



# All Work and No Pay

## Day Laborers, Wage Theft, and Workplace Justice in New Jersey

SETON HALL | LAW

Immigrants' Rights/International Human Rights Clinic  
Center for Social Justice  
Seton Hall University School of Law  
833 McCarter Highway  
Newark, N.J. 07102

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## I. *Introduction*

In August 2010, the Seton Hall Law School Center for Social Justice released a report entitled *Ironbound Underground* which documented rampant wage theft and other workplace violations among day laborers in the East Ward of Newark.<sup>1</sup> Following the release of *Ironbound Underground*, various organizations and advocates working with day laborers throughout New Jersey asked that the Immigrants' Rights/International Human Rights Clinic ("IR/IHR Clinic" or "Clinic") conduct similar surveys of the day laborers in their communities. The Clinic agreed, and during the month of October 2010, students in the Immigrants' Rights/International Human Rights Clinic conducted a survey of day laborers in selected communities throughout the state and prepared this report of their findings.

Day laborers are workers who are employed on a day-by-day basis without any obligations by an employer to employ the worker in the future.<sup>2</sup> Each morning, day laborers and employers negotiate short-term employment arrangements in open-air markets known as pick-up sites.<sup>3</sup> For employers, these day labor markets "provide easy access to a large pool of workers that they can hire when needed and release them when not."<sup>4</sup> Workers are usually paid in cash and there are generally no records linking the employer to the day laborer.<sup>5</sup> The underground nature of the day labor market makes enforcement of labor laws difficult, often leading to abuse of workers by their employers.<sup>6</sup> Moreover, many, if not the majority, of the day laborers are undocumented. Their immigration status, ignorance of their rights, fear of authorities, and limited English proficiency make day laborers particularly susceptible to workplace abuses.<sup>7</sup>

It would be a tremendous mistake, however, to assume that wage theft is an issue that only involves day laborers or immigrants. Because of antiquated, weak, or under-enforced labor laws, wage theft has become a pervasive problem in the United States.<sup>8</sup> Affected industries include retail, restaurants, grocery and drug stores, home healthcare, childcare, domestic work, construction, food and garment manufacturing, wholesale trades, dry cleaning, industrial laundries, car washes, car repair, parking lots, beauty and nail salons, and janitorial and security guard services.<sup>9</sup> While women, people of color, and immigrants are particularly vulnerable due to their disproportionately high representation in low wage sectors, "everyone is at risk, albeit to different degrees."<sup>10</sup>

The Clinic chose to focus on day laborers because they are a relatively accessible group and are perhaps the most exploited of low income workers and therefore an excellent bellwether of wage theft, problems in enforcement of rights, and opportunities for solutions. Our purpose here, however, is to start public discussion of the issue of wage theft. To that end, we offer several suggestions to improve access to justice for day laborers that we believe would assist other low wage workers as well.

## II. *Executive Summary and Recommendations*

In October and November of 2010, the Clinic and its partner organizations surveyed 113 workers at seven pick-up sites in New Jersey where workers gather for work each morning on a daily basis. Clinic students also interviewed day laborer advocates, mayors, police chiefs, and municipal prosecutors to obtain their views of the extent of and solution to wage theft. As a result of its investigation, the IR/IHR Clinic found:

- **Day Laborers Endure a Significant Level of Wage Theft.** Fifty-four percent of day laborers experienced at least one instance in the last year of an employer paying them less money than promised; 48% experienced at least one instance of not being paid at all; 94% of those who on occasion worked over 40 hours per week reported that employers had not paid them overtime as required by state and federal laws.
- **The Financial Loss to the Workers Due to Wage Theft is a Substantial Portion of Their Income.** Forty-three percent suffered total losses from wage theft between \$100 and \$1000 in the past year; 14% suffered losses of \$1000 or more. As for income, 60% of the workers earn \$200 or less per week in the colder months (October through March) and 78% make an average between \$200 and \$500 per week in the warmer months (April through September).
- **Working Conditions are Unsafe.** Forty-three percent were never provided safety equipment (goggles, hardhats, masks, etc.) and 26% were injured on the job severely enough that they could not work for a period of time.
- **Workers were Subjected to Violence by Employers.** Twenty-six percent were assaulted by employers. Of those assaulted, only 14% reported the assaults to the police. Thirty-five percent had been abandoned at a worksite.
- **Workers Do Not Use Legal Recourse to Obtain Unpaid Wages.** Only three day laborers (2.6%) reported filing complaints with the New Jersey Department of Labor and Workforce Development (“NJDOL”), with two having success in that effort. Similarly, only four workers (3.4%) reported that they had filed claims in small claims court against non-paying employers, only two of whom were successful. While New Jersey has a wage theft statute, it is almost never used, with only seven complaints brought under the statute in the entire state last year.
- **Wage Theft was Less Frequent in Communities Where Community Organizations Provided Support.** Workers in Morristown and Bridgeton, where established organizations with paid staff assisted the workers in wage disputes, had lower rates of wage theft than workers in Elizabeth and Orange, where there were no established organizations in the community to help day laborers.

Based on our survey, as well as interviews with public officials, community leaders, and experts on day laborers, the IR/IHR Clinic recommends:

- **Municipalities Should Standardize the Procedures that Allow Day Laborers to File Citizen Complaints Against Employers in Municipal Court.** To help facilitate better access to justice, municipalities should encourage and allow workers in their communities who have been victims of wage theft to file citizen complaints directly with the municipal courts rather than through the police.
- **The New Jersey Legislature Should Revise New Jersey’s Current Wage Theft Statute to Make it More Accessible to Low Wage Workers.** The Legislature should amend the State’s current statute to:
  - create an evidentiary presumption that a worker was employed by the employer if the employer fails to keep accurate employee records as required by law;
  - create a legal presumption that low wage workers are employees and not independent contractors;
  - impose criminal sanctions against employers who retaliate against employees who bring claims;
  - impose stiffer penalties for committing wage theft to provide more effective deterrence; and
  - allow jurisdiction for filing citizen complaints in either the place where hired or the place of work.
- **The NJDOL Should Utilize Community Groups to Assist in the Investigation and Preparation of Wage Theft Complaints.** Given its limited resources, the NJDOL should consider training and utilizing community groups to investigate and document violations and prepare complaints.

### **III. *The Survey Methodology***

This report is based upon a survey of 113 day laborers at seven pick-up sites in New Jersey as well as interviews with government officials and community leaders. Based on discussions with day laborer advocates and a review of several hundred newspaper articles mentioning day laborers, the IR/IHR Clinic identified thirty active day labor sites in New Jersey (see Map). The seven sites selected for the survey represent geographical diversity and varying levels of organizational support among the day laborers. The survey consisted of multiple-choice questions and was conducted primarily in Spanish. Survey participants received Spanish translations of the survey questions so they could follow along. The surveys were administered by Clinic students and volunteers from Seton Hall Law School's Latin American Law Students Association, except in Flemington and Bridgeton, where the surveys were administered by partner groups Hunterdon Hispanos and El Comité de Apoyo a los Trabajadores Agrícolas (CATA), respectively. In order to maintain confidentiality, the interviewers did not ask survey participants for their name or other identifying information.

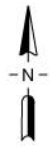
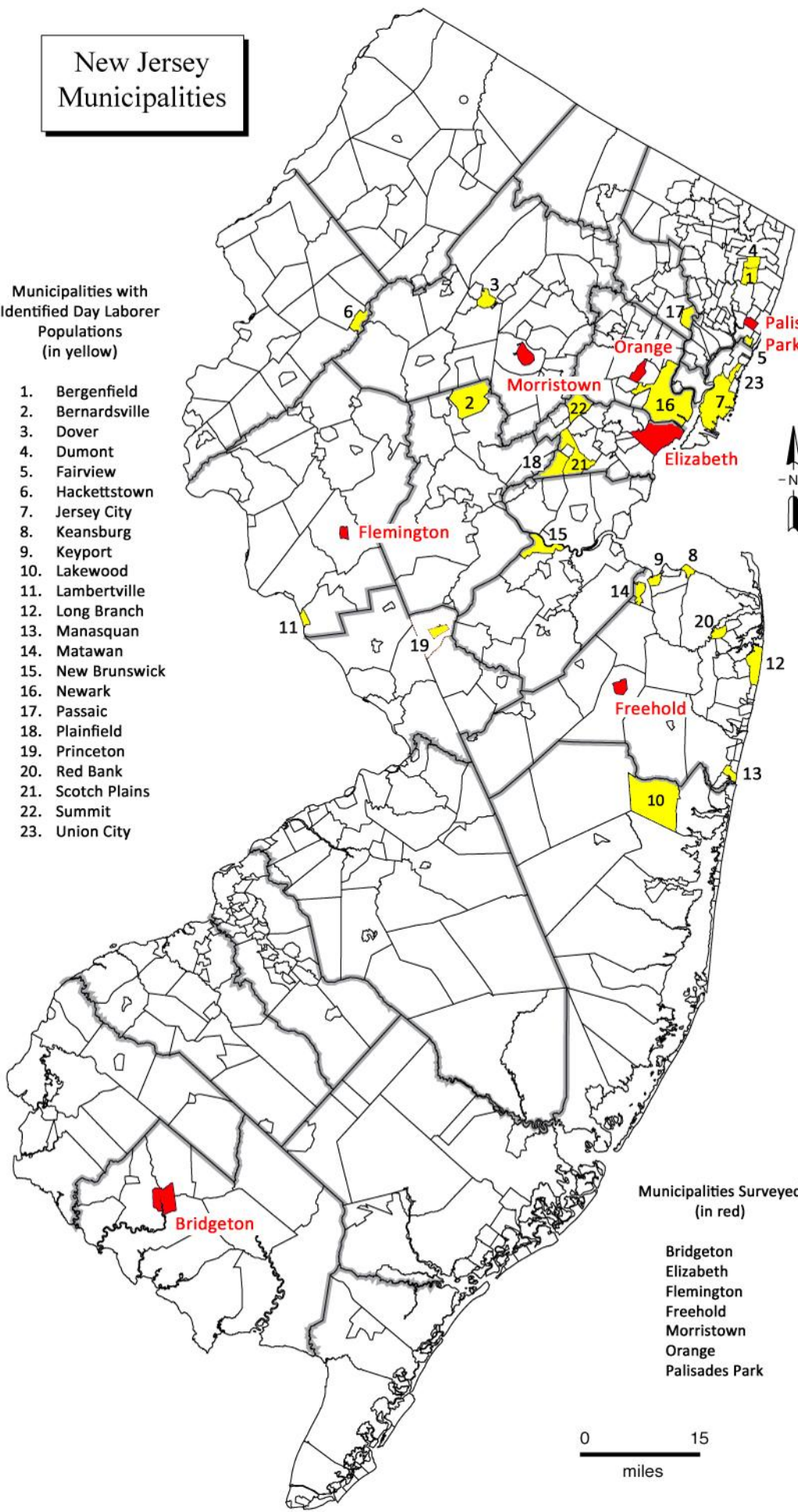
Seton Hall Law School students conducted the survey in Elizabeth, Freehold, Morristown, Orange, and Palisades Park, spending a morning in each town between October 9 and 22, 2010. During those visits, the students observed between 40 and 50 workers in Elizabeth, 15 in Freehold, 50 and 60 in Morristown, 50 and 60 in Orange, and approximately 100 workers in Palisades Park. Prior to our arrival in Freehold, Morristown, and Palisades Park, local community organizations alerted the workers that we would be arriving and urged their participation. Workers in Elizabeth and Orange had no forewarning of our coming. Whether alerted to our coming or not, most of the 255 to 285 workers that we observed in those five towns declined to participate in the survey. Hunterdon Hispanos conducted the survey on the morning of October 13, 2010 among approximately 25 workers at a convenience store parking lot in Flemington. In Bridgeton, CATA conducted the survey at the Bridgeton pick-up site over the course of two mornings and one evening in October and November 2010.

Finally, in compiling the data to make determinations of statewide results, we took into account that the size of the day laborer population and the level of participation in each town varied. Because the number of workers surveyed in any town was not necessarily proportional to its day laborer population, each town has been weighted the same. The statistical difference between these two alternatives is very small for the majority of the results and in no case ever exceeds a 3% difference for any one question.<sup>11</sup> Admittedly, in making these statewide determinations, the results may be more accurate if we factored in the day laborer population of each town. However, this information is not accurately obtainable considering, in part, the migratory nature of some day laborers as well as the seasonal flux of these populations.

# New Jersey Municipalities

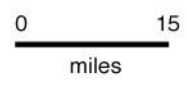
Municipalities with  
Identified Day Laborer  
Populations  
(in yellow)

1. Bergenfield
2. Bernardsville
3. Dover
4. Dumont
5. Fairview
6. Hackettstown
7. Jersey City
8. Keansburg
9. Keyport
10. Lakewood
11. Lambertville
12. Long Branch
13. Manasquan
14. Matawan
15. New Brunswick
16. Newark
17. Passaic
18. Plainfield
19. Princeton
20. Red Bank
21. Scotch Plains
22. Summit
23. Union City



Municipalities Surveyed  
(in red)

- Bridgeton
- Elizabeth
- Flemington
- Freehold
- Morristown
- Orange
- Palisades Park



## Statewide Rates of Workplace Violations of Day Laborers

Not Paid	Underpaid	No Overtime	Injured	Abandoned	Assaulted
<b>48%</b>	<b>54%</b>	<b>94%</b>	<b>26%</b>	<b>35%</b>	<b>26%</b>

### Rankings of Towns by Violations

Percentages of reported violation are in parentheses.

Towns appearing in **red italics** have no community organizations advocating for the workers.

Towns appearing in **purple underline** have community organizations with paid staff.

Towns appearing in black have community organizations with volunteer staff.

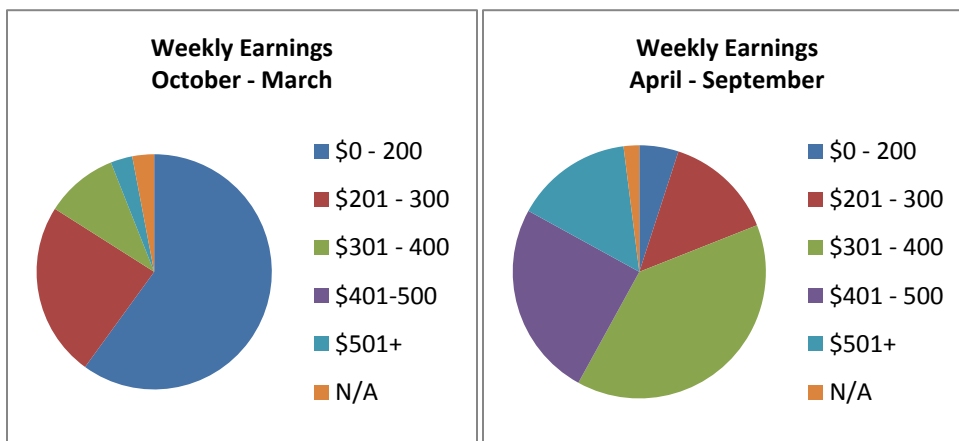
Not paid	Underpaid	No overtime	Injured	Abandoned	Assaulted
<i>Elizabeth (80)</i>	<i>Elizabeth (93)</i>	<i>Elizabeth (100)</i>	<i>Elizabeth (66)</i>	<i>Elizabeth (73)</i>	Freehold (50)
Flemington (57)	Pal Park (56)	Freehold (100)	<i>Orange (31)</i>	<i>Orange (46)</i>	<i>Orange (38)</i>
<i>Orange (54)</i>	<i>Orange (54)</i>	<u>Morristown (100)</u>	Pal Park (25)	Pal Park (44)	<i>Elizabeth (26)</i>
Freehold (42)	Flemington (50)	Pal Park (92)	<u>Bridgeton (25)</u>	Freehold (29)	Flemington (21)
<u>Bridgeton (37)</u>	<u>Morristown (48)</u>	<i>Orange (91)</i>	Flemington (22)	<u>Bridgeton (19)</u>	Pal Park (19)
Pal Park (37)	Freehold (43)	Flemington (88)	<u>Morristown (8)</u>	<u>Morristown (16)</u>	<u>Morristown (16)</u>
<u>Morristown (37)</u>	<u>Bridgeton (31)</u>	<u>Bridgeton (87)</u>	Freehold (7)	Flemington (14)	<u>Bridgeton (12)</u>

## IV. Survey Results

The survey resulted in a profile of a very low waged worker who is regularly exploited and often subjected to violence. The extent of the worker's abuse is somewhat dependent upon the community in which they work and the existence of organizational support. They rarely seek legal assistance and have largely accepted the conditions of their employment as the cost of doing business in the United States.

### a. Worker Profile

The average worker participating in the survey was a married 37 year-old man from Central America<sup>12</sup> with a grade school education and limited or no English language skills. He has worked as a day laborer on average from two to more than five years. On average, he looks for work five days a week and finds work one to three days. He works primarily in construction, frequently for homeowners, although in Bridgeton he works primarily in agriculture nurseries, packing plants, or factories. His weekly income from October through April was approximately from nothing to \$200 per week and approximately from \$301 to \$400 per week from May through September.



### b. Wage Theft

Over the past year, 54% of the workers statewide were paid less money than they were promised by at least one employer. The highest rate of underpayment of wages was in Elizabeth, where 93% of day laborers reported that they had been paid less than promised at least once in the past year, followed by Palisades Park (56%), Orange (54%), Flemington (50%), Morristown (48%), Freehold (43%), and Bridgeton (31%). Over 48% experienced at least one instance in the past year where an employer paid them nothing at all for their work, with the highest rate of non-payment being Elizabeth (80%), followed by Flemington (57%), Orange (54%), Freehold (43%),

Palisades Park (38%), Bridgeton (37%), and Morristown (24%). Statewide, of those who reported working more than forty hours for the same employer in one week, 94% were never paid overtime.

In terms of loss, 31% of the workers surveyed reported that over the past year, they had been deprived of \$100 to \$500 of wages, 10% reported losses of \$501 to \$1000, and 14% reported losses of over \$1000 in the past year. The remaining workers either suffered no loss or less than \$100 during the year or could not recall how much they had lost.

### *c. Safety Violations*

Approximately 26% of the workers had been injured severely enough while working that they could not work. Of those injured, 41% reported being out of work for one week or less and another 41% reported being unable to work for more than three weeks. Only three workers reported having been compensated for the time that they were unable to work. Despite the high rate of injury, 43% of the workers surveyed were never supplied with necessary safety equipment such as goggles, hardhats, or masks to prevent workplace injury, 39% percent of day laborers were only “sometimes” provide necessary safety equipment by their employers, and only 17% were “always” provide necessary safety equipment by their employers.

### *d. Violence Against Workers*

Statewide, twenty-six percent of the workers were assaulted on the job by an employer and nearly 35% were abandoned at a work site. The highest level of employer assault was reported in Freehold (50%), followed by Orange (38%), Elizabeth (27%), Flemington (21%), Palisades Park (19%), Morristown (16%), and Bridgeton (12%).

Only four of the workers who said that they had been assaulted filed complaints with the police. Forty-three percent of those who reported that they had been assaulted by employers but did not report the assault to the police said that they had not done so because they were afraid that the police would report them to immigration authorities. Twenty-five percent believe that the police would not help them.

### *e. Community Support*

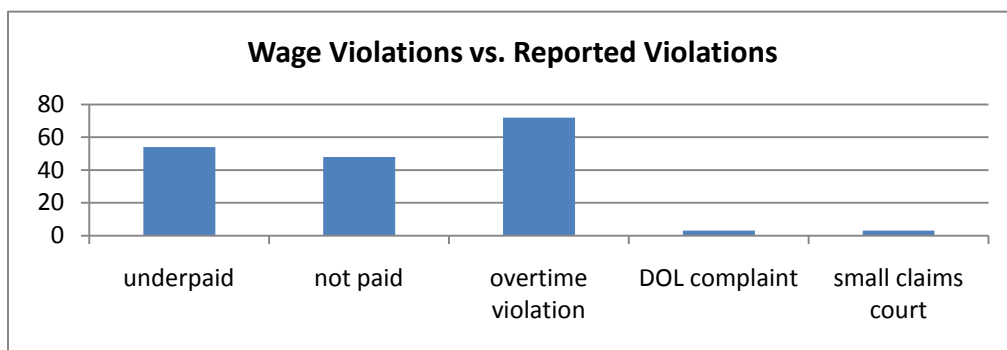
Although not measured in our survey, our research indicated that the workers in Morristown and Bridgeton enjoy extensive support from the advocacy groups Pathways to Work<sup>13</sup> and CATA,<sup>14</sup> respectively, which both have paid staff to assist them in connecting workers with employers and monitoring working conditions. Casa Freehold in Freehold

Township,<sup>15</sup> Hunterdon Hispanos<sup>16</sup> in Flemington, and Grupo Amigos del Tarabjo and Community Friends in Action in Palisades Park<sup>17</sup> offered many of the same services albeit with a volunteer staff. In contrast, the workers in Elizabeth and Orange have no organization to monitor employment or mediate with the community, though organizers from the American Friends Service Committee and the St. Joseph’s Social Service Center have recently begun to assist the workers in Elizabeth.

Our data indicates that generally those communities with the highest rates of wage theft, employer assault, workplace injuries, and employer abandonment lacked organized locally-based community support. Elizabeth, the town with the highest rates of underpayment and non-payment of wages, also had the highest rate of workplace injuries and abandonment. Orange had the third highest rate of wage theft and the second highest rate of workplace injuries, abandonment, and assault. On the other end of the spectrum, Morristown and Bridgeton – both with strong local advocacy groups with paid staff – generally had the lowest rates of wage theft and some of the lowest rates of workplace injuries, abandonment, and assault.

*f. Access to Justice*

Statewide, only three workers (2.6%) filed complaints with the New Jersey Department of Labor and Workforce Development and four (3.4%) filed complaints in small claims court. When we asked the remaining workers why they had not filed claims with either the NJDOL or in court, more than half the responses were that they did not know that they could, did not know how to do so, or were afraid to file a complaint. Many said that it simply was not worth the trouble to complain. Notably, 26% percent of those interviewed said that employers had threatened to report them to immigration authorities if they complained.



## V. *The Limits of Legal and Institutional Remedies*

Despite rampant exploitation and abuse, New Jersey's day laborers have few legal or institutional avenues for obtaining justice. Due to legal and budgetary constraints, the federal and state Departments of Labor lack the ability to address day labor issues, civil actions in small claims court are too complicated for the workers who cannot afford counsel, and the State's criminal prohibition on wage theft by statute is largely moribund.

The United States Department of Labor's Wage and Hour Division (WHD) has jurisdiction to prosecute wage theft only when the employee is engaged in interstate commerce.<sup>18</sup> However, according to the workers and the community organizers who assist them, most employers who hire day laborers are small, independent contractors involved in local projects who are not subject to the WHD jurisdiction. Nonetheless, Joseph Petrecca, the WHD's northern New Jersey district director, has told advocates that despite its limited jurisdiction, his office was willing to call transgressing employers to attempt to negotiate voluntary payment.<sup>19</sup> While the WHD's offer of intervention has been welcomed by advocates, it remains to be seen how effective it will be in the absence of enforcement authority.

In contrast to the limitations on the WHD's authority, officials at the NJDOL report that the agency investigates every wage and hour complaint it receives.<sup>20</sup> With high caseloads and limited staffing, however, the NJDOL complaint process usually requires more than a year to resolve matters.<sup>21</sup> Advocates told us that while the NJDOL has been sympathetic toward day laborers and meets with workers to educate them on their right to unpaid wages, the backlog of cases and lack of success in getting workers their money has caused advocates to stop filing complaints with the agency.<sup>22</sup>

As an alternative to government agency administrative processes, workers can file complaints in small claims court for breach of contract. But this avenue has likewise proven ineffective. In the experience of the IR/IHR Clinic, workers have been unable to collect even when they win judgments, in large part because workers do not have information on the employer's bank accounts or other financial accounts upon which they can file a lien. Day laborers are generally not privy to any of this type of information and thus are largely unable to collect judgments.

Finally, New Jersey has a criminal wage theft statute that states that an "employer who has agreed with an employee . . . to pay wages . . . commits a disorderly persons offense if the employer fails to pay wages when due."<sup>23</sup> This statute, the subject of the following section, is almost never employed by anyone. According to the Administrative Office of the Courts, only seven cases were filed under this statute last year.<sup>24</sup> Indeed, we spoke with twelve municipal prosecutors and none recalled ever prosecuting a wage theft charge. None of the organizers we spoke with were familiar with the statute.

## ***VI. Recommendations: The Legislature Should Amend New Jersey's Wage Theft Statute to Provide Day Laborers Greater Access to Justice***

To combat wage theft, some states and municipalities have implemented new and comprehensive municipal ordinances, toughened state administrative schemes, or implemented criminal sanctions.<sup>25</sup> Some of these efforts have been very successful. For example, within the first five months of enacting the Miami-Dade County wage theft statute in 2009, complainants collected \$25,000 of unpaid wages.<sup>26</sup> Unfortunately, under New Jersey law, municipalities are barred from enacting their own anti-wage theft ordinances under the state preemption doctrine.<sup>27</sup>

Some states that have implemented a new wage theft statute have simultaneously created a new administrative process within a newly created governmental division. For example, Illinois created a separate division within the Illinois Department of Labor to specifically handle cases of wage theft and streamline the process of bringing a claim. Ideally, New Jersey would establish a similar office, preferably a dedicated branch within the Division of Wage and Hour Compliance of the NJDOL. In light of the current economic and budget environment in New Jersey, however, it seems unlikely that the Legislature would have the resources to mandate a new administrative scheme.<sup>28</sup>

Due to the legal and economic limitations to improving the current available protection against wage theft, we suggest as an alternative that the New Jersey Legislature implement a more robust criminal wage theft statute. If done in earnest, revising the current statute can have almost immediate results. Specifically the legislature should create an evidentiary presumption that a worker was employed if an employer fails to keep accurate employee records as required by law; impose criminal sanctions against employers who retaliate against employees who bring claims; create a legal presumption that low wage workers are employees and not independent contractors; and amend the penalties for committing wage theft to provide more effective deterrence. We discuss these and other recommendations in greater detail below. In addition, based on our review of other wage theft statutes, we have appended a proposed model statute to start discussion of legislative change in New Jersey.

### ***a. Municipalities Should Standardize the Procedures that Allow Day Laborers to File Citizen Complaints Against Employers in Municipal Court.***

Wage theft is not a problem that can be eliminated by statutory amendments alone.<sup>29</sup> An amended wage theft statute will only be effective if victims have the opportunity to safely and effectively use it. To this end, we recommend that municipalities should standardize procedures for filing of citizen's complaints for wage theft directly with municipal court to make justice more accessible to victims. A citizen complaint is brought by a private citizen rather than a

police officer.<sup>30</sup> Although they are usually associated with complaints against a municipality's police, they can be utilized in a variety of circumstances.<sup>31</sup>

A citizen complaint must be filed with the municipal court in the municipality where the crime took place.<sup>32</sup> The actual procedure for filing a citizen complaint varies from town to town and may vary by the type of crime alleged. For certain types of injuries, some jurisdictions require filing a police report before a complaint may be filed with the municipal court.<sup>33</sup> Other jurisdictions allow a citizen to file a complaint with the municipal court directly without having to go to the police first.<sup>34</sup> In each case, a judge or an administrator authorized by a judge will issue an arrest warrant or summons once the citizen bringing the complaint convinces the judge of probable cause.<sup>35</sup>

Considering the delays day laborers experience with complaints to the NJDOL and the problems they encounter in enforcing small claims court civil judgments, citizen complaints in municipal court for wage theft may offer the best opportunity for day laborers to obtain swift and effective justice. As a criminal matter, the municipality would be pursuing the employer, eliminating the workers' need to retain counsel. Resolution would be relatively quick and lighter sentencing may be conditioned on payment of lost wages and the appropriate damages and fines. Finally, by allowing the workers to complain directly to the court, day laborers need not interact with the police whom, as our survey shows, they are hesitant to complain to even when they are assaulted by employers.

***b. The Legislature Should Amend the Wage Theft Statute so that if the Employer Fails to Produce Legally Required Employee Records the Fact Finder May Infer that the Employee Worked for the Employer on the Dates and at the Wage Rate Alleged.***

Under existing New Jersey Wage and Hour Law and Regulations and Wage Payment Law, employers are required to keep true and accurate records of time worked by each employee and the wages paid to each employee.<sup>36</sup> These records must be surrendered to the Commissioner of the NJDOL upon demand.<sup>37</sup> Failure to maintain records constitutes a disorderly person's offense but imposes no additional consequences in terms of wage and hour disputes.<sup>38</sup>

The Legislature should, therefore, amend the statute to provide that when a defendant-employer fails to present the legally required employee records to refute an employee-complainant's claim that he was employed by the defendant, the court or jury may infer that the employee did work for the employer on the alleged occasions at the agreed rate. On the other hand, the production of required business records for the disputed employment period would not automatically negate a claim. In that circumstance, the issue for the court would be the credibility of the parties. The Miami-Dade civil wage theft statute provides for a similar presumption.<sup>39</sup>

***c. The Legislature Should Amend New Jersey's Wage Theft Statute to Create a Presumption that Low Wage Workers are Employees and Not Independent Contractors.***

According to labor experts, a persistent problem in wage and hour regulation is that employers misclassify employees as independent contractors who are exempted from wage and hour regulation.<sup>40</sup> For example, a defense to the previous recommendation would be that the employer need not maintain or provide employee records because the complainant was not an employee but an independent contractor. Although New Jersey currently criminalizes an employer's improper classification of an employee as an independent contractor, and low wage workers rarely qualify as independent contractors,<sup>41</sup> misclassification still presents a substantial evidentiary hurdle for an employee to overcome in any type of legal action seeking to redress their harm.<sup>42</sup>

We recommend, therefore, that the New Jersey Legislature also implement a rebuttable presumption which cannot be altered by contract that states that any low wage worker is presumed to be an employee.<sup>43</sup> The presumption would not mean that every worker in a low wage industry is in-fact an employee, but it would presume they are until an employer can demonstrate otherwise. A rebuttable presumption would balance the risk of purposeful employer misclassification of an employee as an independent contractor against the risk of improperly identifying an independent contractor as an employee.<sup>44</sup> The threshold income amount of a low wage industry employee should be determined by the Legislature and set in such a way to keep up with the inflationary or deflationary pressures of the national economy.<sup>45</sup>

Miami-Dade County recently enacted a wage theft ordinance that creates a presumption that low wage workers are not independent contractors.<sup>46</sup> New York's statute does the same. New Mexico created a presumption that only applies to the construction industry<sup>47</sup> and Massachusetts for all service industries.<sup>48</sup> Arizona requires an employer to prove that an employee is an independent contractor by clear and convincing evidence.<sup>49</sup>

***d. The Legislature Should Amend the Wage Theft Statute to Impose Criminal Sanctions for Employer Retaliation Against Employees Who File Complaints.***

A common aspect of wage theft complaints has been retaliation by employers taken against the employees who files claims. As our survey indicated, 26% of the workers we spoke with said that employers had threatened to report them to immigration authorities in response to filing a claim, which is an illegal retaliatory action.<sup>50</sup> This Clinic has witnessed workers abandon complaints because of such threats.<sup>51</sup>

New Jersey law already provides for tort and equity relief and for attorney's fees for certain employees retaliated against by certain employers.<sup>52</sup> While some statutes provide for

damages and others criminalize retaliatory actions against an employee, there is no overarching framework applicable to all employees in all industries.<sup>53</sup> Therefore, an anti-retaliation provision should be added to the statute that provides for damages and criminal penalties for all low wage workers. Illinois' statute criminalizes retaliatory actions taken against an employee as a misdemeanor and allows for specific recovery of damages.<sup>54</sup> The New York Legislature also considered adding these provisions although they were ultimately removed from the final legislation that was recently passed.<sup>55</sup>

***e. The Legislature Should Amend the Wage Theft Statute to Impose Sufficient Fines and Damages to Deter Wage Theft.***

Because the purpose of wage theft is to increase an employer's profits, the best deterrence for combating it and other employer abuses would be to make it prohibitively expensive to engage in such behavior. Under the current wage theft statute, an employee can only recover wages owed, and a court can fine an employer up to a maximum of \$1,000 per offense.<sup>56</sup> In practice, however, courts generally do not impose these fines for minor offenses.<sup>57</sup> Additionally, the wage theft statute does not tier the penalties for repeat offenders, so that the maximum fines and penalties facing a first time offender are the same maximum fines and penalties facing a tenth time offender.<sup>58</sup> This is an inadequate deterrence to wage theft by corrupt employers, especially those who employ day laborers with the intent to cheat them.

We recommend that the damages and fines imposed on convicted employers be mandatory, steeper, and tiered for repeated offenses. Further, repeated acts of wage theft should be elevated from a disorderly person offense to a felony.<sup>59</sup> Moreover, wage theft victims should be awarded liquidated compensation, perhaps an additional 100% of the amount in controversy.<sup>60</sup> New Jersey law already provides for augmented victim awards in other contexts including landlord/tenant disputes.<sup>61</sup> While the New Jersey Criminal Code does not provide for liquidated damages for victims of a disorderly person offense, we recommend that the Legislature allow liquidated damages for victims of wage theft to serve as a deterrent to unscrupulous employers and as well to compensation to victims for their lost wages.<sup>62</sup>

***f. The Legislature Should Amend the Wage Theft Statute for Jurisdiction to be in Either the Place of Hiring or the Place of Work.***

Currently, New Jersey law provides that citizen complaints have to be filed where the crime occurred, but does not define that term. Because employers hire day laborers in one town but transport them to another, the wage theft statute should explicitly state that the place where the offense occurred, and the resulting jurisdiction, may be either the place hired or the place where the work was performed.

***g. The Legislature Should Amend the Wage Theft Statute to Import and Create Definitions for Key Terms and Phrases into the Wage Theft Statute.***

Absent explicit definitions in a criminal statute, courts interpret words by their ordinary meaning.<sup>63</sup> This has the potential to lead to inconsistent results and at times creates an unnecessary hurdle in the administration of justice. Therefore, to better protect the employee and to prevent needless litigation, the wage theft statute should explicitly define essential words and key terms including “employer,” “employee,” “wages,” “reasonable time,” “compensation,” and “benefits.”

***h. The NJDOL Should Utilize Community Groups to Assist in the Investigation and Preparation of Wage Theft Complaints.***

The New Jersey Department of Labor and Workforce Development should consider implementing a program in which community organizations are trained and utilized by the NJDOL to conduct investigations of wage claims and prepare complaints before they are brought to the Division of Wage and Hour Compliance.<sup>64</sup> This would allow the community organizations to act as a force multiplier for the NJDOL and eliminate the need for the NJDOL to investigate each claim that comes before the Division, making it more efficient and less resource intensive.<sup>65</sup>

## VII. Conclusion

By no means are the recommendations of this report meant as a panacea for wage theft and other abuses of workers. Instead they are meant to foster discussion about all workers, marginalized and not, and the safeguarding of their rights.

Clearly no statutory change is sufficient on its own to address all of the problems encountered by day laborers. This report did not extensively discuss, or in many cases even touch upon, other avenues that could provide additional protection. These other avenues could include the creation of hiring halls, more comprehensive private rights of action, and a dedicated sub-division within the Wage and Hour Division of the New Jersey Department of Labor and Workforce Development. Other statutory considerations include creating effective avenues for workers to bring wage theft claims in civil court. Finally, as some states and municipalities have realized, a new administrative scheme to specifically tackle wage theft claims may be exceptionally useful.

As this report found, there are many important players in society that provide support to exploited workers. Community organizations, especially those with a paid staff, have played a crucial role in educating day laborers about their rights and helping to assert these rights in many circumstances. However, they are not alone in this role. Municipal courts, prosecutors, and state and local officials all have essential parts to play in enforcing labor standards and further safeguarding the rights of workers. This report should serve as an invitation to these groups and individuals to engage more thoroughly with all employees who suffer the consequences of wage theft, including day laborers.

Critics of the Clinic's earlier report, *Ironbound Underground*, argued that because many of these workers were undocumented, they deserved to be the victims of wage theft and other abuses. However, what these criticisms failed to recognize is that when one worker suffers we all do. Abuse of labor laws, including wage theft, creates a race to the bottom where all workers see their safeguards erode. Day laborers are akin to the canary in the coal mine, effectively serving as a warning system for those abuses of workers that are becoming all too common. While the recommendations proposed in this report were drafted with a focus on day laborers, this was only done as a starting point to more broadly discuss issues of wage theft and other abuses against employees.

## Appendix: Model Wage Theft Statute

### § 2C:40A-2. Wage theft and related offenses

- a. An employer or agent of an employer who has agreed with an employee or bargaining agent for employees to pay wages, compensation or benefits to or for the benefit of employees commits a disorderly persons offense if the employer:
  - 1) fails to pay wages when due;<sup>66</sup> or
  - 2) fails to pay compensation or benefits within a reasonable time.
- b. Any employer who violates this section within two years of a prior conviction under this section is guilty of a fourth degree felony.<sup>67</sup>
- c. If a corporate employer violates subsection a., any officer or employee of the corporation who is responsible for the violation commits a disorderly person offense.<sup>68</sup>
- d. Jurisdiction for prosecution under this section shall be the place where the offense occurred, which for purposes of this statute may be the place where the employee was hired or the place where the relevant work was performed by the employee.<sup>69</sup>
- e. Failure to pay an employee any portion of wages when due under this sections shall constitute a separate offense.<sup>70</sup>
- f. Upon the state's presentation of sufficient evidence<sup>71</sup> of wage theft under this section, the fact finder may infer that an employer who fails to present employee records, as required under N.J. Stat. § 12:56-4,<sup>72</sup> N.J. Stat. § 34:11-4.6<sup>73</sup> and N.J. Stat. § 34:11-56a20,<sup>74</sup> employed the complainant for the period of time and wage alleged in the complaint.<sup>75</sup>
- g. An individual making less than \$11.11 per hour<sup>76</sup> is presumed to be an employee and not an independent contractor.<sup>77</sup>
  - 1) this presumption cannot be altered by contract.
  - 2) this presumption does not alter the existing criteria for determining whether an individual is an independent contractor as found under the New Jersey Wage and Hour Laws, the New Jersey Wage Payment Laws, or existing state and federal law.
- h. An employer found to have committed wage theft under this section shall pay the employee the wages owed plus liquidated damages equal to 100% of the wages owed.<sup>78</sup>
- i. In addition to damages provided in this and other sections, an employer found guilty of violating this section shall be fined \$200 plus a 20% penalty of the wages owed for a first offense, and \$1000 plus a 20% penalty of the wages owed for subsequent offenses.<sup>79</sup>

- j. An employer who is found to have retaliated against an employee for bringing a claim under this section
- 1) commits a separate disorderly persons offense.<sup>80</sup>
  - 2) is liable to the employee for damages.<sup>81</sup>
- k. Definitions for this section:
- 1) "Employer" means any individual, partnership, association, joint stock company, trust, corporation, the administrator or executor of the estate of a deceased individual, or the receiver, trustee, or successor of any of the same, employing any person in this State.<sup>82</sup> For the purposes of this section the officers of a corporation and any agents having the management of such corporation shall be deemed to be the employers of the employees of the corporation.<sup>83</sup>
  - 2) "Employee" means any person suffered or permitted to work by an employer, except that independent contractors and subcontractors shall not be considered employees.<sup>84</sup>
  - 3) "Wages" means the direct monetary compensation for labor or services rendered by an employee, where the amount is determined on a time, task, piece, or commission basis excluding any form of supplementary incentives and bonuses which are calculated independently of regular wages and paid in addition thereto.<sup>85</sup>
  - 4) "Compensation" is remuneration received in return for services rendered and includes, but is not limited to, medical treatment, wage replacement and permanent disability compensation to employees who suffer job-related injuries or illnesses, and death benefits to dependents of workers who have died as a result of their employment.<sup>86</sup>
  - 5) "Benefits" means gain or advantage, or anything regarded by the beneficiary as gain or advantage, including a pecuniary benefit or a benefit to any other person or entity in whose welfare he is interested.<sup>87</sup>
  - 6) "When due" is the time agreed upon by the employer and employee but in any case not greater than 16 days of completion of the work as provided for under N.J. Stat. § 34:11-4.2 and in accordance with a bi-monthly payment schedule.<sup>88</sup>

## NOTES

<sup>1</sup> Nicholas Norcia, Rafael Perez, Jr., Anjana Malhotra, and Bryan Lonegan, *Ironbound Underground: Wage Theft and Workplace Violations Among Day Laborers in Newark's East Ward*, Center for Social Justice, Seton Hall University, at 11-12, available at <http://law.shu.edu/ProgramsCenters/PublicIntGovServ/CSJ/upload/csaj-report-ironbound-underground-july2010.pdf> [hereinafter *Ironbound Underground*].

<sup>2</sup> Abel Valenzuela Jr., Nik Theodore, Edwin Melendez, and Ana Luz Gonzalez, *On the Corner: Day Labor in The United States* (2006), at 6, 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).

<sup>3</sup> *Id.* at 1.

<sup>4</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 02-925, WORKER PROTECTION: LABOR'S EFFORTS TO ENFORCE PROTECTIONS FOR DAY LABORERS COULD BENEFIT FROM BETTER DATA AND GUIDANCE 2 (Sept. 26 2002) [hereinafter *2002 GAO Report*].

<sup>5</sup> Abel Valenzuela Jr. and Edwin Meléndez, *Day Labor in New York: Findings from the NYDL Survey*, (2003) at 1, available at [http://www.sscnet.ucla.edu/issr/csup/pubs/papers/pdf/csup3\\_NYDLS.pdf](http://www.sscnet.ucla.edu/issr/csup/pubs/papers/pdf/csup3_NYDLS.pdf).

<sup>6</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-458T, WAGE AND HOUR DIVISION'S COMPLAINT INTAKE AND INVESTIGATIVE PROCESSES LEAVE LOW-WAGE WORKERS VULNERABLE TO WAGE THEFT (March 25, 2009) (finding the Labor Department's wage and hour division doing a poor job of helping the most vulnerable workers, including day laborers, in the United States).

<sup>7</sup> *Report of the New Jersey Governor's Blue Ribbon Advisory Panel on Immigrant Policy*, 68-69 (2009), available at [http://www.state.nj.us/publicadvocate/home/pdf/ipp\\_report\\_march.pdf](http://www.state.nj.us/publicadvocate/home/pdf/ipp_report_march.pdf) ("Few in our society are as economically and otherwise vulnerable as recent immigrants to this country who toil as laborers, seek work on a day-to-day basis and have limited English proficiency"); *2002 GAO Report*, *supra* note 4, at 2-3; LaQuanda Brown and Kaitlyn Muller, *Local Day Labor Worker Centers*, Rutgers University-Camden (2008).

<sup>8</sup> Annette Bernhardt, Ruth Milkman, Nik Theodore, Douglas Heckathorn, Mirabai Auer, James DeFilippis, Ana Luz Gonzalez, Victor Narro, Jason Perelshteyn, Diana Polson, and Michael Spiller, *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*, (2009), 2-4, available at <http://www.nelp.org/page/-/brokenlaws/BrokenLawsReport2009.pdf?nocdn=1>.

<sup>9</sup> *Id.* at 15-16.

<sup>10</sup> *Id.* at 5.

<sup>11</sup> There are two ways to interpret the statistics of the survey when making a determination of state-wide results: by making each day laborer surveyed equal or making each town equal. As an extreme example, suppose three towns with a day laborer population of one hundred individuals are surveyed. In the first two towns, five people were surveyed, while in the last town, all one hundred were surveyed. In this example, in the first two towns there were no instances of reported wage theft but at the third site all one hundred people surveyed experienced wage theft. When results are calculated with the surveys of each day laborer being equal wage theft is about 91% for the whole state. However, that result is probably not an accurate representation of the entire state because significantly more people were interviewed in the third town. The alternative method of determining the rate of state-wide wage theft is to make all three towns equal so that these three groups of results are averaged. In this example, this leads to a rate of wage theft occurrence of about 33%.

<sup>12</sup> Guatemala (36); Mexico (30); Honduras (24); Ecuador (14); Peru (4); El Salvador (2); Costa Rica (2).

<sup>13</sup> <http://www.pathwaystoworkers.org>.

<sup>14</sup> <http://www.cata-farmworkers.org>.

<sup>15</sup> <http://www.casafreehold.org>.

<sup>16</sup> <http://www.hunterdonhispanos.org>.

<sup>17</sup> <http://site.communityoffriendsinaction.org>.

<sup>18</sup> 29 U.S.C. § 206(a) (2007).

<sup>19</sup> Interview with Joseph Petrecca, District Director, Wage and Hour Division, U.S. Department of Labor (Sept. 28, 2010).

<sup>20</sup> *Ironbound Underground*, *supra* note 1, at 11-12.

<sup>21</sup> Telephone interview with Keith Talbot, Senior Attorney at Legal Services of New Jersey Workers Legal Rights and Farm Worker Projects (Oct. 28, 2010).

<sup>22</sup> Ellie Spiegel of the Community of Friends in Action in Palisades Park, Diana Mejia, an organizer with both the American Friends Service Committee and Wind of the Spirit in Morristown, Orange, and Elizabeth, and Rosa Chilquillo of Pathways to Work in Morristown.

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- <sup>23</sup> N.J. STAT. ANN § 2C:40A-2 (1999).
- <sup>24</sup> Telephone Interview with the Administrative Office of the Courts (Nov. 3, 2010).
- <sup>25</sup> N.Y. Wage Theft Prevention Act, S8380 (Nov. 30, 2010); The Justice Ordinance: New Orleans' Municipal Prohibition on Wage Theft Crimes (Sept. 28, 2009); C.R.S. 5-3-13; Washington SB 3145; 30 ILL COMP STAT. 105/5.755 (2010); Miami-Dade County, Florida, Municipal Code, Chapter 22, §§ 1-10 (2010).
- <sup>26</sup> Michael Miller, *Sixteen Miami-Dade Businesses You Might Not Want to Work For*, MIAMI NEW TIMES, available at [http://blogs.miaminewtimes.com/riptide/2010/10/sixteen\\_miami-dade\\_businesses.php](http://blogs.miaminewtimes.com/riptide/2010/10/sixteen_miami-dade_businesses.php).
- <sup>27</sup> N.J. STAT. ANN. § 2C:1-5(d) (2010) (“Notwithstanding any other provision of law, the local governmental units of this State may neither enact nor enforce any ordinance or other local law or regulation conflicting with, or preempted by, any provision of this code or with any policy of this State expressed by this code, whether that policy be expressed by inclusion of a provision in the code or by exclusion of that subject from the code.”). Notably this includes local ordinances that are merely duplicative of state statutes. *Inganamort v. Ft. Lee*, 120 N.J. Super. 286, 306-07 (Law Div. 1972). The current wage theft statute is broad in creating a disorderly persons offense for employers who fail to pay wages when due. There is no limiting language distinguishing between types of wages or types of employees, so a local ordinance would not be able to expand on the types of wages, employers, or employees. As a result, the only option available is to revise New Jersey’s wage theft statute.
- <sup>28</sup> Lisa Fleisher, *Looking Ahead, Analysts Say N.J. Budget Woes May Be Far From Over*, THE STAR LEDGER, available at, [http://www.nj.com/news/index.ssf/2010/07/looking\\_ahead\\_njs\\_budget\\_woes.html](http://www.nj.com/news/index.ssf/2010/07/looking_ahead_njs_budget_woes.html).
- <sup>29</sup> Telephone interview with Amy Gottlieb, American Friends Service Committee (Nov. 1, 2010).
- <sup>30</sup> N.J. Court Rules, R. 7:2-2(a)(1) (2009).
- <sup>31</sup> See generally Kevin M. Keenan & Samuel Walker, *An Impediment To Police Accountability? An Analysis Of Statutory Law Enforcement Officers’ Bills Of Rights*, 14 B.U. PUB. INT. L.J. 185 (2005); Hazel Glenn Beh, *Municipal Liability For Failure To Investigate Citizen Complaints Against Police*, 25 FORDHAM URB. L.J. 209 (1998); Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453 (2004).
- <sup>32</sup> N.J. Court. Rules, R. 7:2-2(a)(1) (2009).
- <sup>33</sup> Telephone interview with Newark Police Officer ( Nov. 11, 2010) (police report required for certain offenses); Glen Rock Police, Citizen’s Complaint Procedures (“In order to sign a complaint charging any individual with a criminal or disorderly persons offense you must first file a Police Report. After your have done so, you may obtain from the lobby of the police station, or the Court Administrator, a citizen’s complaint package that contains the appropriate affidavit. Complete these forms and return them to the Municipal Court Administrator during normal business hours in person. The Municipal Court Administrator requires that you make an appointment in advance.”) available at, <http://www.glenrockpolice.com/Quality%20of%20life.htm>.
- <sup>34</sup> Telephone interview with Trenton Municipal Court (Nov. 11, 2010) (police report not required for any offense, can go to municipal court directly); TrentonNJ.org, Municipal Courts Frequently Asked Questions, available at <http://www.trentonnj.org/Cit-e-Access/FAQ/index.cfm?TID=55&DID=1102> (“A citizen complaint may be filed at Trenton Municipal Court, Trenton, during normal business hours. On occasion, complaints will be taken during specific times, depending on staff availability.”).
- <sup>35</sup> N.J. Court Rules, R. 7:2-2(a)(1) (2009) (“The arrest warrant or summons may be issued only if it appears to the judicial officer from the complaint, affidavit, certification or testimony that there is probable cause to believe that an offense was committed, the defendant committed it, and an arrest warrant or summons can be issued.”).
- <sup>36</sup> N.J. STAT. ANN. § 34:11-56a20 (1966). Records of wages and hours (“Every employer of employees subject to this act shall keep true and accurate record of the hours worked by each and the wages paid by him to each...”).
- <sup>37</sup> N.J. STAT. ANN. § 34:11-56a20 (1966). Records of wages and hours (“...such records shall be open to inspection by the commissioner or the director or their authorized representative at any reasonable time.”).
- <sup>38</sup> N.J. STAT. ANN. § 34:11-56a22 (1966). Violations; penalties (“...violates any provision of this act or of any regulation or order issued under this act shall be guilty of a disorderly persons offense and shall, upon conviction for a first violation be punished by a fine of not less than \$100 nor more than \$1000 or by imprisonment for not less than 10 nor more than 90 days or by both the fine and imprisonment and, upon conviction for a second or subsequent violation, be punished by a fine of not less than \$500 nor more than \$1000 or by imprisonment for not less than 10 days nor more than 100 days or by both the fine and imprisonment.”).
- <sup>39</sup> Miami-Dade County, Florida, Municipal Code, Chapter 22, §§ 1-10 (2010) (“*Standards for Resolving Factual Disputes*. (a) Adequate records. When the following three conditions are met: 1) where by operation of some other statute or regulation, a respondent employer has an obligation to keep records of an employee’s hours worked and records of compensation provided to an employee; and 2) where such records are imprecise, inadequate, or do not exist; and 3) where a complainant employee presents sufficient evidence to show, as a matter of just and reasonable

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inference, the amount of work done or the extent of work done or what compensation is due for the work done; (b) then the burden of imprecision falls on the respondent whose obligation it was to keep accurate records and the respondent must come forward with evidence of the precise amount of work performed or with evidence to negate the reasonableness of the inference to be drawn from the complainants' evidence;”).

<sup>40</sup> Telephone interview with David Socolow, former Commissioner of the New Jersey Department of Labor and Workforce Development, (Nov. 3, 2010).

<sup>41</sup> *Lowe v. Zarghami*, 158 N.J. 606, 616 (1999) ([T]he control test assesses four factors in determining a worker's status: (1) the degree of control exercised by the employer over the means of completing the work; (2) the source of the worker's compensation; (3) the source of the worker's equipment and resources; and (4) the employer's termination rights. The greater the degree of control exercised by the employer, the more likely a worker will be considered an employee. . . . The relative nature of the work test supplements the control test in limited circumstances. If a working relationship was created by social legislation under which public policy concerns dictate a more liberal standard, then a court may apply the relative nature of the work test rather than the control test.” (citations omitted)).

<sup>42</sup> N.J. STAT. ANN. § 34:20-5 (2007) (“An employer . . . who fails to properly classify an individual as an employee . . . and fails to pay wages, benefits, taxes, or other contributions required by any of those acts, shall be: (1) Guilty of a disorderly persons offense . . . .”); N.J. STAT. ANN. § 34:15-79 (2009) (“An employer who . . . misrepresents one or more employees as independent contractors . . . and, if the misrepresentation . . . is knowing , shall be guilty of a crime of the fourth degree . . . .”); N.J. STAT. ANN. § 34:15-57.4 (1999) (“A person shall be guilty of a crime of the fourth degree if the person purposely or knowingly: (2) Makes a false or misleading statement, representation or submission, including a misclassification of employees . . . .”). There is no single rule or test for determining whether someone is an independent contractor or an employee for the purposes of the Fair Labor Standards Act (FLSA). United States Department of Labor, Wage and Hour Division, <http://www.dol.gov/whd/regs/compliance/whdfs13.htm>.

<sup>43</sup> Heather Boushey, Shawn Fremstad, S, Rachel Grag, and Margy Waller. *Understanding Low-Wage Work in the United States*, Center for Economic Policy and Research, (2007) at 2-6 (“a low wage job [is] one paying less than two thirds of the median wage -- \$11.11 per hour or less.”) *available at*, <http://www.inclusionist.org/files/lowwagework.pdf>.

<sup>44</sup> MASS. ANN. LAWS. ch. 149, § 148B, (2004) Employee status; Exceptions; Penalties (“(a) For the purpose of this chapter . . . an individual performing any service . . . shall be considered to be an employee under those chapters unless:-- (1) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and (2) the service is performed outside the usual course of the business of the employer; and, (3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed. . . .”); ARIZ. REV. STAT. ANN. § 23-362, (2006), Minimum wage, definitions “whether a person is an independent contractor or an employee shall be determined according to the standards of the federal fair labor standards act, but the burden of proof shall be upon the party for whom the work is performed to show independent contractor status by clear and convincing evidence.”

<sup>45</sup> *Understanding Low-Wage Work in the United States*, *supra* note 43.

<sup>46</sup> Miami-Dade County, Florida, Municipal Code, Chapter 22, §§ 1-10 (2010).

<sup>47</sup> N.M. STAT. ANN. § 60-13-3.1, (2005) Employer and employee relationship; independent contractor; improper reporting; penalty; license sanctions (“ . . . a contractor who is an employer shall consider a person providing labor or services to the contractor for compensation to be an employee of the contractor and not an independent contractor unless the following standards indicative of an independent contractor are met: (1) the person providing labor or services is free from direction and control over the means and manner of providing the labor or services, subject only to the right of the person for whom the labor or services are provided to specify the desired results; (2) the person providing labor or services is responsible for obtaining business registrations or licenses required by state law or local ordinance for the person to provide the labor or services; (3) the person providing labor or services furnishes the tools or equipment necessary to provide the labor or services; (4) the person providing labor or services has the authority to hire and fire employees to perform the labor or services; (5) payment for labor or services is made upon completion of the performance of specific portions of a project or is made on the basis of a periodic retainer; and (6) the person providing labor or services represents to the public that the labor or services are to be provided by an independently established business. A person is engaged in an independently established business when four or more of the following circumstances exist: (a) labor or services are primarily performed at a location separate from the person's residence or in a specific portion of the residence that is set aside for performing labor or

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services; (b) commercial advertising or business cards are purchased by the person, or the person is a member of a trade or professional association; (c) telephone or email listings used for the labor or services are different from the person's personal listings; (d) labor or services are performed only pursuant to a written contract; (e) labor or services are performed for two or more persons within a period of one year; or (f) the person assumes financial responsibility for errors and omissions in labor or services as evidenced by insurance, performance bonds and warranties relating to the labor or services being provided.”).

<sup>48</sup> MASS. ANN. LAWS. ch. 149, § 148B (2004). Employee status; Exceptions; Penalties (“(a) For the purpose of this chapter and chapter 151, an individual performing any service, except as authorized under this chapter, shall be considered to be an employee under those chapters unless:-- (1) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and (2) the service is performed outside the usual course of the business of the employer; and, (3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed . . .”).

<sup>49</sup> ARIZ. REV. STAT. ANN. § 23-362, (2004). Minimum wage, definitions “whether a person is an independent contractor or an employee shall be determined according to the standards of the federal fair labor standards act, but the burden of proof shall be upon the party for whom the work is performed to show independent contractor status by clear and convincing evidence.”

<sup>50</sup> To establish a *prima facie* claim of retaliation in violation of the FLSA, a plaintiff must show “(1) participation in protected activity known to the defendant; (2) an employment action disadvantaging the plaintiff; and (3) a causal connection between the protected activity and the adverse employment action.” *Lai v. Eastpoint Int'l, Inc.*, 2000 U.S. Dist. LEXIS 12502, 2000 WL 1234595, \*3 (S.D.N.Y. Aug. 31, 2000) (citations omitted). (reporting plaintiffs to the INS and making baseless allegations to the government that plaintiffs are terrorists, constitute an adverse employment action); *Singh v. Jutla & C.D. & R's Oil, Inc.*, 214 F. Supp.2d 1056, 1059 (N.D. Cal. 2002) (discussing forms of illegal retaliation under the FLSA other than retaliatory discharge); *Contreras v. Corinthian Vigor Ins. Brokerage, Inc.*, 103 F. Supp. 2d 1180 (N.D. Cal. 2000) (reporting a plaintiff to the INS in retaliation for a plaintiff having complained under the FLSA constituted an adverse employment action); *Centeno-Bernuy v. Perry*, 302 F. Supp. 2d 128, 136 (W.D.N.Y. 2003).

<sup>51</sup> *Ironbound Underground*, *supra* note 1, at 11-12.

<sup>52</sup> N.J. STAT. ANN. § 34:6A-45, (1983); N.J. STAT. ANN. § 34:8A-10.1, (1955) Retaliatory action against worker for exercise of legal right; prohibition; presumption; liability (applies only to seasonal farm workers); N.J. STAT. ANN. § 34:11-56.66, (2005), Retaliation against complaining worker, disorderly persons offense (applies only to contractor or subcontractor employers); N.J. STAT. ANN. § 34:19-3,12, (1986), (part of the “Conscientious Employee Protection Act); N.J. STAT. ANN. § 34:20-9, (2007), Discrimination, retaliation prohibited (part of the “Construction Industry Independent Contractor Act”).

<sup>53</sup> N.Y. Wage Theft Prevention Act, S8380 (Nov. 30, 2010); The Justice Ordinance: New Orleans’ Municipal Prohibition on Wage Theft Crimes (Sept. 28, 2009); 30 ILL. COMP. STAT. 105/5.755 (2010).

<sup>54</sup> 30 ILL. COMP. STAT. 105/5.755 (2010).

<sup>55</sup> N.Y. Wage Theft Prevention Act, S8380 (Nov. 30, 2010) § 215 Penalties and civil action (“No employer or his or her agent, or the officer or agent of any corporation, partnership, or limited liability company, or any other person, shall discharge, threaten, penalize, or in any other manner discriminate or retaliate against an employee (i) because such an employee has made a complaint to his or her employer, or to the commissioner or to his or her authorized representative or to the Attorney General that the employer has engaged in conduct that the employee, in good faith, believes violates his or her rights under this chapter.”)

<sup>56</sup> N.J. STAT. ANN. § 2C:40A-2 (1999).

<sup>57</sup> Telephone interview with Joseph Monaghan, Municipal Prosecutor for Passaic (Oct. 20, 2010).

<sup>58</sup> N.J. STAT. ANN. § 2C:40A-2 (1999).

<sup>59</sup> N.Y. Wage Theft Prevention Act, S8380 (Nov. 30, 2010) (“[I]n the event that a second or subsequent offense occurs within six years of the date of conviction for a prior offense, shall be guilty of a felony for the second or subsequent offense.”).

<sup>60</sup> The United States Supreme Court has held that undocumented workers are entitled to compensatory and punitive damages, but not payment for lost work. *See Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

<sup>61</sup> N.J. STAT. ANN. § 46:8-21.1 (1971). Return of deposit; displaced tenant; termination of lease; civil penalties, certain (“In any action by a tenant . . . for the return of moneys due under this section, the court upon finding for the tenant . . . shall award recovery of double the amount of said moneys, together with full costs of any action and, in the court’s discretion, reasonable attorney’s fees.”).

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<sup>62</sup> The fines and restitution provision of the New Jersey Criminal Code would need to be amended to accommodate this exception to other disorderly person offenses. This can be accomplished without significant change to the statute itself, or to other statutes relying on it, simply by adding the text in brackets, “The restitution ordered paid to the victim shall not exceed the victim’s loss, [unless provided elsewhere,] except that in any case . . .”

<sup>63</sup> *Mortimer v. Board of Review*, 99 N.J. 393, 398 (1985) (“In determining the proper interpretation of a statute, the basic rule is that the statutory language should be given its ordinary meaning absent specific intent to the contrary.”).

<sup>64</sup> Telephone interview with David Socolow, former Commissioner of the New Jersey Department of Labor and Workforce Development, (Nov. 3, 2010).

<sup>65</sup> *Id.*

<sup>66</sup> Miami-Dade County, Florida, Municipal Code, Chapter 22, § 22-3 (2010) (“For any employer to fail to pay any portion of wages due to an employee . . . within a reasonable time from the date on which that employee performed the work . . .”).

<sup>67</sup> N.Y. Wage Theft Prevention Act, S8380 (Nov. 30, 2010) (“[I]n the event that any second or subsequent offense occurs within six years of the date of conviction for a prior offense, shall be guilty of a felony for the second or subsequent offense . . .”).

<sup>68</sup> N.J. STAT. ANN. § 2C:40A-2(b) (1999) (currently contains the same section and language).

<sup>69</sup> N.J. STAT. ANN. § 2C:40A-2 (1999). Violation of contract to pay employees (“a. An employer who has agreed with an employee or with a bargaining agent for employees to pay wages, compensation or benefits to or for the benefit of employees commits a disorderly persons offense if the employer: (1) fails to pay wages when due; or (2) fails to pay compensation or benefits within 30 days after due. b. If a corporate employer violates subsection a., any officer or employee of the corporation who is responsible for the violation commits a disorderly persons offense.”)

<sup>70</sup> 30 ILL. COMP. STAT. 105/5.755 (2010). (“Each payment to any employee in any week of less than the wage applicable under this article shall constitute a separate offense.”).

<sup>71</sup> When an employee files a complaint containing basic information, such as the information required in the NJDOL Wage Claim form MW-31A, this employee should be granted the presumption that they worked for an employer and are a victim of wage theft. This form requires that an individual provide certain identifiable information concerning an employer including name, address, days worked, job duties, etc. If an employee is able to complete this form sufficiently to create an inference as to its accuracy, than this presumption would require that an employer present accurate records describing their business activities to refute this claim. Failure to maintain adequate business records would result in a presumption of employment in favor of the employee.

<sup>72</sup> N.J. STAT. ANN. § 12:56-4 (2009).

<sup>73</sup> N.J. STAT. ANN. § 34:11-4.6 (1965).

<sup>74</sup> N.J. STAT. ANN. § 34:11-56a20 (1966).

<sup>75</sup> N.Y. Wage Theft Prevention Act, S8380 (2010) (version from June 29, 2010) (“Failure of an employer to keep adequate records or provide statements of wages to employees as required under this chapter, in addition to exposing such employer to penalties authorized . . . shall not operate as a bar to filing a complaint by an employee. In such a case the employer in violation shall bear the burden of proving that the complaining employee was paid wages, benefits and wage supplements”).

<sup>76</sup> *Understanding Low-Wage Work in the United States*, *supra* note 43.

<sup>77</sup> MASS. ANN. LAW ch. 149, § 148B, (2004) Employee status; Exceptions; Penalties (“(a) For the purpose of this chapter and chapter 151, an individual performing any service, except as authorized under this chapter, shall be considered to be an employee under those chapters unless:-- (1) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and (2) the service is performed outside the usual course of the business of the employer; and, (3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed. . . .”); A.R.S. § 23-362, (2006), Minimum wage, definitions “whether a person is an independent contractor or an employee shall be determined according to the standards of the federal fair labor standards act, but the burden of proof shall be upon the party for whom the work is performed to show independent contractor status by clear and convincing evidence.”; *Understanding Low-Wage Work in the United States*, *supra* note 45.

<sup>78</sup> Miami-Dade County, Florida, Municipal Code, Chapter 22, § 22-2,3 (2010) (“Liquidated damages shall mean twice the amount a respondent employer is found to have unlawfully failed to pay the complainant employee. . . . [Wage theft violation] shall entitle an employee . . . to receive back wages in addition to liquidated damages from that employer.”).

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<sup>79</sup> 30 ILL. COMP. STAT. 105/5.755 (2010); The Justice Ordinance: New Orleans' Municipal Prohibition on Wage Theft Crimes (Sept. 28, 2009) (damages plus 4% of wages owed); ILLINOIS (damages plus 2% in unpaid wages per month from the date payment was owed); Miami-Dade County, Florida, Municipal Code, Chapter 22, § 22-2,3 (2010) (double damages).

<sup>80</sup> N.Y. Wage Theft Prevention Act, S8380 (2010) (version from June 29, 2010); 30 ILL. COMP. STAT. 105/5.755 (2010).

<sup>81</sup> 30 ILL. COMP. STAT. 105/5.755 (2010) ("An employee who has been unlawfully retaliated against shall be entitled to recover through a claim filed with the Department of Labor or in a civil action, but not both, all legal and equitable relief as may be appropriate. In a civil action, such employee shall also recover costs and all reasonable attorney's fees.").

<sup>82</sup> N.J. STAT. ANN. § 34:11-4.1 (1965).

<sup>83</sup> N.J. STAT. ANN. § 34:11-4.1 (1965).

<sup>84</sup> N.J. STAT. ANN. § 34:11-4.1 (1965).

<sup>85</sup> N.J. STAT. ANN. § 34:11-4.1 (1965).

<sup>86</sup> BLACK'S LAW DICTIONARY 122 (3d Pocket ed. 2006).

<sup>87</sup> BLACK'S LAW DICTIONARY 67 (3d Pocket ed. 2006).

<sup>88</sup> N.J. STAT. ANN. § 34:11-4.2 (1965).