *id.*

80. See generally Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193, 206-07 (2007) (discussing the effects and consequences of the Immigration Reform and Control Act of 1986).

81. See *id.* at 206 (citing JEFFREY S. PASSEL, PEW HISPANIC CTR., *THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE UNITED STATES*, at i (2006), available at <http://www.pewhispanic.org/files/reports/61.pdf>).

82. See *id.* at 206-07; see also PASSEL, *supra* note 81, at 10-12.

83. See generally NAT'L EMP'T LAW PROJECT, *supra* note 70, at 50; NAT'L EMP'T LAW PROJECT, *UNINTENDED CONSEQUENCES: LIMITING WORKERS' COMPENSATION BENEFITS FOR UNDOCUMENTED WORKERS EXPOSES WORKERS TO GREATER RISKS OF INJURY, BUSINESS TO GREATER COSTS 1* (2011), available at [http://nelp.3cdn.net/f4626d080903865d3e\\_q7m6bn3qp.pdf](http://nelp.3cdn.net/f4626d080903865d3e_q7m6bn3qp.pdf) (discussing the application of workers' compensation law to undocumented workers); Ruben J. Garcia, *Ghost Workers in an Interconnected World: Going Beyond the Dichotomies of Domestic Immigration and Labor Laws*, 36 U. MICH. J.L. REFORM 737, 753-54 (2003) (discussing the barriers created by U.S. law preventing undocumented workers from unionizing or improving work conditions).

84. See, e.g., *Alvarado v. Shipley Donut Flour & Supply Co.*, 526 F. Supp. 2d 746, 751 (S.D. Tex. 2007); *Bureorong v. Uvawas*, 922 F. Supp. 1450, 1459 (C.D. Cal. 1996) (alleging employer imprisoned Thai garment workers and assaulted them).

harassment,<sup>85</sup> and retaliation,<sup>86</sup> as well as unpaid work.

“Wage theft” has become the newest moniker for wage violations faced by low-wage workers, especially immigrant workers, in today’s workplace.<sup>87</sup> As set forth in Section I, unpaid minimum wage, misclassification of workers, and “off-the-clock” work, combine in unlawful practices that result in millions of dollars of lost wages for workers who can least afford it.<sup>88</sup> One Urban Institute study found that 2.2 million immigrant workers make less than the minimum wage.<sup>89</sup> The Employer Policy Foundation (an employer-funded think tank) estimated that workers would receive an additional nineteen billion dollars annually if employers followed wage and hour laws.<sup>90</sup> Recent government studies find as many as fifty to one hundred percent of employers in low-wage industries, such as the garment industry, the nursing home industry, and the poultry industry, in violation of FLSA minimum wage and overtime protections.<sup>91</sup>

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85. See, e.g., *Chellen v. John Pickle Co.*, 446 F. Supp. 2d 1247, 1285-86 (N.D. Okla. 2006) (finding employer kept workers imprisoned and routinely harassed them about their Indian heritage).

86. See, e.g., *Singh v. Jutla & C.D. & R’s Oil, Inc.*, 214 F. Supp. 2d 1056, 1059 (N.D. Cal. 2002) (finding the employer fired workers after they filed a FLSA claim); *Contreras v. Corinthian Vigor Ins. Brokerage, Inc.*, 25 F. Supp. 2d 1053, 1056 (N.D. Cal. 1998) (finding that FLSA applies to immigrant worker fired after he filed FLSA claim).

87. See, e.g., KIM BOBO, *Wage Theft in America passim* (2d ed., 2011); Nancy Reichman, *What’s in a Name? Wage Theft and the Criminalization of Unfair Labor Practices* (2012) (unpublished manuscript) (on file with author); Brishen Rogers, *Toward Third-Party Liability for Wage Theft*, 31 BERKELEY J. EMP. & LAB. L. 1, 1 (2010); Nantiya Ruan, *What’s Left to Remedy Wage Theft?: How Arbitration Mandates that Bar Class Actions Impact Low-Wage Workers*, 2013 MICH. ST. L. REV. 1103 (2013) [hereinafter Ruan, *What’s Left to Remedy Wage Theft?*]; Ruan, *Facilitating Wage Theft*, *supra* note 2.

88. See Ruan, *What’s Left to Remedy Wage Theft?*, *supra* note 87, at 1106-07 (citing Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America’s Cities* 2-3 (2009)); See generally Reichman, *supra* note 87 (manuscript at 4) (“The number of articles referencing ‘wage theft’ grew slowly after 2005 until 2009 when the number of articles referencing ‘wage theft’ exploded: eighty-three percent were written between 2009 and 2011.”).

89. RANDY CAPPS ET AL., URBAN INST., *A PROFILE OF THE LOW-WAGE IMMIGRANT WORKFORCE* 2 (2003), available at [http://www.urban.org/UploadedPDF/310880\\_lowwage\\_immig\\_wkfc.pdf](http://www.urban.org/UploadedPDF/310880_lowwage_immig_wkfc.pdf); see Ruckelshaus, *supra* note 29, at 389-90.

90. See Ruckelshaus, *supra* note 29, at 390 (citing Suzanne M. Crampton et al., *The FLSA and Overtime Pay*, 32 PUB. PERSONNEL MGMT. 331, 331 (2003)).

91. See Smith & Ruckelshaus, *supra* note 20, at 559; see also *Close to Half of Garment Contractors Violating FLSA, According to DOL Report*, [1996] Daily Lab. Rep. Online (BNA) (May 6, 1996) (indicating that about 47% of garment contractors and manufacturers were found in violation of the FLSA); REST. OPPORTUNITIES CTR. OF N.Y. & THE N.Y.C. REST. INDUS. COAL., *BEHIND THE KITCHEN DOOR: PERVERSIVE INEQUALITY IN NEW YORK CITY’S THRIVING RESTAURANT INDUSTRY* ii (2005), available at

Three litigation trends in immigration labor and wage rights have made a lasting impact in the last three decades: backlash from immigration reform, the increased vulnerability of day laborers, and migrant farm work abuses.

*A. Immigration Reform: Employer Sanctions and Worker Intimidation*

In 1986, Congress enacted the Immigration Reform and Control Act (“IRCA”),<sup>92</sup> marking a “sea change in immigration law by extending federal immigration regulation into the private workplace through the prohibition of employment of unauthorized immigrants.”<sup>93</sup> The Act’s primary purpose was to discourage illegal immigration and protect American workers from wage competition with undocumented workers.<sup>94</sup> Employer sanctions and penalties were implemented to deter employers from hiring unauthorized workers and, in turn, deter unauthorized workers from looking for or taking such jobs.<sup>95</sup>

As the studies cited above reflect, IRCA’s primary purpose to deter undocumented workers from coming and taking low-wage jobs in America has unquestionably failed.<sup>96</sup> As Professor Michael Wishnie has argued, other consequences of IRCA include increased discrimination against undocumented workers.<sup>97</sup> As evidence, Professor Wishnie cites a GAO study that surveyed 4.6 million workers, finding that nineteen percent of employers had engaged in discrimination, including not hiring job applicants with foreign appearances or accents, applying IRCA’s verification of documents only to workers who had a foreign appearance of accent, and hiring only persons born in the United States.<sup>98</sup>

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<http://www.urbanjustice.org/pdf/publications/BKDFinalReport.pdf> (indicating that more than half of the studied restaurant industry workers experienced overtime or minimum wage violations); David Weil, *Compliance with Minimum Wage Laws: Can Government Make a Difference?* 13 (2003), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=368340](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=368340) (indicating that 54.4% of the garment contractors surveyed were not in compliance with the FLSA minimum wage provisions).

92. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3859 (1986).

93. Wishnie, *supra* note 80, at 193. While in 1976, the Supreme Court found that Congress “had expressed no more than ‘a peripheral concern with [the] employment of illegal entrants’”, in 1986, Congress enacted “a comprehensive framework for ‘combating the employment of illegal aliens.’” *Arizona v. United States*, 132 S. Ct. 2492, 2503-04 (2012) (quoting *De Canas v. Bica* 424 U.S. 351, 360 (1976); *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002)).

94. Wishnie, *supra* note 80, at 203.

95. *See id.*

96. *See supra* notes 89-92 and accompanying text.

97. *See* Wishnie, *supra* note 80, at 205.

98. *Id.* at 207; *see also* Sarah M. Kendall, *America’s Minorities Are Shown the “Back*

Coupled with increased discrimination is the disturbing trend of ineffective and declining government enforcement of employer sanctions.<sup>99</sup> Notwithstanding a few well-known cases of “raids” on worksites,<sup>100</sup> including meatpacking plants,<sup>101</sup> government agencies have focused resources elsewhere. In the 1980s, government enforcement put an emphasis on deportation of persons with criminal convictions and placing agents in border control to patrol the border between the United States and Mexico.<sup>102</sup>

But most scholars agree that one of the most damaging moments came in 2002, when, in *Hoffman Plastics Compounds, Inc. v. NLRB*,<sup>103</sup> the Supreme Court held that employers who violate the NLRA are exempt from back pay liability to undocumented workers.<sup>104</sup> The result of this decision is that immigrant workers are silenced from communicating with labor and employment agencies about unlawful activity they have either experienced or witnessed in the workplace.<sup>105</sup>

Although courts agree that damages for work actually performed under the FLSA are not governed by *Hoffman Plastics*,<sup>106</sup> advocates for

*Door*” . . . Again: *The Discriminatory Impact of the Immigration Reform and Control Act*, 18 Hous. J. INT’L L. 899, 904–05 (1996) (indicating a pattern of widespread discrimination against persons perceived as alien as a direct result of IRCA’s implementation); Steven M. Kaplan, *The Employer Sanctions Provision of IRCA: Deterrence or Discrimination?*, 6 GEO. IMMIGR. L.J. 545, 549–50 (1992) (concluding that IRCA resulted in widespread discrimination).

99. Wishnie, *supra* note 80, at 209.

100. See generally Kim Bobo, *Dispatches from the Workplace: Bishops Lead the Cry to Stop Workplace Raids*, RELIGION DISPATCHES (Oct. 23, 2008), <http://www.religiondispatches.org/archive/politics/643/>.

101. See Nancy Lofholm, *Fear From Swift Plant Raid Resonates in Greeley Six Years Later*, DENVER POST, Jan. 15, 2013, [http://www.denverpost.com/news/ci\\_22374170/fear-from-swift-plant-raid-resonates-greeley-six](http://www.denverpost.com/news/ci_22374170/fear-from-swift-plant-raid-resonates-greeley-six); Bruce Finley and Tom McGhee, *Raids at Swift Plants Target Identity Theft*, DENVER POST, Dec. 13, 2006, [http://www.denverpost.com/nationalpolitics/ci\\_4825289](http://www.denverpost.com/nationalpolitics/ci_4825289).

102. Wishnie, *supra* note 80, at 209–10.

103. 535 U.S. 137 (2002).

104. See Keith Cunningham-Parmeter, *Fear of Discovery: Immigrant Workers and the Fifth Amendment*, 41 CORNELL INT’L L.J. 27, 28 (2008); see also Ruben J. Garcia, *Ten Years After Hoffman Plastic Compounds, Inc. v. NLRB: The Power of A Labor Law Symbol*, 21 CORNELL J.L. & PUB. POL’Y 659, 669 (2012) (“The true impact of *Hoffman* may be hard to determine . . . . [C]ourts have generally not extended *Hoffman* past the issue of back pay under the [National Labor Relations Act], but the breadth of the Court’s holding can be applied to remedies other than back pay.”).

105. Wishnie, *supra* note 80, at 213; Garcia, *supra* note 104, at 669 (“[T]he true impact of *Hoffman* may be hard to determine. One reason is that undocumented workers are unlikely to complain . . . . *Hoffman* remains a powerful symbol of what is wrong with American labor law, especially as it relates to immigrant workers.”).

106. See Christopher David Ruiz Cameron, *Borderline Decisions: Hoffman Plastics Compounds, the New Bracero Program, and the Supreme Court’s Role in Making Federal Labor Policy*, 51 UCLA L. REV. 1, 5 (2003); see, e.g., *David v. Signal Int’l, LLC*, 257 F.R.D. 114, 124 (E.D. La. 2009); *Zavala v. Wal-Mart Stores, Inc.*, 393 F. Supp. 2d 295, 325 (D.N.J. 2005); Chellen



immigrant workers bringing suit for unpaid wages have been met with intimidating requests for discovery of immigration status.<sup>107</sup> The specter has been raised and has been impossible to bury.

### B. Day Laborers and Insecure Workplaces

Although day labor is not new, it has enjoyed a resurgence in urban and suburban areas in the last few decades.<sup>108</sup> One study estimated that there were 750,000 day laborers in the United States in 2004.<sup>109</sup> These workers for hire can be seen on street corners, in Home Depot parking lots, and in worker advocacy centers, waiting for private homeowners or construction companies to choose them for a day's work.<sup>110</sup> They are mostly unemployed Latino men.<sup>111</sup> The lack of protection for these laborers has many advocates worried about hazardous work conditions, severe injuries and fatalities, employer abuses including wage theft and retaliation, and being outside regulatory agency reach and workers' compensation eligibility.<sup>112</sup>

Concerns over immigration status keep workers from asserting their wage rights when faced with wage theft.<sup>113</sup> A Seton Hall University

v. John Pickle Co., 446 F. Supp. 2d 1247, 1278 (N.D. Okla. 2006); Liu v. Donna Karan Int'l, Inc., 207 F. Supp. 2d 191, 192 (S.D.N.Y. 2002); Serrano v. Underground Utils. Corp., 970 A.2d 1054, 1064 (N.J. Super. Ct. App. Div. 2009); see also Safeharbor Emp'r Servs. I, Inc. v. Cinto Velazquez, 860 So. 2d 984, 986 (Fla. Dist. Ct. App. 2003) (holding that *Hoffman Plastics* did not preclude illegal aliens from receiving workers' compensation benefits under state law).

107. Courts often deny such discovery based on the *in terrorem* effect it has on plaintiffs. See Rivera v. NIBCO, Inc., 364 F.3d 1057, 1074-78 (9th Cir. 2004) (upholding lower court decision denying defendant employer's proposed discovery of immigration status based on undue burden to the plaintiffs); Reyes v. Snowcap Creamery, Inc., 2012 WL 4888476, at \*3 (D. Colo. 2012).

108. See Abel Valenzuela Jr., *Working on the Margins: Immigrant Day Labor Characteristics and Prospects for Employment* 1 (Ctr. For Comparative Immigration Studies, Working Paper No. 22, 2000), available at [http://www.popcenter.org/problems/day\\_labor\\_sites/PDFs/Valenzuela\\_2000b.pdf](http://www.popcenter.org/problems/day_labor_sites/PDFs/Valenzuela_2000b.pdf).

109. See Juno Taylor, Note, *All in a Day's Work? Statutory and Other Failures of the Workers' Compensation Scheme as Applied to Street Corner Day Laborers*, 74 FORDHAM L. REV. 1521, 1523 (2005) (citing Aixa M. Pascual, *Day Laborers' Danger: Risking it All for Work*, ATLANTA J.-CONST., Apr. 18, 2004, at C1). More recent studies reflect a number closer to 117,000, although the exact number of day laborers is difficult to quantify. ABEL VALENZUELA JR. ET AL., ON THE CORNER: DAY LABOR IN THE UNITED STATES 4 (2006), available at [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); see also U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-925, WORKER PROTECTION 12 (2002) ("Data from the survey show that in 2001, there were about 260,000 individuals working as day laborers.").

110. See generally Taylor, *supra* note 109, at 1526 (noting that an increasing number of "street corner" day laborers working in construction, landscaping, painting, and carpentry industries).

111. *Id.* at 1526-27.

112. See *id.* at 1532-33.

113. See Reichman, *supra* note 87 (manuscript at 12).

study of day laborers found that very few workers who had actually experienced wage theft were willing to complain.<sup>114</sup>

The vast majority that had not filed complaints responded that they did not know they could, that they did not know how to complain, or that they were afraid. Nearly a quarter said that employers threatened to report them to immigration authorities if they had a complaint. Many said that it simply was not worth the trouble to complain . . . .<sup>115</sup>

Because many day laborers toil under the constant threat of being deported, which means not only the loss of a job, but also the loss of a way to support their (often extended) family, instances of unpaid wages and safety violations go unchallenged.<sup>116</sup>

### C. Migrant Workers: Wage Deductions

#### 1. Lowering Wages Below the Minimum Floor

American agriculture depends upon immigrant workers to harvest the crops.<sup>117</sup> And while that is not a new development, and our country has a long, tortured agricultural labor history,<sup>118</sup> the last few decades have witnessed substantial evidence of widespread wage abuses.

Only two percent of the two to three million farmworkers in the United States<sup>119</sup> secure their employment through the H-2A guest worker

114. *Id.*

115. *Id.* (citing IMMIGRANTS' RIGHTS/INT'L HUMAN RIGHTS CLINIC, SETON HALL LAW SCH. CTR. FOR SOC. JUSTICE, ALL WORK AND NO PAY: DAY LABORERS, WAGE THEFT, AND WORKPLACE JUSTICE IN NEW JERSEY 9 (2011)).

116. See generally Taylor, *supra* note 109, at 1546 (outlining a provision of the Day Laborer Fairness and Protection Act that could "ameliorate the deportation fears that prevent day laborers from pursuing workers' compensation claims.").

117. See Maria L. Ontiveros, *Lessons from the Fields: Female Farmworkers and the Law*, 55 ME. L. REV. 157 n.3 (2003).

118. See generally PETER MATTHIESSEN, *SAL SI PUEDES: CESAR CHAVEZ AND THE NEW AMERICAN REVOLUTION* 5 (1st rev. ed. 1973) (discussing the history of agricultural labor movements in the United States); Michael H. LeRoy & Wallace Hendricks, *Should "Agricultural Laborers" Continue to Be Excluded from the National Labor Relations Act?*, 48 EMORY L.J. 489, 505-06 (1999) (outlining the legislative history of the National Labor Relations Act's exclusion of agricultural workers); Arthur N. Read, *Let the Flowers Bloom and Protect the Workers Too*, 6 U. PA. J. LAB. & EMP. L. 525, 558-67 (2004) (discussing the treatment of agricultural workers under the National Labor Relations Act); Matthew Webster, *"Jobs Americans Won't Do": Our Farming Heritage, Hazardous Harvests, and a Legislative Fix*, 29 LAW & INEQ. 249 (2011).

119. See Patrick C. McManaman, *From Bracero to H-2A San Joaquin Valley Shepherders: Lessons Learned from the Failure of Our Nation's Guest Worker Programs*, 16 SAN JOAQUIN AGRIC. L. REV. 127, 127-28 (2007) (noting that two percent of farmworkers were H-2A visa

visa program, which allows foreign guest workers to work in agricultural positions on a seasonal basis.<sup>120</sup> A DOL report noted that H-2A workers are “malleable and less likely to voice complaints about wages and working conditions.”<sup>121</sup> Migrant farmworkers have little to no voice to advocate for themselves in the legal system, given their transient lifestyle and lack of resources. Instead, they are beholden to advocacy groups to make their case for them.<sup>122</sup> Accordingly, despite contractual guarantees that outline wage and hours, H-2A workers suffer wage violations and poor working conditions that are not often addressed by the legal system.<sup>123</sup>

Yet one growing litigation trend seen in federal court is challenges to wage deductions from migrant farm workers’ pay, which result in their wages falling below minimum wage.<sup>124</sup> Such suits often end in mixed results.<sup>125</sup> For example, in *Ramos-Barrientos v. Bland*,<sup>126</sup> migrant

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holders); NC FARMWORKER INST., UNITED STATES FARMWORKER FACTSHEET (2007), available at [http://www.wjcnny.org/wp-content/uploads/2012/03/SAF\\_Fact\\_Sheet\\_US07\\_0.pdf](http://www.wjcnny.org/wp-content/uploads/2012/03/SAF_Fact_Sheet_US07_0.pdf) (noting that “[f]armworkers suffer from the highest rate of toxic chemical injuries and skin disorders of any workers in this country, as well as significant rates of eye injuries[,] . . . face higher incidences that other wage-earners of heat stress, dermatitis, urinary tract infections, parasitic infections, and tuberculosis[,]” and suffer from “lead poisoning, respiratory illnesses, ear infections, and diarrhea” as a result of poor housing conditions).

120. NC FARMWORKER INST., *supra* note 119.

121. OFFICE OF INSPECTOR GEN., U.S. DEP’T OF LABOR, NO. 04-98-004-03-321, CONSOLIDATION OF LABOR’S ENFORCEMENT RESPONSIBILITIES FOR THE H-2A PROGRAM COULD BETTER PROTECT U.S. AGRICULTURAL WORKERS 12 (1998); see also Lisa Guerra, *Modern-Day Servitude: A Look at the H-2A Program’s Purposes, Regulations, and Realities*, 29 VT. L. REV. 185, 208 (2004).

122. See generally TIM JUDSON & CRISTINA FRANCISCO-MCGUIRE, WHERE THEFT IS LEGAL: MAPPING WAGE THEFT LAWS IN THE 50 STATES 2 (2012), available at <http://www.progressivestates.org/sync/pdfs/PSN.WhereTheftIsLegal.pdf> (describing the increase of advocacy organizations that resulted from the emergence of wage theft as a major economic justice issue).

123. See generally *id.* at 2-4 (noting that more than “60% of low-wage workers suffer wage violations each week.”).

124. See, e.g., *Garcia v. Frog Island Seafood, Inc.*, 644 F. Supp. 2d 696, 704 (E.D.N.C. 2009); *De Leon-Granados v. Eller & Sons Trees, Inc.*, 581 F. Supp. 2d 1295, 1308 (N.D. Ga. 2008); *Castillo v. Case Farms of Ohio, Inc.*, 96 F. Supp. 2d 578, 638 (W.D. Tex. 1999).

125. See *Frog Island Seafood*, 644 F. Supp. 2d at 706-07 (affirming the defendant’s liability for reimbursement of plaintiff’s transportation and border crossing expenses to the extent that those expenses reduced the plaintiff’s first week’s wages below the minimum wage, but denying the defendant’s liability for passport and visa expenses); *Eller & Sons Trees*, 581 F. Supp. 2d at 1308 (granting the plaintiffs’ motion for partial summary judgment based on the defendant’s failure to reimburse expenses incurred by the defendant to the extent those expenses dropped the plaintiffs’ pay in the first week of work below the federal minimum wage). But see *Case Farms of Ohio*, 96 F. Supp. 2d at 638-39 (holding that, with one exception, the plaintiffs could not recover minimum wage damages after consenting to housing deductions by the defendant to be paid to a third party on the plaintiffs’ behalves).

farmworkers from Mexico, hired under H-2A visas, alleged that the farm violated the FLSA by failing to pay them minimum wage by: (1) deducting the costs of housing and meals from their pay; and (2) failing to reimburse them for travel fees they had paid to a subcontractor of the company hired by the employer to assist with recruiting workers.<sup>127</sup> The Eleventh Circuit affirmed summary judgment on the meals and travel fees claims and reversed on the housing expense claim.<sup>128</sup> The court held that even though the FLSA generally gives employers a wage credit for housing, a wage credit was not appropriate for H-2A workers because providing the housing was for the benefit of the employer.<sup>129</sup> But the court concluded that the farm was entitled to take a wage credit for the meals because those meals were primarily for the benefit of the workers, who would have incurred expenses for food in the course of ordinary life.<sup>130</sup> Finally, the court found that the employer was not obligated to reimburse the workers for travel fees they had paid to a subcontractor of the company hired by the employer to assist with recruiting workers because the employer had not authorized the subcontractor to collect such charges and was unaware that it was doing so.<sup>131</sup>

Such is a common a story for migrant workers looking to recover their lost earnings: one step forward, two steps back, with little hope for attorney representation outside legal advocacy groups.

## 2. Aggregation of Wage Claims and Its Importance to Low-Wage Workers

Another major trend in wage litigation over the past thirty years has been the growth of the collective action to combat growing wage and overtime violations and the erroneous misapplication of certification motion practice.<sup>132</sup>

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126. 661 F.3d 587 (11th Cir. 2011).

127. *Id.* at 593.

128. *Id.* at 602.

129. *Id.* at 597-98.

130. *Id.* at 599-600.

131. *Id.* at 602; see also Eleanor G. Carr, *Search for a Round Peg: Seeking a Remedy for Recruitment Abuses in the U.S. Guest Worker Program*, 43 COLUM. J.L. & SOC. PROBS. 399, 400 (2010); Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 3034 (2006).

132. See generally Scott A. Moss & Nantiya Ruan, *The Second-Class Class Action: How Courts Thwart Wage Rights by Misapplying Class Action Rules*, 61 AM. U. L. REV. 523, 559-60 (2012).

Collective actions are often the sole means of judicial relief where a worker's wage claim is too small to support individual litigation.<sup>133</sup> Wage claims, especially for low-wage workers, are often valued at less than the transactional costs of litigation, resulting in "negative value" claims that are not prosecuted unless brought in the aggregate.<sup>134</sup> Most wage claims involve relatively small per-person damages,<sup>135</sup> and even though these lost wages are vital to low-wage workers, they are not profitable for plaintiff's attorneys. This remains true even though statutory fees under the FLSA are permitted because most attorneys can only expend the necessary resources if a successful outcome looks promising with relief from aggregate claims.<sup>136</sup>

But the aggregation vehicle for wage claims is statutorily mandated and less advantageous to plaintiffs.<sup>137</sup> For aggregate minimum and overtime wage claims, section 216(b) of the FLSA trumps Federal Rule of Civil Procedure 23, as it authorizes a very different collective action.<sup>138</sup> Rule 23 covers most types of civil cases, including consumer fraud, mass torts, antitrust, and civil rights.<sup>139</sup> It operates as an opt-out

133. See Ruan, *What's Left to Remedy Wage Theft?*, *supra* note 87, at 1116-17; Ruan, *Facilitating Wage Theft*, *supra* note 2, at 730.

134. See *Mascol v. E & L Transp., Inc.*, No. CV-03-3343 CPS, 2005 WL 1541045, at \*7 (E.D.N.Y. June 29, 2005) (holding that "the class action form is superior to alternative methods of adjudicating this controversy" because the claims were negative value); *Iliadis v. Wal-Mart Stores, Inc.*, 992 A.2d 710, 725 (N.J. 2007) ("Because of the very real likelihood that class members will not bring individual actions, class actions are often the superior form of adjudication when the claims of the individual class members are small." (internal quotation marks omitted)); see also *Weber v. Goodman*, 9 F. Supp. 2d 163, 170-71 (E.D.N.Y. 1998).

135. See *Phelps v. 3PD, Inc.*, 261 F.R.D. 548, 563 (D. Or. 2009) (recognizing the superiority of class actions due to the typically small size of individual awards); *Chase v. AIMCO Props., L.P.*, 374 F. Supp. 2d 196, 198 (D.D.C. 2005) ("[I]ndividual wage and hour claims might be too small in dollar terms to support a litigation effort . . ."); *Sav-On Drug Stores, Inc. v. Superior Court of L.A. County*, 96 P.3d 194, 209 (Cal. 2004) (observing, in an overtime action, that a class action suit "provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation." (internal quotation marks omitted)); see also *Richmond v. Dart Indus., Inc.*, 629 P.2d 23, 27 (1981); Ruckelshaus, *supra* note 29, at 387 (discussing factors, including the typically small size of each individual worker's claim, that contribute to workers' lack of access to the courts).

136. See *Scott v. Aetna Servs., Inc.*, 210 F.R.D. 261, 268 (D. Conn. 2002) (concluding that a class action is the superior method for bringing plaintiffs' overtime claims, in part, because "the cost of individual litigation is prohibitive"); *Ansoumana v. Gristede's Operating Corp.*, 201 F.R.D. 81, 85-86 (S.D.N.Y. 2001) (noting that individual suits, as an alternative to class litigation, may not be feasible based on class members' lack of financial resources and disincentives for attorneys).

137. 29 U.S.C. § 216(b) (2006).

138. Moss & Ruan, *supra* note 132, at 532; see also Ruan, *What's Left to Remedy Wage Theft?*, *supra* note 87, at 1117.

139. See Moss & Ruan, *supra* note 132, at 530. Early arguments that Rule 23 should apply to FLSA claims failed. See, e.g., *Schmidt v. Fuller Brush Co.*, 527 F.2d 532, 536 (8th Cir. 1975) ("Rule 23 cannot be invoked to circumvent the consent requirement of . . . FLSA § 16(b) . . .");

device: if the class meets the rule's requirements<sup>140</sup> and is judicially deemed a class, the class members must "opt out" in order to be removed from the case.<sup>141</sup> In contrast, FLSA wage claims are controlled by statutory rule 216(b).<sup>142</sup> These "opt-in" litigations require each worker to affirmatively opt into the suit by filing a consent-to-join form with the court.<sup>143</sup>

Section 216(b) provides that "an action . . . may be maintained against any employer . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated."<sup>144</sup> Accordingly, the sole requirements of FLSA section 216(b) are that members must be "similarly situated" and opt into the action individually.<sup>145</sup> But this seemingly low threshold appears more difficult when one considers the special needs of low-wage workers. Many low-wage workers remain unaware of their statutory wage rights unless they are notified of the violation, because they are either intentionally or unintentionally misinformed by their employer, or they lacked resources and communications skills to understand their rights.<sup>146</sup> Therefore, timely notice of wage violations is crucial in vindicating wage rights, and must be made within the two-year FLSA statute of limitations.<sup>147</sup>

Three developments in the section 216(b) jurisprudence have been

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*LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 288-89 (5th Cir. 1975) (finding a "fundamental, irreconcilable difference between" Rule 23 and section 16(b), and because section 16(b) "is unambiguous[.] . . . we must apply the law as it has been written.").

140. Rule 23(a) requires that:

(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23(a).

Additionally, a class also must qualify as one of the three Rule 23(b) types, which are defined mainly by the relief sought. FED. R. CIV. P. 23(b). The least common, Rule 23(b)(1), applies when separate actions risk multiple court orders inconsistent with each other or the rights of non-parties. FED. R. CIV. P. 23(b)(1). Subsection (b)(2) applies when members seek mainly injunctive or declaratory relief against a party who acted on "grounds generally applicable to the class," as in lawsuits against segregation or pollution, while subsection (b)(3) applies to money damages claims, making it most similar to FLSA section 16(b) wage collective actions. FED. R. CIV. P. 23(b)(2)-(3). A subsection (b)(3) class requires that common issues "predominate" over individual ones and that a class action be "superior to other" options such as many individual suits. FED. R. CIV. P. 23(b)(3).

141. See FED. R. CIV. P. 23(c)(2)(b)(v).

142. 29 U.S.C. § 216(b) (2006).

143. *Id.*

144. *Id.*

145. See *id.*

146. See Moss & Ruan, *supra* note 132, at 564-66.

147. See 29 U.S.C. § 255 (2006).

fundamental in wage litigation: the hybrid federal and state collective action, the judicially created certification process, and the use of representational evidence.

### 3. Hybrid Class and Collective Actions: More Wage Claims Heard

Wage rights are governed by not only federal FLSA law, but also state wage and hour statutes and regulations that can provide additional protections beyond what the FLSA affords, including higher minimum wages, protection of full unpaid hourly wages (not just the unpaid minimum portion), longer statute of limitations, and expanded coverage for job classifications.<sup>148</sup> Because state wage claims often provide expanded coverage and therefore higher potential damages, workers recently have sought both FLSA and state wage claims together in one suit in federal court.<sup>149</sup> Federal courts now recognize the viability of these “hybrid” suits, which have the added benefit of allowing the state wage claims to be aggregated under Rule 23’s more generous “opt-out” class procedure.<sup>150</sup>

For low-wage workers, who are often struggling in the net of poverty, receiving timely notification, understanding and completing an opt-in form, and mailing said form within a short time frame, are extremely challenging. Failure to do so results in the complete loss of their owed wages.<sup>151</sup> In contrast, by utilizing the Rule 23 procedure, all similarly situated workers are deemed a part of the class without the opt-in form, which results in a higher number of satisfied wage claims.<sup>152</sup>

One of the early courts to recognize this “hybrid” action was the Southern District of New York in *Ansoumana v. Gristede’s Operating Corp.*<sup>153</sup> There, a group of low-wage grocery store workers claimed

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148. LAUREN L. HO ET AL., “THE REAL DOUBLE-EDGE SWORD”: EVERYTHING YOU WANTED TO KNOW ABOUT WAGE AND HOUR HYBRIDS 5 (2010), available at [http://www.americanbar.org/content/dam/aba/administrative/labor\\_law/meetings/2010/annualconference/196.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2010/annualconference/196.authcheckdam.pdf).

149. See *id.*

150. See, e.g., *De Asencio v. Tyson Foods, Inc.*, No. CIV.A. 00–CV–4294, 2002 WL 1635103 (E.D. Pa. July 17, 2002) (aggregating FLSA claims with claims under Pennsylvania Wage Payment and Collection Law); *Chavez v. IBP, Inc.*, No. CT–01–5093–EFS, 2002 WL 31662302 (E.D. Wash. Oct. 28, 2002) (granting plaintiff motions to Rule 23(b)(3) certification motion with regard to both FLSA and state law claims); *Ansoumana v. Gristede’s Operating Corp.*, 201 F.R.D. 81 (S.D.N.Y. 2001) (holding that the trial court could exercise supplemental jurisdiction over state minimum wage law claims).

151. See 29 U.S.C. § 255.

152. See Ruan, *Facilitating Wage Theft*, *supra* note 2, at 733–34.

153. *Gristede’s Operating Corp.*, 201 F.R.D. at 96.

FLSA and New York state wage violations for being paid a set daily rate that fell below minimum wage.<sup>154</sup> The court granted Rule 23 class certification for the state wage claims, holding that the exercise of supplement jurisdiction over state minimum wage claims was appropriate use of the court's case management powers.<sup>155</sup>

Today, most courts recognize the viability of such hybrid actions, which has a positive effect on the ability to vindicate wage rights.<sup>156</sup>

#### 4. Certification, De-certification, and Notice

Notice is a critical component of wage collective litigation because of the need to educate workers about their wage rights, as well as the strict statute of limitations of the FLSA.<sup>157</sup> The first, and only, Supreme Court decision to deal with Section 216(b) notice was in 1989, *Hoffman-La Roche Inc. v. Sperling*.<sup>158</sup> The Court held that section 216(b) implicitly grants courts "managerial responsibility" over the opt-in process, and, "[b]y monitoring preparation and distribution of the notice, a court can ensure that it is timely, accurate, and informative."<sup>159</sup> The Court also recognized that notices ordered by courts are not Rule 23 class certification analogues, but instead, simple case management orders appropriate under the judicial management rule, Federal Rule of Civil Procedure 83(b).<sup>160</sup>

How courts should manage notice was not addressed until six years later, when, in 1995, the Fifth Circuit articulated a now-standard two-step certification approach premised on a need for standardizing *Hoffman-La Roche* notice.<sup>161</sup> In *Mooney v. Aramco Services Co.*, the court delineated the following two-step process:

The first determination is made at the so-called 'notice stage' . . . [as to] whether notice of the action should be given to potential class members. . . . [T]his determination is made using a fairly lenient

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154. *Id.* at 83.

155. *See id.* at 96.

156. *See generally*, Andrew C. Brunsten, *Hybrid Class Actions, Dual Certification, and Wage Law Enforcement in the Federal Courts*, 29 BERKELEY J. EMP. & LAB. L. 269, 299 (2008) ("The Rule 23 class action overcomes the inadequacies of the opt-in regime by enabling greater aggregation of claims and, ultimately, by facilitating stronger wage law enforcement and deterrence of noncompliance.").

157. *See Hoffman-LaRoche Inc. v. Sperling*, 493 U.S. 165, 170 (1989).

158. *Id.*

159. *Id.* at 170-72.

160. *See id.* at 172; *see also* Moss & Ruan, *supra* note 132, at 541.

161. *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1213-14 (5th Cir. 1995).



standard, and typically results in ‘conditional certification’ . . . [and] putative class members [being] given notice . . . to ‘opt-in.’ . . .

The second determination is typically precipitated by a [defense] motion for ‘decertification’ . . . after discovery is largely complete. . . .<sup>162</sup>

In the over twenty years since, federal courts routinely have followed this two-step certification process even though it is not sanctioned by statutory authority.<sup>163</sup> It does, however, have a significant impact on the success of workers’ wage claims because it allows courts to impose on plaintiff workers a stricter “commonality” burden of proof standard than the “similarly situated” statutory requirement.<sup>164</sup> Plaintiffs must prove in the second stage, when defendants move to “decertify” the collective action, that there are not “disparate factual and employment settings” or individualized defenses.<sup>165</sup> Courts thus prohibit collective actions “even by workers claiming the same employer violated the same wage rule; for example, workers had different supervisors, worksites, or pay schemes.”<sup>166</sup>

Thus, even though a strong argument can be made that courts

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162. *Id.* Oddly, *Mooney* is the leading precedent for a two-step process it ultimately did not endorse and it has been cited by numerous circuits since for creating the process. See Moss & Ruan, *supra* note 132, at 551-52.

163. See Moss & Ruan, *supra* note 132, at 552-54.

164. See *id.* at 554-55.

165. *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1103 (10th Cir. 2001) (internal quotation marks omitted); see also *Anderson v. Cagle’s, Inc.*, 488 F.3d 945, 952 (11th Cir. 2007).

166. Moss & Ruan, *supra* note 132, at 527. See e.g., *Hernandez v. United Auto Credit Corp.*, No. 08-3404, 2010 U.S. Dist. LEXIS 40209, at \*10-15 (N.D. Cal. Mar. 31, 2010) (granting motion to decertify because employee duties and authority levels differed); *Johnson v. Big Lots Stores, Inc.*, 561 F. Supp. 2d 567, 576-87 (E.D. La. 2008) (decertifying class because of “the dissimilarity of plaintiffs’ self-reported job duties,” which made it “exceedingly difficult for Big Lots to assert its statutory exemption defense on a collective basis”); *Sharer v. Tandberg, Inc.*, No. 06-626, 2007 WL 676220, at \*3 (E.D. Va. Feb. 27, 2007) (granting motion to decertify because employees’ job titles and responsibilities were too dissimilar and named plaintiffs did not all allege same wage deprivations); *Smith v. Heartland Auto. Servs., Inc.*, 404 F. Supp. 2d 1144, 1152 (D. Minn. 2005) (decertifying upon finding “significant the discrepancies between and among the named plaintiffs and the opt-in class members with respect to a Store Manager’s ability to exercise discretion, perform management tasks, and act independently of the district manager”); *Johnson v. TGF Precision Haircutters, Inc.*, No. Civ.A. H-03-3641, 2005 WL 1994286, at \*2, \*8 (S.D. Tex. Aug. 17, 2005) (decertifying because multiple sites varied and employer defenses were individualized observing that “if it were not for [issues such as geographic differences], the job duties per se might not require decertification”); *Bayles v. Am. Med. Response of Colo., Inc.*, 950 F. Supp. 1053, 1061-63 (D. Colo. 1996) (decertifying because pay-docking policy was not consistent for all); *Lusardi v. Xerox Corp.*, 118 F.R.D. 351, 359 (D.N.J. 1987) (granting motion to decertify because of disparate employee duties and locations among ADEA plaintiffs).

handle section 216(b) wage collective actions “fundamentally incorrectly,”<sup>167</sup> judicial approval of the two-step certification process has grown, as has the number of wage claims generally.<sup>168</sup> While only twenty-nine decisions on certification of wage claims were reported in the 1990s, 795 decisions were reported from 2000-2011.<sup>169</sup>

## 5. Representational Evidence and Statistical Sampling

Proving lost wages is often difficult for plaintiffs when the keeping of employment records, including time clocks, payroll, and schedules, is in the full control of their employers.<sup>170</sup> When plaintiffs bring a lost wages collective action, the sufficiency of the evidence under the FLSA is examined in a framework set forth by the Supreme Court in 1946.<sup>171</sup> In *Anderson v. Mt. Clemens Pottery Co.*, the Court was concerned that an unscrupulous employer could insulate itself from wage suits by failing to maintain employment records that an employee could use to prove the workers was un- or underpaid.<sup>172</sup> The Court ruled that, in the absence of adequate employment records, a worker suing for lost wages could submit sufficient evidence from which FLSA violations and the amount of an award may be reasonably inferred.<sup>173</sup>

To meet this burden, a class of workers need not present testimony from each unpaid worker.<sup>174</sup> Instead, the collective may present testimony of a representative sample of employees as proof in its case in chief.<sup>175</sup> The adequacy of the sample information, however, is often challenged in the courts. For example, in *Reich v. Southern New England Telecommunications Corp.*, the Second Circuit held that the testimony of a representative sample of 2.5% of workers (or, thirty-nine of approximately 1,500 employees) was adequate evidence upon which to award FLSA back wages to the entire group of employees because:

[1] the testimony covered each clearly defined category of worker; [2] there was actual consistency among those workers’ testimony, both

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167. Moss & Ruan, *supra* note 132, at 527.

168. *See id.* at 582-83.

169. *Id.* at 550.

170. *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1964).

171. *See id.* at 687-88.

172. *See id.* at 687.

173. *Id.* at 687-88 (noting that, because “[e]mployees seldom keep . . . records [of their hours] themselves,” hours may be proven by oral testimony).

174. *See Reich v. S. New England Telecomm. Corp.*, 121 F.3d 58, 67 (2d. Cir. 1997).

175. *See id.*

within each category and overall; [3] [the employer] offered no contradictory testimony; [4] the abuse arose from the admitted policy of employer that was consistently applied; and [5] the periods at issue were employees' lunch hours, which were predictable, daily-recurring periods of uniform and predetermined duration.<sup>176</sup>

Other courts have recognized the validity of a wide range of sample sizes.<sup>177</sup>

In the last decade or so, numerous judicial opinions have discussed the use of statistical methods in proving liability or damages in wage collective actions under the FLSA and state wage laws.<sup>178</sup> Wage collective actions, like other complex litigations, present courts with the unappealing prospect of resolving claims of a large group of participating plaintiffs who have suffered individualized harm pursuant to a common practice. Trying each claim separately would eradicate many of the efficiencies created by aggregate litigation in the first place.

Statistical sampling methods are particularly appropriate in large-scale wage-and-hour actions.<sup>179</sup> These cases involve tremendous amounts of individualized data, namely the actual hours worked each day by each claimant during the relevant time period, which for some states can be up to six years.<sup>180</sup> Yet because records of the actual time worked often do not exist, but instead must be recreated based on recollection and estimation, the calculations are necessarily approximate. Statistical sampling enables courts to produce maximally accurate aggregate determinations of hours worked using the same types of data required for individual claims and thereby efficiently resolve class-wide wage litigations.

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176. *Id.* at 61, 67-68.

177. *See, e.g.,* *Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 472-73 (11th Cir. 1982) (awarding back wages to 207 employees where twenty-three testified); *Herman v. Hector I. Nieves Transp., Inc.*, 91 F. Supp. 2d 435, 447 (D. P.R. 2000) (finding that the testimony of fourteen out of approximately 100 truck drivers provided an adequate basis for determining the numbers of hours worked); *McLaughlin v. DialAmerica Mktg., Inc.*, 716 F. Supp. 812, 824-25 (D.N.J. 1989) ("The testimony of 43 witnesses, both at trial and by deposition, confirms the existence of minimum wage violations for every home researcher employed by DialAmerica between 1980 and 1982."); *Donovan v. Kaszycki & Sons Contractors, Inc.*, 599 F. Supp. 860, 868 (S.D.N.Y. 1984).

178. *E.g.,* *Ordonez v. Radio Shack, Inc.*, No. CV 10-7060-CAS (JCGx), 2013 WL 210223, at \*7 (C.D. Cal. Jan. 17, 2013); *Jimenez v. Allstate Ins. Co.*, No. LA CV10-08486 JAK (FFMx), 2012 WL 1366052, at \*12-15 (C.D. Cal. Apr. 18, 2012).

179. *See generally* Richard T. Seymour, *State-Court Wage and Hour Claims*, 27 A.L.I.-A.B.A. 435, 449-453 (2009) (outlining the use of statistic evidence in wage and hour collective and class actions); Steven G. Zieff, *Advanced Issues in Collective Actions*, 10 EMP. RTS. & EMP. POL'Y J. 435, 440-44 (2006) (surveying the use of statistical evidence in recent wage and hour collective and class actions).

180. *See* N.Y. LAB. LAW § 663 (Consol. 1983).

The downfall, however, comes from the requisite averaging that occurs, which while highly effective in producing aggregate damage amounts may result in “rough justice” whereby each individual plaintiff recovers the average amount of unpaid wages rather than a more individualized determination of damages.<sup>181</sup> For example, in *Dole v. Haulaway, Inc.*,<sup>182</sup> the court requested statistical data to simplify the wage trial and in response, the plaintiffs proffered the testimony of one the DOL’s own compliance officers.<sup>183</sup> The compliance officer summarized the hours of overtime claimed by each employee who had testified or provided a stipulation.<sup>184</sup> The witness then averaged the amount of per-employee overtime, excluding two obvious outliers, and applied the averaged figure to each non-testifying employee, reaching a total figure of a little over half a millions dollars in unpaid overtime wages.<sup>185</sup>

Obviously, employers fight this type of aggregation of data, calling in their own experts to show that individualized claims are more appropriate in hopes of either limiting damages or altogether defeating the “similarly situated” standard in decertification.<sup>186</sup> And while some courts agree,<sup>187</sup> others, like the *Dole* court, are more apt to follow the reasoning that the use of statistical sampling in wage cases achieves the goals of collective litigation – efficiency and aggregation of small claims that might never be otherwise heard – which should not be undercut by a judicial requirement that individual damages be proven with exacting precision.<sup>188</sup>

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181. See *Jeansonne v. Schmolke*, 40 So. 347, 361-62 (La. Ct. App. 2010). See generally, e.g., *Falcon Creditor Trust v. Blue Cross Blue Shield (In re Falcon Prods., Inc.)*, 372 B.R. 474, 484 (Bankr. E.D. Mo. 2007) (discussing the calculation of the aggregate amount of employee benefits pursuant to the Bankruptcy Code), *aff’d* No. 4:07-CV-1495CAS, 2008 WL 26045 (E.D. Mo. Feb. 8, 2008); *Jeansonne v. Schmolke*, 40 So.-3d 347, 361-62 (La. Ct. App. 2010).

182. 723 F. Supp. 274 (D.N.J. 1989), *aff’d* 914 F.2d 242 (3d Cir. 1990).

183. *Id.* at 277-78.

184. *Id.* at 278-80.

185. *Id.* at 280.

186. See *id.* at 281 (outlining the defendant’s evidence).

187. See, e.g., *Jimenez v. Allstate Ins. Co.*, No. LA CV10-08486 JAK (FFMx), 2012 WL 1366052, at \*21-22 (C.D. Cal. Apr. 18, 2012) (redefining the plaintiffs proposed class); *Pryor v. Aerotek Scientific, LLC*, 278 F.R.D. 516, 536 (C.D. Cal. 2011); *Flores v. CVS Pharmacy, Inc.*, No. 2:07-CV-05326-JHN-Ex, 2010 WL 3656807, at \*6 (C.D. Cal. Sept. 7, 2010); *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 268 F.R.D. 604, 612 (N.D. Cal. 2010) (prohibiting use of statistical evidence in class action wage claim suit because such evidence was “of extremely limited help to resolving the key issues.”).

188. See, e.g., *Marlo v. United Parcel Serv., Inc.*, 251 F.R.D. 476, 484 (C.D. Cal. 2008), *aff’d* 639 F.3d 942 (9th Cir. 2011) (noting the purposes of class actions and finding plaintiff’s statistical evidence not representative of class and, thus, prohibited); *Reich v. IBP, Inc.*, No. 88-2171, 1996

## IV. ON THE HORIZON: WHAT'S NEXT IN WAGE RIGHTS

By reading the tea leaves of recent wage litigation, one can predict a few trends in the making. The coming years of wage claims likely will see an increase of cases involving: (1) parties fighting over mandatory arbitration agreements and the viability of class action waivers; (2) non-lawyer advocacy for low-wage workers fighting wage theft; (3) increased reliance on labor rights for non-union workers; and (4) scrutiny of unpaid internships and their lawfulness under the FLSA.

*A. Mandatory Arbitration, Class Action Waivers, and Low-Wage Workers*

Mandatory arbitration agreements in employment relationships have garnered much attention in the last two decades.<sup>189</sup> The growing number of arbitration clauses in employment contracts has resulted in private arbitration becoming a “parallel judicial system.”<sup>190</sup> Workers are becoming increasingly subject to arbitration mandates of their employers.<sup>191</sup> It is estimated that between fifteen and twenty-five percent of employers have adopted employment arbitration.<sup>192</sup> The number of arbitration clauses is sure to have given rise to the broad support they have received from the judiciary, especially from the Supreme Court.<sup>193</sup>

The latest Supreme Court approval came in 2010, when the Court held in *AT&T v. Concepcion* that corporate boilerplate language in a consumer contract mandating individual arbitration, while prohibiting aggregation of claims in class actions (known colloquially as a “class waiver”), is enforceable and consistent with public policy.<sup>194</sup> This author has written about the combined effect of mandatory arbitration and class waivers that facilitates the silence of low-wage workers from

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WL 137817, at \*3 (D. Kan. Mar. 21, 1996).

189. See Ruan, *What's Left to Remedy Wage Theft?*, *supra* note 87, at 1136; see also Thomas J. Stipanowich, *Arbitration: The “New Litigation,”* 2010 U. ILL. L. REV. 1, 8 (2010).

190. David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 439 (2011).

191. See *id.*

192. Alexander Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?* 11 EMP. RTS. & EMP. POL’Y J. 405, 411 (2007).

193. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991) (holding that a claim falling under the Age Discrimination in Employment Act of 1967 can be subjected to compulsory arbitration pursuant to an arbitration agreement); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *Stolt-Nielsen S.A. v. AnimalFeeds Int’l. Corp.*, 130 S. Ct. 1758, (2010); *AT&T Mobility Corp. v. Concepcion*, 131 S. Ct. 1740 (2011) (interpreting the Federal Arbitration Act).

194. *AT&T Mobility*, 131 S. Ct. at 1753.

voicing wage theft claims.<sup>195</sup>

But one argument that has received traction in the federal courts is that class waivers in arbitration are prohibited based on a substantive rights theory.<sup>196</sup> These courts recognize that when plaintiffs are precluded from aggregating their claims, that preclusion results in their inability to vindicate certain federal statutory rights.<sup>197</sup> These courts rely upon a “federal substantive law of arbitrability” and look to whether the plaintiffs are able to prove that they will be unable to vindicate their federal statutory rights, including wage rights, if precluded from aggregating their claims.<sup>198</sup> For example, in *Raniere v. Citigroup, Inc.*, the court found that the legislative history of the FLSA evidenced congressional intent to for employees to have a nonwaivable right to collective action.<sup>199</sup> The *Raniere* court held that a waiver of class action is thus “unenforceable as a matter of law” because, “[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute [at issue].”<sup>200</sup>

Recently, the U.S. Supreme Court addressed class waivers and statutory enforcement arguments in *American Express v. Italian Colors Restaurant*.<sup>201</sup> There, the Court held that arbitration agreements should be enforced “unless the FAA’s mandate has been overridden by congressional command,” and found that the anti-trust statutes at issue - the Sherman and Clayton Acts - contained no Congressional command precluding a class waiver in arbitration.<sup>202</sup> However, the FLSA carries an entirely contrary Congressional command and, accordingly, the substantive law argument in wage cases may survive.

The *Raniere* case is currently pending review by the Second Circuit and similar holdings likely will be challenged by employers seeking to uphold class waivers and keep workers from aggregating their wage claims in the future.

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195. Ruan, *What’s Left to Remedy Wage Theft?*, *supra* note 87, at 1136-40.

196. See *Sutherland v. Ernst & Young LLP*, 847 F. Supp. 2d 528, 539-40 (S.D.N.Y. 2012); *Raniere v. Citigroup Inc.*, 827 F. Supp. 2d 294, 314 (S.D.N.Y. 2011); *Herrington v. Waterstone Mortg. Corp.*, No. 11-cv-779-bbc, 2012 WL 1242318, at \*3-6 (W.D. Wis. Mar. 16, 2012).

197. See *id.*

198. *Raniere*, 827 F. Supp. 2d at 309; see also *Banus v. Citigroup Global Mkts., Inc.*, No. 09 Civ. 7128(LAK), 2010 WL 1643780, at \*8 (S.D.N.Y. Apr. 23, 2010).

199. *Id.* at 314 (citing legislative history indicating Congress’s desire to “reduce[ ] the burden borne by the public fisc,” (see 83 Cong. Rec. 9264), and to promote “uniformity with regard to the application of FLSA standards” (citing H. Rep. No. 2182, 75th Cong., 3d Sess. at 6-7)).

200. *Id.* (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)).

201. 133 S. Ct. 2304 (2013).

202. *Id.* at 2309.

### B. *Unpaid Internships: Furthering the Socioeconomic Divide in Paid Work*

Another fertile ground for wage litigation is the growing phenomenon of unpaid internships in the workplace. In a tight economy with relatively high unemployment, the number of companies offering unpaid internships and the number of college graduates and young professionals accepting such unpaid positions are growing.<sup>203</sup> In lieu of wages, companies offer training and an entry point into hard to access professions, such as publishing, entertainment, and politics.<sup>204</sup> These internships are seen as positive resume builders, and new workers have begun to view them as necessary to stay competitive in a tight job market.<sup>205</sup>

Observers have commented that unpaid internships perpetuate inequality between those that have a means to accept unpaid work (by accepting support from family or other independent means) and economically disadvantaged graduates who cannot afford to take unpaid positions.<sup>206</sup> As internships become increasingly necessary to advancement, those who cannot afford to engage in free work end up further disadvantaged in the job market.<sup>207</sup> Meanwhile, lower-paying, entry-level jobs are increasingly being filled by unpaid internships, shrinking the number of entry jobs and paths for internal advancement.<sup>208</sup>

One emerging litigation trend questions whether these unpaid

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203. David C. Yamada, *The Employment Law Rights of Student Interns*, 35 CONN. L. REV. 215, 217 (2002); Jessica L. Curiale, Note, *America's New Glass Ceiling: Unpaid Internships, the Fair Labor Standards Act, and the Urgent Need for Change*, 61 HASTINGS L. J. 1531, 1532 (2010); Steven Greenhouse, *The Unpaid Intern, Legal or Not*, N.Y. TIMES (April 2, 2010), [http://www.nytimes.com/2010/04/03/business/03intern.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2010/04/03/business/03intern.html?pagewanted=all&_r=0)

204. Curiale, *supra* note 203, at 1533-34.

205. Greenhouse, *supra* note 203.

206. See Andrew Mark Bennett, Comment, *Unpaid Internships & the Department of Labor: The Impact of Underenforcement of the Fair Labor Standards Act on Equal Opportunity*, 11 U. MD. L.J. RACE, RELIGION, GENDER AND CLASS 293, 297-98 (2011) (citing Daniel Akst, *Unpaid Internships? File Under 'Hypocrisy'*, L.A. TIMES (June 15, 2010), <http://articles.latimes.com/2010/jun/15/opinion/la-oe-akst-internships-20100615>; Robert Farley, *Unpaid Labor Illegal? In America?*, LAWYERS, GUNS & MONEY (April 3, 2010), <http://www.lawyersgunsandmoneyblog.com/2010/04/unpaid-labor-illegal-in-america/>; Ben Yagoda, *Will Work for Academic Credit*, CHRON. HIGHER EDUC. (Mar. 21, 2008), <http://chronicle.com/article/Will-Work-for-Academic-Credit/10480/>); Curiale, *supra* note 203, at 1536.

207. Curiale, *supra* note 203, at 1536.

208. See *id.* at 1536-37.

internships violate the FLSA's minimum wage requirement.<sup>209</sup> The issue turns on whether the unpaid intern is an "employee" within the meaning of the statute.<sup>210</sup> For guidance, the DOL issued a number of opinion letters analyzing the applicability of the FLSA to various internships, and has established a six-part test to determine whether interns are subject to the minimum wage requirements of the FLSA.<sup>211</sup> The courts usually only give minimal deference to the DOL guidance, finding the opinions letters and regulations relevant, but not conclusive, on the issue of whether interns are employees for purposes of the FLSA.<sup>212</sup>

As more cases find their way to the courts, the body of law governing internships is likely to grow over the next decade or so.

### *C. Labor Rights for Non-Union Employees*

Another developing trend is non-unionized workers' use of labor laws to protect workplace rights. The National Labor Relations Act (NLRA)<sup>213</sup> protects all workers, not just unionized employees, from employer action that impinges upon their right to concerted activity,<sup>214</sup> which might protect low-wage workers in a variety of contexts. In *In re D.R. Horton*, a national homebuilding company imposed an arbitration clause on its workers that included a class waiver.<sup>215</sup> The NLRB held that the agreement violated workers' rights, whether unionized or not, to engage in collective action, protected under Section 8(a)(1) of the NLRA, when it requires employees to sign an agreement that precludes them from bringing collective claims.<sup>216</sup> Commentators agree that this decision could have sweeping implications for all workers "from low-

209. See *Glatt v. Fox Searchlight Pictures*, —F.R.D.—, No. 11 Civ. 6784(WHP), 2013 WL 2495140 (S.D.N.Y. June 11, 2013); *Xuedan Wang v. Hearst Corp.*, 12 CV 793 HB, 2013 WL 3326650 (S.D.N.Y. June 27, 2013).

210. See Bennett, *supra* note 206, at 300.

211. WAGE & HOUR DIV., U.S. DEP'T OF LABOR, FACT SHEET NO. 71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT 1 (2010); WAGE & HOUR DIV., U.S. DEP'T OF LABOR, FIELD OPERATIONS HANDBOOK, § 10b11 (1993).

212. See, e.g., *O'Connor v. Davis*, 126 F.3d 112, 115 (2d Cir. 1997) (looking to other circuits in determining that an unpaid intern is not an employee); *McLaughlin v. Ensley*, 877 F.2d 1207, 1209 n.2 (4th Cir. 1989) (determining whether the employer or the worker is the "primary beneficiary" of the worker's labor; using prior circuit precedent in this determination, rather than DOL guidance); *Donovan v. Am. Airlines, Inc.*, 686 F.2d 267, 273 (5th Cir. 1982) (affirming the district court's decision in part because it is supported by DOL guidance).

213. 29 U.S.C. §§ 151-169 (2006).

214. See 29 U.S.C. § 158 (2006).

215. 357 NLRB 184 (2012).

216. See *id.* at 192-93.



wage restaurant workers to well-paid employees on Wall Street” if allowed to stand.<sup>217</sup>

Additionally, the NLRA has been found to protect workers who communicate on social media sites from adverse action by their employers.<sup>218</sup> For example, in *In re Hispanics United of Buffalo*, five employees were fired after making critical remarks about their employer on Facebook; the NLRB ordered their reinstatement because it violated their right to protected concerted activity.<sup>219</sup>

When workers make complaints about their pay, work schedules, or other terms and conditions of employment, the NLRA might provide protection from retaliatory measures,<sup>220</sup> and given the positive reception in the NLRB so far, it is likely to be a growing field of litigation.

#### *D. The Increased Importance of Non-Lawyer Wage Rights Advocacy*

Another labor movement in the making is to make wage violation claims more accessible to workers through non-lawyer advocacy. The “ability to proceed *pro se* without an advocate . . . is outside the capabilities of many low-wage workers” in any forum, whether judicial, arbitral, or regulatory.<sup>221</sup> Non-lawyer advocates, especially those with knowledge of the industry and worker population at issue, can be successful in helping workers navigate the claims process.

An example of this growing phenomenon is the growing number of worker centers in urban areas, which already organize and collaborate on important wage issues. The National Employment Law Project, the National Day Laborer Organizing Network, Interfaith Worker Justice, Make the Road in New York, the Employment Law Center, and the UCLA Center for Labor Research and Education in Los Angeles are a few examples of successful organizations that are already working to provide support for low-wage workers.<sup>222</sup>

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217. Steven Greenhouse, *Labor Board Backs Workers on Joint Arbitration Cases*, N.Y. TIMES (Jan. 6, 2012), [http://www.nytimes.com/2012/01/07/business/nlrba-backs-workers-on-joint-arbitration-cases.html?\\_r=0](http://www.nytimes.com/2012/01/07/business/nlrba-backs-workers-on-joint-arbitration-cases.html?_r=0).

218. See *In re Hispanics United of Buffalo*, No. 3-CA-27872, 2011 WL 3894520 (N.L.R.B. Div. of Judges Sept. 2, 2011).

219. See *id.*; see also, *Aroostook Cnty. Reg'l Ophthalmology Ctr.* 317 N.L.R.B. No. 32, 226, 229 (1995) *modified on other grounds* 81 F.3d 209 (D.C. Cir. 1996) (NLRB held that employee complaints to each other concerning schedule changes constituted protected activity).

220. See e.g. *Aroostook Cnty. Reg'l Ophthalmology Ctr.* 317 N.L.R.B. at 226, 229.

221. Ruan, *supra* note 87, at 38-9.

222. See *id.* at 39; See also NAT'L EMP'T PROJECT, JUST PAY: IMPROVING WAGE AND HOUR ENFORCEMENT AT THE UNITED STATES DEP'T OF LABOR.

The most significant barrier to non-lawyer advocacy is attorney practice rules. Assuming there are enough resources and capacity to train advocates to take on the role in assisting low-wage workers in making wage claims, the acceptance of such non-lawyer advocacy requires a specific set of procedural rules allowing non-lawyer participation and, optimally, recognition from Model Rules of Professional Responsibility acknowledging this type of lay advocacy.<sup>223</sup>

In order for workers to vindicate their wage rights in the arbitration forum, a campaign to liberalize unauthorized practice of law rules across jurisdictions could pave the way for this type of wage rights advocacy. Because such rules are mostly governed by state laws, a model rule and updated strategy headed by the American Bar Association or other interest group could be the best solution for mobilization.<sup>224</sup>

## V. CONCLUSION

The right of workers to receive what they lawfully earn has a longstanding legal remedy in the FLSA, but procedural hurdles, growing litigation costs, shrinking workplace protections, and increasingly varied workplace settings make vindicating those rights challenging, particularly for low-wage workers. The last 30 years has not brought major legislative change to wage and hour laws. Instead, it unquestionably has been an era of increased vulnerability for American workers at the bottom of our labor market, and increasingly contested litigation strategies by lawyers for employers and employees alike. It is time for new strategies and advocacy for low-wage workers to address the job insecurity and economic disadvantage these workers face while toiling in American workplaces.

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223. The Model Rules have yet to recognize non-lawyer advocacy. See MODEL CODE OF PROF'L RESPONSIBILITY 5.5 (2011).

224. Quintin Johnstone, *Unauthorized Practice of Law and the Power of State Courts: Difficult Problems and Their Resolution*, 39 WILLAMETTE L. REV. 795, 842–43 (2003).

