

# **Where Theft is Legal**

**Mapping Wage Theft Laws in the 50 States**

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**June 2012**

# Acknowledgments

This report would not have been possible without the contributions of many individuals, organizations, and supporters. First and foremost, we thank the workers' centers, labor unions, advocacy groups, researchers, legislators, and enforcement agency staff who have been on the front lines combating wage theft and devising policies and strategies to turn the tide on this monumental problem.

For their invaluable contributions to this report, we would like to thank our legal interns, Kyle Antonelli and Garrett Kaske; our policy intern, Robert Olsen; and our legal analyst, Ryan Nelson. They were true partners, not only in the work of researching laws in all fifty states; they contributed immensely to working through the complex methodological and policy questions needed to sort through and analyze it all.

We also thank the state agency staff who responded to our exploratory survey at the outset of this project, and whose responses were indispensable in helping us refine the scope and approach of this report and in providing some valuable direction in navigating state laws. We likewise thank the National Employment Law Project for reviewing a draft of our report and for their advice and insights.

This project would not have been possible without the support of our funders, in particular the Public Welfare Foundation and the Ford Foundation. We are immensely grateful to them for enabling us to do this work — a hopefully valuable contribution to helping workers across the nation achieve justice.

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# Introduction: Mapping Wage Theft Laws in the 50 States

The role of workers' rights and workplace protections in the economic recovery has been hotly debated in state legislatures since 2010. Conservative leaders argue that labor regulations are a strangulating force on economic growth, making it too costly for employers to invest in job creation. Labor advocates and progressives argue that hard economic times are the worst time to roll back these protections, and that they are crucial to economic growth and stability.

These debates have played out most visibly in fights over legislative proposals targeting the rights of government workers and unions. A central theme in conservatives' cases is an assumption that trends in the private sector mirror free market economic "reality," a world where institutions that empower workers simply and unsustainably distort costs: if private sector wages are falling, that's just what the market will bear; if workers don't have pensions, it's because they're too expensive and no longer relevant. Many conservatives argue, as Wisconsin Governor Scott Walker articulated, that the public sector is "out of balance" and needs to be "brought back in line" with the private sector, where pensions, healthcare coverage, and union representation have been on the decline for decades.

By surveying the effectiveness of laws meant to protect workers against violations by unscrupulous employers in all 50 states, this report reveals a very different picture of the actual "imbalance" between private sector and public sector employment standards. Since the private sector workforce is virtually non-union and concentrated in lower-wage sectors, the conditions such working people face are increasingly the foundation on which the American standard of living rests. Laws to guarantee an employee's right to be paid what she or he is legally owed form a bulwark against the type of mass exploitation we are mortified by in other countries, and which are only a couple of generations distant in our own nation's history.

**Our research shows that states' wage theft laws are grossly inadequate, contributing to a rising trend in workplace violations that affects millions of people throughout the country.** The growth of this and other forms of the "underground economy" also have a serious impact on state revenues, amounting to billions of dollars per year in tax and payroll fraud.

Several states are acting to address these problems by strengthening their laws against unscrupulous employers. Our recent report, *Cracking Down on Wage Theft*, highlights some of these states, most particularly New York, which passed a law in 2010 that greatly enhanced the ability of workers to recover nearly \$3 billion per year stolen wages and for the state to recoup hundreds of millions in lost revenue — simply by enforcing the law. However, the improvements that states like Massachusetts, Illinois, and New Mexico have recently made come against a backdrop of virtual lawlessness. **Our comprehensive survey of state laws across three categories essential to addressing the problem — Accessing Justice, Transparency and Accountability, and Securing Justice — reveals that 44 of the 50 states (plus Washington, DC) do not receive passing grades on combating the wage theft epidemic.** Even the highest-ranked states — New York and Massachusetts — receive barely passing grades and have just begun to develop truly effective policies for cracking down on wage theft, while the vast majority of states have few, if any, protections at all.

These grades - which measure only statutes and not rules and regulations - are just one indication of overall strength of the states' wage theft enforcement. State agencies have, in most cases, extended rules and regulations further than what is provided for by statute, but the extent to which they can do so is both legally and pragmatically shaped by the statutes.

## Wage Theft: A Defining National Trend

The backdrop for this report is an economic landscape that shows signs of a tectonic shift away from America's

vision as a land of opportunity. Working families throughout the country continue to experience a perilous decline in their economic security, and not just in terms of persistently high jobless rates and record levels of long-term unemployment. Incomes for the 99% remain stagnant, while those of the elite 1% have risen to record highs — a picture that is even worse for those in lower-wage brackets.<sup>1</sup> The federal minimum wage has remained the same for three years,<sup>2</sup> declining in value by nearly \$.50/hour when accounting for inflation. At the same time, low-wage employment has risen significantly,<sup>3</sup> exposing more workers to unethical and often illegal labor practices that proliferate in lower-wage sectors like retail and food service. Still more find themselves in precarious circumstances, with disproportionate numbers of people working temporary jobs with no stability<sup>4</sup> and/or being limited to part-time employment because they can't find a full-time job<sup>5</sup>

Wage theft, or the systemic non-payment of wages, is a problem affecting millions of workers across the country. Over 60% of low-wage workers suffer wage violations each week. As a result, they lose 15% of their earnings each year, on average. The vast majority of these workers are over the age of twenty-five, and most are supporting at least one child.<sup>6</sup>

Employers who engage in wage theft are not just stealing from hard-working families. By not paying workers what they are owed, dishonest businesses not only place law-abiding employers at a competitive disadvantage, they slow down the economic recovery by depressing the consumer spending needed to fuel economic growth and by defrauding states and taxpayers to the tune of millions of dollars.

## **An Overview of the Problem**

Wage theft has emerged as a major economic justice issue in the last decade. A rising wave of concern among workers has led to a rapid increase in the number of grassroots advocacy organizations focused on the issue. Over 100 worker centers formed between 2000-2006, and dozens of research reports have been published to assess and analyze the problem.<sup>7</sup>

This rising tide of advocacy and research has shined light on a disturbing reality: seventy years after enactment of the nation's first wage law, the Fair Labor Standards Act of 1938, enforcement capacity has diminished to the point where there are essentially no cops on the beat. The U.S. Department of Labor (USDOL) now has only one enforcement agent for every 141,000 workers, down from one per 11,000 workers in 1941.<sup>8</sup> All together, state labor agencies have slightly less capacity than USDOL,<sup>9</sup> resulting in less than 15% of the total enforcement coverage workers enjoyed decades ago. State revenue shortfalls and accompanying state agency layoffs since the recession have largely exacerbated this problem.<sup>10</sup>

Along with a sharp decrease in union membership and an increase in low-wage and informal employment, sharply declining enforcement capacity has had a significant yet predictable effect: a major increase in wage-and-hour violations, to the point that wage theft is virtually ubiquitous in certain industries. In 2008, the National Employment Law Project (NELP) and a team of advocates, policy groups, and academic research centers undertook a survey of workers in three large cities to document the extent of wage theft. What they found was shocking:

- 64% of low-wage workers experience wage theft each week
- 26% are paid under the legal minimum wage
- 76% of workers owed overtime go unpaid or underpaid
- On average, low-wage workers lose \$51 per week to wage theft, or \$2,634 per year

For low-wage workers, that amounts to 15% of their annual income, at average earnings of \$17,616 per year.<sup>11</sup>

Worker groups and legal advocates have developed strategies to tackle the problem in earnest since the late 1990s. By organizing workers and building community-based campaigns around workplace justice cases, grassroots advocates began raising the profile of wage theft and other labor violations. In states like Illinois and New York, they have built broader coalitions with legal advocates, labor unions, policy groups, and public officials. In

some places, the work of advocates with state labor departments and attorneys general has resulted in targeted enforcement strategies and policy development. In 2011, NELP produced *Winning Wage Justice*,<sup>12</sup> for the first time assembling a comprehensive guide to model policies, practices, and advocacy strategies for fighting wage theft.

Despite advances in advocacy, organizing, and in some places, enforcement, existing wage payment statutes have proved too modest and incomplete to be an effective deterrent against what has become a pervasive and entrenched problem. For instance, some states levy no fines at all for wage theft, while most others invoke penalties smaller than a speeding ticket. When employers stand to gain thousands of dollars from every worker they underpay, such penalties are clearly inadequate to address the crime. In recent years, worker advocates have turned to strengthening state laws to better enable workers to obtain justice.

While a small handful of states have gradually enhanced wage payment laws, our findings show that, until the enactment of New York's Wage Theft Protection Act (WTPA) in 2010, only Massachusetts had developed a relatively strong, comprehensive law that embodied most of what are recognized as model policies. The most promising trend has been that of states (and in some cases, cities) enacting increasingly comprehensive reforms that make major advances in wage-and-hour enforcement possible. We hope that this report will fuel that trend by allowing advocates and policymakers in the states to see clearly in which categories their own laws fall short, and point to ways in which they can be improved.

**NOTE: We have been intentionally general in highlighting the areas of strength and weakness in each state's laws.** Because wage laws have interrelated parts and are structured differently from state to state, in most cases legislation must be crafted uniquely. We encourage those who are interested in developing legislation to contact us or the National Employment Law Project for assistance.

## Purpose of this Report

The wage theft epidemic is drawing more attention than ever, thanks to a growing body of literature documenting the far-reaching impact that law-breaking employers have on working families and local economies. Recent reports that explore the issue on a broad scale include:

- National Employment Law Project's (NELP) groundbreaking 2009 study, *Broken Laws, Unprotected Workers*, the first to expose the alarming degree to which wage theft violations are truly widespread and systematic in core sectors of the economy.
- As mentioned previously, NELP's *Winning Wage Justice* report, published in January 2011.
- The National State Attorneys General Program at Columbia Law School's *Enforcement of State Wage and Hour Laws: A Survey of State Regulators*, an analysis of state-level wage and hour enforcement released in April 2011 that finds major disparities in how states approach enforcement.
- Policy Matters Ohio's report on state enforcement capacity, *Investigating Wage Theft: A Survey of the States*.<sup>13</sup>

Scores of reports have also scrutinized specific industries in which wage theft runs particularly rampant, confirming that violations of the law are both purposeful and routine:

- Seton Hall Law School Center for Social Justice's January 2011 report, *All Work and No Pay*, surveys day laborers across New Jersey — workers who are especially vulnerable to wage theft due to the underground nature of the industry and the fact that workers, a large number of whom are undocumented, do not know their rights and are reluctant to use legal recourse.
- Change to Win and NELP's 2011 study, *The Big Rig*, finds that the sweeping misclassification of port truck drivers not only helps drive profits in the industry, but is also linked to safety violations, as well as serious environmental and public health consequences in the areas surrounding the nation's ports.

However, before state legislators, advocates, and state agencies can act, they need an understanding of what is already on the books and where the holes lie — no easy task considering that a myriad of laws are part of a comprehensive wage theft regime, yet are not necessarily housed in the same section of state code.

This report identifies the wage theft laws in all fifty states and gauges their strength, allowing stakeholders to better determine and prioritize the policies in their states that need improvement. In addition, we evaluate states on the overall potency of their statutes and then grade and rank them accordingly, revealing which states and regions are national leaders in combating wage theft.

That said, state laws are but one major pillar in the overall enforcement regime, with agency regulations, rules, policies, and enforcement practices resulting from and adding to those laws. To conduct a comprehensive survey of the entirety of each state's legal regime would be a monumental (and probably impractical task). In light of that, the evaluation of wage theft statutes in this report should be viewed as a bellwether or proxy for the overall robustness of state laws. Most of the states that rank highest here are generally acknowledged as having the strongest wage enforcement regimes; those that rate lowest have virtually no laws that would afford an agency the authority to do much more than is cited here.

As an organization focused on the legislative branch of government, Progressive States Network sees the vital role that statutory law plays, not only by defining the legal landscape, but by infusing the popular will into how laws are implemented and enforced. The prevalence of legislative approaches to strengthening wage theft laws in recent years speaks to the essential conclusion of this report: the nation's laws need an overhaul to provide the authority, protections, and tools for the innovative, sustained, and aggressive enforcement programs to gain the upper hand on this problem.

## Methodology

Progressive States Network began a comprehensive, statutory review of all 50 states by developing a 13-question survey (see Appendix B) based on

## Statutes vs. Regulations: an Illustrative Case in California

Though we have limited our analysis to state statutes, we point out in various sections of this report that statutes are simply one part of a comprehensive wage theft regime that spans federal to local law as well as any number of enforcement agencies at various levels of government. While statutes are important, the combination of statutes and regulations is what truly determines how effective the legal regime for enforcement actually is.

Nowhere is this more evident than in California, which, under our rankings, was one of the lower-ranked states in the definitions section for lacking definitions for “employer” and “employee” under wage and hour laws — an unexpected aberration given their exemplary rankings in other wage theft categories. This is due to the state's long-standing practice of implementing the wage-and-hour law via wage orders — administrative regulations issued by the state Industrial Welfare Commission. In California, even more than other states like New York, wage orders are the primary means by which wages and hours are regulated.

The 17 wage orders each correspond to a specific industry or occupation and provide the range of definitions missing from California's statutes. Though workers would arguably be better off if the definitions were enconced in the relative permanence of the law, the definitions in the wage orders are well-established in wage-and-hour jurisprudence in California. Unless it were done to extend coverage to workers historically excluded from minimum wage and wage theft laws, incorporating definitions into statutes would not be the most important issue to address in California.

model legislation and best practices used to combat wage theft and misclassification. The survey, which was sent to a list of state Department of Labor contacts found on the Interstate Labor Standards Association's website, gave us a sense of how enforcement agencies chose to interpret the law as well as the degree to which relatively changeable department regulations were followed.<sup>14</sup> Once we had established the policies that would be analyzed in the report, we began researching the relevant statutes through state websites, Lexis Nexis, or Justia.

Only statutes are included in our analysis. We chose not to evaluate administrative rules and regulations because they are dependent on the actions of political appointees and, compared to statutes, can shift more frequently as a result. While regulations, rulemakings, and administrative orders can all provide important protections to workers, the policies and standards we focus on here are easily and appropriately legislated. We also recognize that an important aspect of combating wage theft is the legal and political climate within which employment practices and worker advocacy take place. States in which elected officials have taken a stance on the issue by enacting wage theft policies statutorily have established a significant first step: harnessing political will in favor of workers.

We identified nine major aspects of wage theft policy, and grouped them into three broad categories:

- **Access to Justice** (Definitions, Access to Civil Litigation, Anti-Retaliation).
- **Transparency and Accountability** (Notice of Wages and Paydays, Employer Record-keeping, Paystubs, and Right to Inspect).
- **Securing Justice** (Damages and Penalties).

Laws within each category were weighed according to ratios that we devised for each specific policy, which are explained in more detail in subsequent appendices. In order to accurately represent the relative importance of each policy, they were given different weighting factors — for example, we weighed the ability to access civil litigation more than the ability of state agencies to inspect employer property during a wage violation investigation.

We also weighed the three broad categories against each other to not only reflect the degree to which each policy area is an essential component of a comprehensive wage theft regime, but to provide a check against any one category dominating a state's total score. Grades were determined through use of a standard academic grading system: 90% and above = A; 80% and above = B; etc. Plus and minus gradients were assigned for scores in the top and bottom three percentage points within each letter-grade range. We utilized this grading system rather than, for instance, grading on a curve, to emphasize how each state's rating measures against the standards needed to protect workers, rather than measuring states against one another. In the end, while this results in most states failing (only to different degrees), it reflects the reality of widespread wage theft, and how far states need to go in order to address it.

Misclassification of employees was kept separate from wage theft and given its own grade and ranking, in keeping with the unique aspects of misclassification within the overall scheme of wage theft. For example, workers who have been misclassified as independent contractors are not covered by wage and hour laws, making any wage theft protections within those laws inapplicable. The fact that independent contractors are not considered eligible for workers' compensation or unemployment insurance further complicates their access to the most basic worker protections. Finally, in most states that have passed laws against misclassification, the protections are narrowly applied to only one or two industries, much the opposite of wage payment laws. The divergence between these two areas of law made it sensible and appropriate to evaluate them separately.

## **How are Wage Laws Enforced?**

State laws are a critical pillar in a multi-layered framework for combating wage theft, involving government enforcement, private litigation, and direct workplace engagement. Federal, state, and in some cases local government laws lay the groundwork for and define the scope of enforcement, while regulations and policies set by government agencies implement, augment, and enhance the statutory provisions.



## **The Statutory Framework**

The crucial federal statute is the Fair Labor Standards Act (FLSA), the national minimum wage law. FLSA sets the absolute wage floor and provides for its enforcement. However, its application can be limited in the universe of wage theft. FLSA only protects workers in relation to federal minimum wage and overtime standards. If a worker's wage is more than the FLSA minimum wage, or the state's wage rate is higher, then FLSA is of little use. Similarly, federal class action laws can make it difficult for employees of smaller businesses to bring cases collectively.

State laws are essentially the linchpin where wage theft is concerned. They can provide for still higher standards: covering a wider range of workers, setting a higher minimum wage, enhancing penalties and damages, etc. Even more importantly, though, state laws are the primary vehicle for ensuring broader wage payment protections. In fact, even where a state has no minimum wage, strong state wage payment laws can provide many workers with vital rights and protections they lack under federal law. The policies and standards outlined in this report point in that direction.

Similar to the state role, city or county ordinances may set higher standards than state laws, or fill in where the state has failed to set standards. A few local governments have moved to do so, such as San Francisco, CA, and Seattle, WA. Those cities have recently enacted wage theft laws, in part to enforce minimum wage rates that exceed the state's. Miami-Dade County, Florida's wage theft ordinance fills in where the state totally abandoned workers by abolishing its Labor Department in 2002.

That move now presents an even more serious problem: Florida's minimum wage exceeds the federal rate, leaving minimum wage workers with little protection. However, where the state giveth, it can also taketh away. Many states expressly prohibit local governments from regulating wage standards. And while Miami-Dade's ordinance has been a great success, Florida advocates have had to fight preemption bills in the last two legislative sessions.

## **Avenues for Enforcement**

At each level, the law can be enforced by a government agency, through civil litigation, or by direct pressure on the employer. The vast majority of enforcement occurs via government agencies, simply by virtue of their size and relative resources: worker organizations are mostly local and grassroots, lacking the reach and capacity to attack the problem widely; and many wage theft cases have limited appeal for private attorneys, particularly in states that do not provide for court costs and attorney fees.

A crucial issue not fully addressed in this report is the issue of agency enforcement capacity and practices. Except in cases like Florida's wholesale abolition of the Labor Department, agency capacity is largely driven by factors external to wage theft statutes: revenue and budget constraints, on the one hand; and enforcement practices and strategies, on the other. However, within those constraints, certain policies highlighted here can partially address issues of capacity and enforcement practice. Opening more avenues and incentives for private rights of action can partially make up for scant agency resources. Private attorneys general policies, such as California's, can be most effective in this regard.

In addition, dedicating revenues from wage theft penalties to a special fund to support enforcement programs, as Illinois did in its Wage Theft Enforcement Act (2010), is another way to sustain and expand enforcement capacity. We suspect that a combination of private attorneys general and dedicated funding through enforcement could have a synergistic effect, though no state has implemented both policies. In addition, mandating inter-agency coordination around wage payment and misclassification can help states recover lost revenues more efficiently and enhance worker protections.

## State Wage Theft Rankings

No one policy is a cure-all for wage theft. Because of the patchwork of laws relating to wage theft in any given state, there is not much utility in extolling the strength of one law when deficiencies in another may depress intended outcomes. These realities are reflected in the accompanying state grades and rankings, where a number of states receive fair grades in one category and failing grades in another. For example, North Dakota receives a C- and a spot in the top ten in Accessing Justice, but an F- and a ranking in the bottom ten in Transparency and Accountability. A holistic analysis of a state's body of wage theft laws is therefore needed to determine the true effect of any state's statutes on and practicality for workers who live there.

As it turns out, one of the most important findings of this report is that state wage theft laws, in general, are almost universally inadequate. In our scoring system, the two highest-rating states, New York (with an overall grade of C+) and Massachusetts (with a grade of C), only receive 77% and 74% of the total possible points respectively, and it is a steep fall from there: Connecticut, Illinois, North Carolina, and California follow with grades of D, and the other 44 states and Washington, DC receive F's. Further underscoring the deep drop-off, the tenth-ranked state receives only 52% of the total points, and the bottom eleven states all receive 25% or less. Two states — Alabama and Mississippi — scored zero points.

This reflects the findings of NELP's 2008 report *Broken Laws, Unprotected Workers*, which surveyed workers in Chicago, Los Angeles, and New York City, and found extremely high rates of wage theft in states where the laws were still relatively strong compared to other states. If laws afford workers little opportunity to press claims independently, little protection from retaliation, and little financial benefit if they prevail, then violations will still largely go unreported and unchallenged. Likewise, until the odds of being penalized are increased and the consequences of violations become substantially greater than the financial rewards of wage theft, there will be little reason for dishonest employers to change their behavior. Combined with the meager capacity for agency-based enforcement documented in other reports, weak laws virtually guarantee impunity for unethical employers.


### Overall Wage Theft Grades (Best/Worst)

Wage Theft Top 10



NY	C+	CA	D
MA	C	HI	F+
CT	D	NH	F+
IL	D	WI	F+
NC	D	OH	F+

Wage Theft Bottom 10



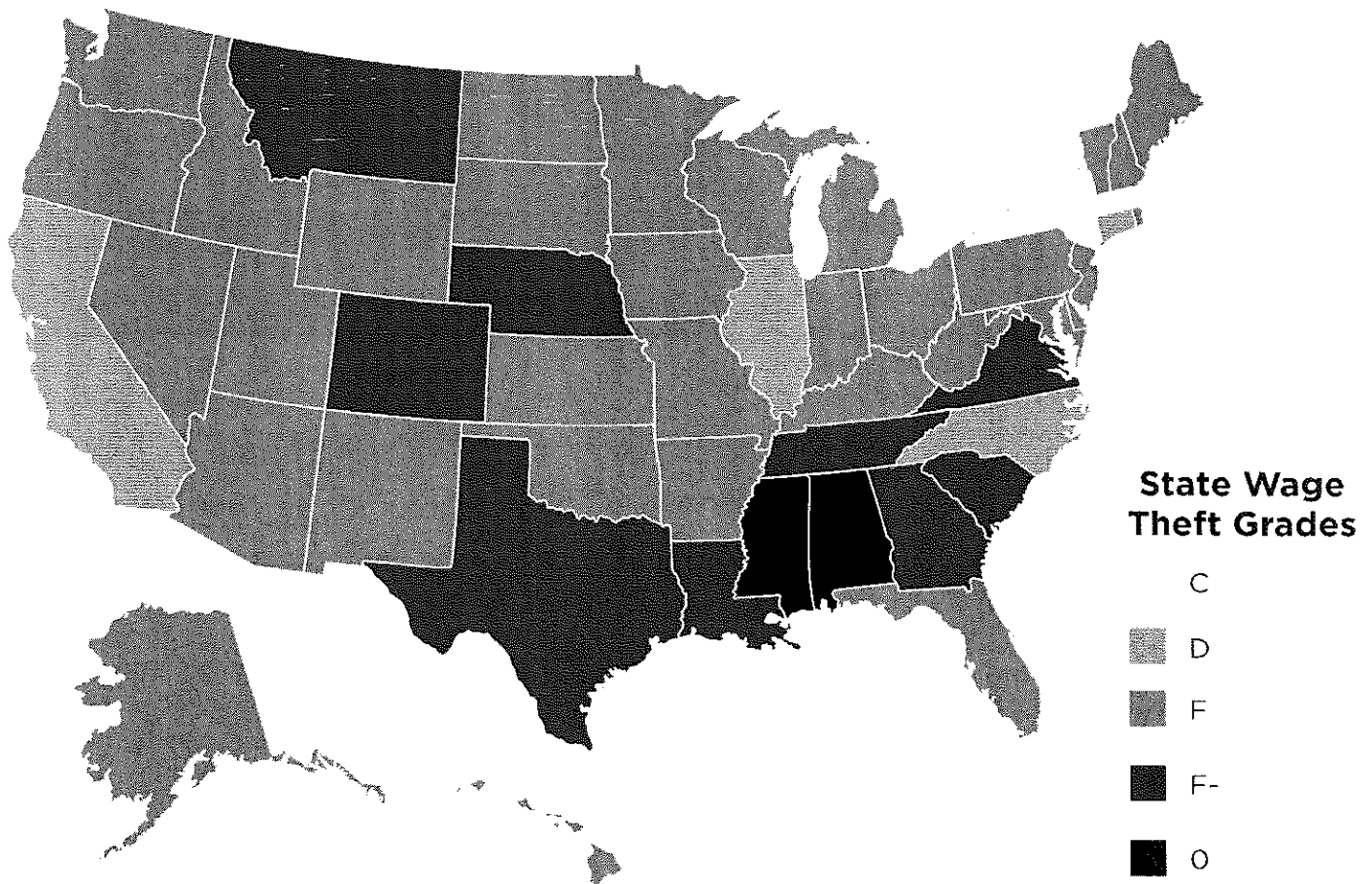
SC	F-	VA	F-
WY	F-	GA	F-
NE	F-	TN	F-
TX	F-	MS	O
LA	F-	AL	O

It is also important to note that, since the *Broken Laws* report was published, California, Illinois, and New York have all enacted laws that significantly improved their wage theft statutes by addressing several areas of the law rather than just one. Our recent report *Cracking Down on Wage Theft* documents how New York’s Wage Theft Prevention Act of 2010 has made that state’s law the strongest in the country by beefing up anti-retaliation provisions, requirements for notification, and damages to workers, among other notable changes. 2010’s Illinois Wage Theft Enforcement Act as well as California’s Wage Theft Prevention Act of 2011 also made sweeping changes to their respective wage theft laws.

There is still significant room for improvement in all of these states. In New York, provisions for penalties and damages are still far below the new standards, whereas Massachusetts lacks several important notice and record-keeping requirements. In California, penalties and damages remain relatively weak, and employee protection relies too much on agency regulations. While comprehensive legislation to improve these areas should still be pursued, research to measure the impact of new laws in these states would also be valuable to help determine which policies and practices are most effective.

### State Grades and Rankings: Good and Bad in a World of Ugly

The clearest story to emerge from this survey is that states are failing to effectively combat wage theft across the board. The number of states receiving failing grades overall — 44 — is unsurprisingly similar to those receiving failing grades within each category: 34 receive F’s for Accessing Justice, 42 receive F’s for Transparency and Accountability, and 46 receive F’s for Securing Justice. The overall top ten and bottom ten rankings shown here also tell some interesting stories in themselves.

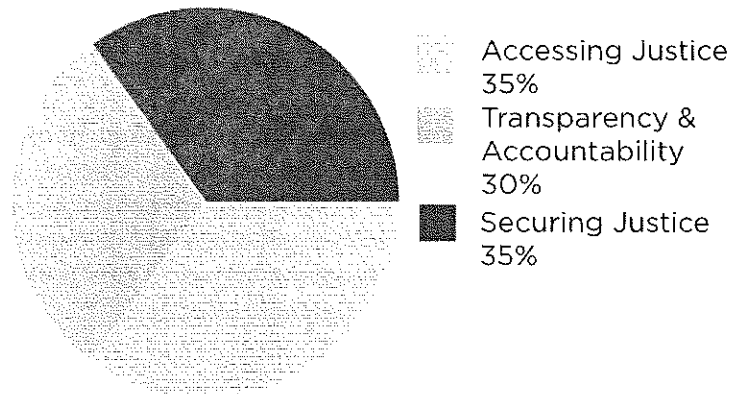


All of the top ten states have one or more major areas of weakness. Massachusetts, for instance, has no Notice requirements, and North Carolina has no civil or criminal penalties for wage violations. In addition, key provisions vary significantly even across state borders: #9 Wisconsin offers broad anti-retaliation protections to workers and assisting employees alike, but does not require employers to divulge critical information about wages or paydays; a similar story can be found in #8 New Hampshire, where employers face significant fines and possible jail time but workers can recover little if any liquidated damages. The only area where there is real consistency among the top states is Retaliation: all ten states protect both affected and assisting employees from retaliation for reporting and pressing claims; they only vary in regard to what other kinds of activities are protected, such as informing other employees of their rights or contacting a workers center or labor department without filing a complaint.

At the bottom, Alabama and Mississippi are still outliers, with essentially no protections for workers who are victims of wage theft. Matters are not much better for workers in the other bottom ten states: what modest protections exist in those states are made functionally useless by the overwhelming weaknesses in their laws. Most have one category in which they score 50%, but all score zero in at least one category. South Carolina, for instance, has fairly good notice requirements, but the state has no minimum wage or overtime laws, very few workers are covered by the wage payment law, and there are no retaliation protections.

Within the “failing” range, 23 states (and DC) score between 35% and 50% of the total possible points. There is little consistency in the strengths and weaknesses of these states’ laws. For instance, #10 Ohio and #14 Delaware have very close wage theft scores, though in individual categories they diverge, with one state scoring much higher than the other in nearly every policy category. On the other hand, #18 New Jersey and #19 New Mexico have nearly equal scores and rate fairly closely in most categories, but are widely divergent in three areas (Definitions, Notice, and Damages). From state to state, the protections afforded employees vary widely, though the end sum is that the overall policies in these states are weak.

## How the overall Wage Theft score was calculated



Topic	Points	Weight	Total Pts	% of Score
Definitions	26	1.15	30	10%
Retaliation	8	5.625	45	15%
Access to Civil Litigation	22	1.36	30	10%
Notice	20	1.05	21	7%
Record Keeping	11	2.18	24	8%
Employee File & Paystub	5	4.8	24	8%
Right to Inspect	2	10.2	20	7%
Damages	24	2.5	60	20%
Penalties	36	1.25	45	15%
<b>TOTAL POINTS</b>			<b>299</b>	<b>100%</b>

## Relation to the Policy Categories

There is a surprising degree of variation between states that rank in the top ten and bottom ten and the rankings in the three policy categories: Accessing Justice, Transparency and Accountability, and Securing Justice. Only two of the top ten states (Connecticut and New York) also rate in the top ten in all three categories. Reflecting the relative strength of its law, New York ranks first or second in all categories. Four of the top ten states rank as highly in two categories, and the remaining four all rank in the top ten in just one category.

Likewise, among the bottom ten, only three states rank as lowly in all three categories: Alabama, Mississippi, and Tennessee. Four other states rate in the bottom ten in two categories: Georgia, Louisiana, South Carolina, and Virginia. This variation in the lower rankings is indicative of the poor overall quality of states' wage theft laws: while the bottom ten states are those with the weakest overall policy, many states are just as weak or weaker in key areas.

## Geography vs. Minimum Wage

It would be tempting to look for regional correlations to wage theft laws, given the preponderance of southern states in the bottom ten rankings. States in that region are well-known for their low rates of union membership, so-called "Right to Work" laws, and anti-labor climates, so it is unsurprising that so many southern states have poor wage theft laws. That is not the whole story, though. North Carolina has the lowest rate of unionization in the country,<sup>15</sup> yet ranks fifth overall. On the other hand, Montana is well above the median in union representation (at #17 in 2011), yet is #40 in wage theft — tied with its neighbor Wyoming, which has a substantially lower level of union membership.

A more compelling story is the relationship between states' wage theft and minimum wage laws. State minimum wage laws can be broken down into four categories:

- No minimum wage law — 5 states
- Lower than the federal rate — 4 states

- Equal to the federal rate — 23 states
- Higher than the federal rate — 18 states and DC

Four states with no minimum wage and two states with sub-federal wage rates are in the bottom ten. Mississippi and Alabama, which score zero points, also have no minimum wage law. Two of the other states (#46 Louisiana and #36 Arkansas) round out the bottom fifteen.

There is no reason that states need to have a minimum wage in order to have perfectly adequate and robust wage theft laws. Requiring that people get paid what they are owed for their labor does not require a set standard for what the minimum rate of pay should be; to the contrary, it is the minimum wage that is toothless without provisions for enforcement.

This is obviously not the whole story, since three states with minimum wages higher than the federal are also in the bottom fifteen (#41 Montana, #37 Florida, and #38 Vermont), and #11 Minnesota's minimum wage is still more than \$2 lower than the national rate. The greatest aberration is Washington, which has the highest state minimum wage in the country (\$9.04 in 2012) but, at #40, has among the weakest wage theft laws. Again, this reinforces the point that enacting strong policies against wage theft does not presume having a minimum wage at all, much less an exceptionally high one. In fact, at the time of this writing, New York's minimum wage is still equal to the federal rate — and substantially lower than the rate in Massachusetts (\$8.00), Connecticut (\$8.25), and Illinois (\$8.25).

The relevant factor seems to be whether the state's minimum wage has at least kept pace with the federal rate. States that have a record of raising wage standards tend to have stronger enforcement laws; but even more strongly, states that do little to raise wage standards do little to protect workers from wage theft. If anything, what may distinguish North Carolina from its other southern neighbors in terms of wage theft may be that it has a minimum wage rate equal to the federal rate.

The factors that help determine whether a worker will choose to file a claim are often out of his or her hands. For example, whether a worker can even file a claim with their state Department of Labor hinges entirely on the classifications of workers that the state chooses to exempt from wage-and-hour or wage payment law — if the state even has those statutes on the books, which some do not. The strength of a state's anti-retaliation laws is also critical. Workers who cannot afford to be fired or have their hours cut with no recourse under the law are more likely to stay silent. Finally, the ability to pursue remedies outside of overburdened state enforcement agencies enables options such as class action lawsuits, which make it easier for aggrieved workers to recover their lost wages.

New York leads the country with its score of 99 out of 105 points in this category, while southern states comprise the bulk of low-scoring states — largely because most of these states lack basic minimum wage laws that provide a basis for enforcement.

### Definitions of “Employee,” “Employer,” and “Independent Contractor”

Whether or not a worker can file a lawsuit to recoup lost wages depends entirely on how the state defines not only the term “employee,” but also “employer” and “independent contractor.” Definitions often vary even between different parts of the law, and certain classifications of workers will not necessarily be afforded the same protections between, say, wage-and-hour statutes and wage payment statutes.

To this end, the best definitions of “employee” and “employer” are those that are as expansive as possible. Whether or not states explicitly define “independent contractor” or otherwise provide a test is also included in this category, and is a particularly important consideration. Subcontracting employers often try to shirk their responsibilities under wage-and-hour law by claiming that the temp agency or other intermediary is actually the sole employer responsible for wage payment.

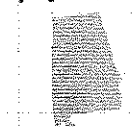
It is in states' best interest to promulgate good definitions. In addition to helping workers understand their rights, definitions also help employers run their businesses free of the risk of unexpected lawsuits. Not having employee definitions at all is obviously a bad practice, but it is one that is surprisingly common especially with regard to wage payment law, since many states do not have one. However, states such as Colorado, Kansas, South Dakota, and West Virginia have taken steps to cover more classifications of employees than the Fair Labor Standards Act (FLSA), while New Jersey is leading the country with

### Accessing Justice Top 10



NY	A	WI	C+
MA	B	ND	C-
NC	B-	DE	C-
IL	B-	CT	C-
OR	C+	RI	C-

### Accessing Justice Bottom 10



VT	F-	TX	F-
LA	F-	SC	F-
GA	F-	TN	F-
VA	F-	MS	O
WY	F-	AL	O

a definition of “employer” that ascribes responsibility for violations to officers of corporations, preventing them escaping liability by blaming lower-level managers, or through use of shell companies or “fly-by-night” business entities.

## Anti-Retaliation

Anti-retaliation statutes are one of the most vital aspects of an effective body of laws to prevent wage theft. Without protections against retaliation, few workers would take advantage of wage theft laws since doing so can lead to discipline, demotion, decreased pay, or even termination. Anti-retaliation laws also encourage workers to report wage violations — an important consideration given the reality that, without worker complaints, enforcement agencies would not know about the majority of wage theft cases. Ideally, anti-retaliation statutes safeguard not only workers directly affected by a violation, but also third party workers who help them file claims and testify.

States should avoid enacting laws that only protect workers and/or third parties who are testifying or about to testify. Such laws ignore the reality of wage theft — that employees can suffer retaliation long before they are called to testify in a case, whether it be for demanding payment from their employer or informing another employee of their rights. Retaliation is likely to occur when employers realize that employees are inquiring about their rights or beginning the claim process.

Nearly 80% of states have basic anti-retaliation provisions that protect workers from retaliation when they take action against a wage theft violation, while about half of states go even further to shelter third party workers who assist or testify in a case. Only nine states provide the baseline level of protection for retaliation: California, Connecticut, Delaware, New York, North Carolina, North Dakota, Oregon, Rhode Island, and Wisconsin.

## Access to Civil Litigation

Statutes that allow workers to sue their employers or pursue similar civil actions to recover lost wages are ideal. When workers can only turn to the state department of labor for recourse, the process takes much longer thanks to under-resourced agencies that lack capacity to handle wage claims. When lost wages can mean the difference between paying bills on time and accruing late fees, timeliness is essential. Allowing employees to band together and file a class action suit is also important. Not only do class actions permit employees to share attorney’s fees

among the group, but they also encourage workers to come forward who otherwise may feel that the amount of wages lost do not justify an individual action to recover them.

Finally, the amount of time a worker has to take action after the initial violation is a significant consideration. Sometimes, workers will not attempt to recover wages until after they have moved to a different place of work, due to fear of retaliation. In other instances, workers do not become aware of their rights until months or years after the incident took place. Having a statute of limitations that is five years or more lets workers obtain much-needed justice and sends the message to employers that illegal actions have consequences, even years after the fact. New York has the strongest civil litigation provisions, though this is an area where nearly a dozen states are strong.



## Definitions of Employment

- Definitions of “Employ,” “Employee,” and “Employer” in wage-and-hour laws are broad and cover close to all categories of workers, including those excluded by FLSA.
- Definition of “Independent Contractor”:  
Presumption that a worker is an “employee” unless the employer proves otherwise, using the ABC Test (see page 19).

## Anti-Retaliation

- Covers affected employees as well as third-party employees.
- Covers all forms of discrimination, ranging from intimidation to discharge, in instances when employees are inquiring about or speaking about their rights under minimum wage/overtime/payment of wages law
- Includes a presumption of retaliation when any form of discrimination occurs after a worker has engaged in a protected activity..

## Access to Civil Litigation

- Employees can file a civil action in court immediately, without needing to exhaust administrative remedies.
- Class actions are permitted.
- A statute of limitations of at least five years.

## Transparency and Accountability

In addition to helping workers stay on the same page with their employers regarding wage rate, paydays, and other terms of employment, good transparency and accountability laws help keep employers honest. If there is documentation of what employers are paying their employees and when, as well as an understanding that the state department of labor can inspect records during the course of an investigation, then there is more incentive for businesses to follow the letter of the law. Though opponents argue that strong wage theft laws generally will expose employers to frivolous claims, statutes that encourage a paper trail actually ensure that employers who play by the rules have nothing to fear.

It should be no surprise that New York leads the country in overall transparency and accountability laws, given the strength of legislation passed in 2009 that, in part, aimed specifically to tighten the state's transparency laws to guard against unexpected changes in wage rate or payday.

### Notice of Wage Rates and Paydays

Formal notice of wages and paydays is particularly crucial to low-wage workers who live paycheck to paycheck and depend on an employer's timeliness and reliability. In an ideal scenario, notice is given on an individual basis, at the time of hire: every worker should sign a contract that details the information pertaining to employment, including but not limited to wages and paydays. Employers should also give workers at least two weeks' notice regarding any changes to wages or paydays, so that employees have a minimum amount of time to make any necessary adjustments.

New York is the only state in the country that requires individualized written notice of wages and paydays both at time of hire and with regard to any changes. Other states merely give the option of a posted notice for either scenario, while over a dozen states did not have any notification requirements at all. States can also do more to lengthen the amount of time given to a worker regarding changes to wages or paydays, considering that only a handful of states require notice beyond seven days.

### Record Keeping

Detailed records are crucial in order for afflicted workers to prove that wage theft has occurred. The best statutes mandate that businesses keep track of a range of information, including rate of pay, deductions, and daily/weekly hours. However, it is also

### Transparency & Accountability Top 10

CA	C-	WV	D-
NY	C-	DE	D-
HI	D+	MN	D-
MD	D+	CT	F
ME	D-	NH	F

### Transparency & Accountability Bottom 10

VT	F	SD	F-
VA	F-	MT	F-
ND	F-	MS	O
NE	F-	FL	O
TN	F-	AL	O



important that records are kept long enough for workers to be able to obtain the necessary information weeks, months, or years after they have left the job. Ideally, the length of time required for record keeping would match the state's statute of limitations for wage and hour or payment of wages laws.

While only seven states do not have any record keeping laws in place, the laws on the books in the majority of states can be improved mainly by requiring employers to capture more information about pay rates and paydays — a minimal addition to information employers must track to compute payroll accurately.

States can also establish a presumption that the employer did not pay the required wages if record keeping requirements are not met. Though Arizona is the only state in the country with a law of this kind, it is increasingly being recognized as a model practice that is a boon to workers and enforcement efforts alike.

## Access to Employment Contracts and Pay Stubs

Even the best recordkeeping and notice requirements are not fully effective unless they go hand-in-hand with laws that support employee access, the best way for workers to get the information needed to verify that they are being properly paid. Beyond simply giving formal notice of wages and paydays once at the time of hire, employers should be required to give such information and more whenever a worker requests it, as well as provide detailed wage statements with each pay period. These safeguards go a long way toward ensuring that workers can track crucial information from week to week and reconcile any discrepancies with initial employment agreements.

Seventeen states have baseline paystub requirements that require employers to give workers information regarding wages, hours worked, and deductions with each pay period. Notably, Minnesota goes beyond the basics to require that an employer's legal and dba ("doing business as") name are also included on payroll statements.

## Right to Inspect

The ability of the state enforcement agency to enter a workplace to inspect records, interview workers,

etc. pursuant to investigation of a wage claim is a critical component of any comprehensive body of wage theft laws. Without unfettered access, it is much harder for the state to obtain the information it needs to settle a wage dispute — prolonging the process and delaying justice for low-wage workers who need every paycheck to get by. Protecting the identity of affected employees during such investigations is also an essential consideration that helps guard workers from retaliation and further economic hardship.

More than half of states allow the state enforcement agency such access to a workplace, but only a handful — Kentucky, Maine, Maryland, New Hampshire, Ohio, and Washington — also maintain a worker's anonymity during the process.



### Notice

- Requires employers to give written notification of wage rates and paydays to employees at the time of hire.
- Requires employers to give written notice of changes in wage rates or paydays to employees at least thirty days in advance.

### Recordkeeping

- Requires employers to keep detailed payroll records for at least five years
- If employers do not comply with record-keeping requirements, there is a rebuttable presumption in favor of the employee

### Pay Stubs and Employment Policies

- Employers must furnish employment agreements and policies upon employee request.
- Requires employers to provide detailed wage statements each pay period.

### Right to Inspect

- Entitles the state enforcement agency to enter a workplace at any time in order to inspect records, interview workers, and perform other duties to investigate violations.
- Protects the anonymity of all workers involved in an investigation.

# Securing Justice

In order to clamp down on wage theft effectively, the law must incentivize workers to pursue claims, as well as deter employers from violating the law. The third major component of strong wage theft laws encompasses these two imperatives: the amount in damages workers are able to recover through filing a wage claim, and the amount in penalties employers must pay. In some states, Damages and Penalties are conflated because they can both entail financial consequences for the employer. In fact, they should be seen as distinct and serving different purposes. That said, incentivizing workers to pursue claims and disincentivizing employers from breaking the law are synergistic. Massachusetts is the only state that addresses both adequately.

## Damages

Damages are payments to the affected worker for lost wages, legal costs, and financial and/or personal hardship caused by wage theft. All states that permit workers to pursue wage claims allow them to recover the value of lost wages, but that in itself is often insufficient to enable workers to pursue wage claims. Recovery of court costs and attorney fees is crucial, since most low-wage workers cannot afford the costs of going to court — a major disincentive to bringing a claim at all. Several states also require employers to pay workers an additional amount in interest on unpaid wages.

Most significantly, enabling workers to recover “liquidated damages” in addition to their lost wages is of vital importance. The impact of wage theft on low-wage workers is more severe because of how little they earn. Losing a paycheck can have major financial and personal repercussions: eviction from one’s home, utilities being shut off, or a car repossessed. Many victims of wage theft are forced into relying on payday lenders who charge exorbitant interest rates, pushing families into a crushing cycle of debt. Massachusetts sets the strongest example here, enabling employees to recover double-liquidated damages, interest on unpaid wages, court costs and attorney fees.

Many states only enable workers to recover liquidated damages when the employer has “intentionally,” “knowingly,” or “willfully” violated the law, which we note impedes the goal of making victims whole by confusing Damages with Penalties.

## Securing Justice Top 10



MA	A-	NC	D-
NY	C	CA	F+
CT	D	NM	F+
IL	D-	ME	F+
OH	D-	WI	F+

## Securing Justice Bottom 10



UT	F-	WA	F-
KS	F-	LA	F-
SC	F-	TN	F-
WV	F-	MS	O
GA	F-	AL	O

## Securing Justice Model Policies

### Penalties

Penalties are the civil and/or criminal consequences to unethical employers for violating the law. Most commonly, penalties take the form of fines payable to the state. These fines are important for three reasons:

- To recognize that wage theft imposes costs on society beyond its impact on individual workers.
- To enable the state to recover at least part of the cost of enforcing the law.
- To act as a further disincentive to employers by raising the financial liability flowing from wage theft.

Many state laws also impose criminal penalties for wage violations, though prison sentences appear to be seldom given in practice. In this category, we ranked states based on what the law says, since this appears to be a matter of prosecutorial discretion. Other types of penalties include barring wage thieves from doing business with the state, revoking business licenses (explained in further detail in the “Wage Theft 3.0” section), issuing “stop work orders” until the employer has complied with the law, or requiring violators to post bond to insure against future violations.

One particularly powerful provision adopted by California is a “Private Attorneys General” provision, which enables workers to recover penalties on behalf of the state through a civil action. Employees are entitled to retain 25% of the penalties, while 75% is paid to the state. Such a provision is a powerful incentive to private attorneys to take on wage claimants’ cases.

### Damages

- Liquidated damages are equal to two times the amount of wages owed.
- Attorney’s fees and court costs automatically awarded to workers who prevail in a wage claim.
- Employer liability for liquidated damages is not based on whether violations are intentional.

### Penalties

- Substantial civil and criminal penalties, such as fines (at least \$5,000), jail time, and debarment.

# Misclassification

An especially pernicious aspect of the wage theft problem is a form of payroll fraud called misclassification. It can take many forms, including counting cashiers as “managers” to discourage them from unionizing, or hourly workers as salaried, “exempt” employees to skirt minimum wage and overtime laws. In its most serious and widespread form, employers classify employees as “independent contractors,” enabling the employer to avoid a wide array of labor standards and taxes, including not just wage payment and collective bargaining laws, but also workers’ compensation and unemployment insurance.

Doing so facilitates both wage theft and tax fraud on a massive scale. In certain industries, such as construction and transportation, misclassification has become a standard business practice. That places law-abiding employers at a competitive disadvantage and creates a “snowball” effect, forcing more and more businesses to misclassify in order to remain in business.

The cost to state governments is enormous. Several states have studied the issue, and although there is wide variety in the methods and scope of those studies, they all conclude that misclassification is widespread and growing, and that the drain on states’ coffers ranges from the tens to the hundreds of millions of dollars each year:

- A California study found the number of misclassified workers grew by 54% between 2005 and 2007 and recovered \$170 million in payroll taxes, fines, and fees.<sup>16</sup>
- Audits in Illinois, Massachusetts, New York, Ohio, and Pennsylvania estimate between 250,000 and 700,000 misclassified workers in each state.<sup>17</sup>
- A 2012 report on New York’s trucking industry found that 18% of drivers are misclassified, and that employers are shorting the state \$88 million per year in workers’ compensation alone.<sup>18</sup>

Several states have begun addressing misclassification in a variety of ways:

- Establishing study committees and task

## Missclassification Grades (Best/Worst)

### Misclassification Top 10

IL	B	NJ	F
MA	C	UT	F
MD	D	MN	F
CA	F+	NY	F
DE	F+	NH	F

### Misclassification Bottom 10

WI	F-	SD	F-
OR	F-	IA	F-
MO	F-	TX	F-
HI	F-	TN	F-
AR	F-	MT	F-

\* These are the 10 lowest-ranking states with some statutory provisions allowing workers to contest misclassification. 18 states and DC scored effectively zero: AL, AK, AZ, FL, GA, IA, KY, LA, MI, MS, NC, NV, OH, OK, SC, VA, WV, WY and DC.

forces to determine the extent of the problem, enforcement strategies, and policy options.

- Creating inter-agency task forces to coordinate enforcement, audits, and/or process allegations.
- And, most significantly, enacting laws to create enforcement mechanisms and stiffer penalties.

The former measures have played an important role in developing consensus in state legislatures around policy changes and in helping state agencies develop ways of working together on a multi-faceted problem. Last year, the U.S. Department of Labor initiated a joint federal-state task force to crack down on misclassification, which seventeen states have joined thus far.

Even more so than with wage theft, our research shows that states lack the most basic laws to address the problem of misclassification. Without a means for workers to challenge misclassification, their ability to bring wage claims and access other rights, such as unemployment insurance, is significantly impaired. While it is generally possible for workers to assert their status as employees in a wage claim, unless state law includes strong provisions defining employment status and what constitutes an independent contractor, the deck is still stacked against the employee. In many states, the only formal way for a misclassified worker to get their rightful status recognized is by filing a claim for workers' compensation or unemployment insurance benefits — meaning they have to have been either laid off or hurt on the job so severely that they are unable to work.

In other states, if an agency finds evidence of misclassification, it can bring a fraud case through which workers can become properly classified — but there exists no procedure by which workers can challenge misclassification themselves proactively. Such states also generally lack provisions to ensure that the agencies responsible for administering labor standards, workers' compensation, unemployment insurance, and tax collection alert each other to cases of misclassification so they can enforce the law.

The real-world nexus between misclassification and wage theft is strong, particularly from an enforcement perspective. Worker advocates are attentive to misclassification, and empowering workers to file claims or bring actions on their own is a much simpler and less costly means of addressing the problem than agency investigations alone. In evaluating states' misclassification laws, we have measured them according to these measures:

- What industries and workers are covered by the law.
- Their definitions of employment and independent contractor.
- Whether workers are permitted to file claims.
- Whether workers can recover damages.
- The extent of penalties for violations.

We found that most states provide little to no enforcement of misclassification:

- 18 states and the District of Columbia scored no points.
- 11 states have some provisions related to misclassification, but no recourse for workers.
- 11 states only permit workers to report claims to the state agency.
- 9 of the 21 states where workers can file reports or claims limit this protection to specific industries.

Given the extreme unevenness of states' laws on misclassification — particularly with regard to industry-specific protections — we chose to emphasize laws that provide good statutory models for enforcement, even if they do not apply comprehensively to all industries. Illinois and Massachusetts have by far the strongest misclassification laws. Massachusetts' law is comprehensive, across all industries, and retains the strong civil action and liquidated damages provisions of its wage theft laws.

Despite the fact that Illinois's law is industry-specific, it rates slightly higher than Massachusetts because it marries worker-friendly rights of action and damages, substantial penalties, strong

anti-retaliation measures, and efficient interagency enforcement. Not only does Illinois impose hefty penalties, but it contains a private attorney general provision, which entitles workers to enforce the law on behalf of the state and keep 10% of the fines paid by the employer. This is a strong inducement for private attorneys to take on the cases of low-wage workers.

Illinois's statute also provides for the clearest and most simple interagency enforcement scheme: reports are processed by their department of labor's wage and hour division, through which workers are able to file wage claims simultaneously; when the Department verifies a case of misclassification, it must notify the Workers' Compensation Board, Unemployment Insurance Division, and Tax Collection Departments who initiate their own enforcement actions.

### Employment Status: As Easy as ABC

One essential best practice that stands out among the leading states on misclassification: the definition of independent contractor. Rather than force workers to prove a negative ("I am not an independent contractor"), states have adopted a number of different "tests" or criteria for determining whether a person is an independent contractor or not, usually as part of their workers' compensation and unemployment insurance laws. It is presumed that, if the person does not pass the test, then that person is an employee and not an independent contractor. Four tests are the most common:

- ABC test (and its variants, the AC test and the ABC plus 123) (see sidebar)
- Common Law test
- Economic Realities test
- IRS's twenty-point test

Among states advancing misclassification laws, the "ABC test" is far and away the preferred method for determining employment status. Of the sixteen states with the strongest misclassification laws, twelve use the ABC test or an enhanced version of it. Three others use a modified or slightly scaled back version of the ABC, like the AC. What is more, among these top states, five have adopted a different test than they used in 1998-99, when the IRS commissioned a major national survey of state

## The ABC Test

The central principle under the ABC test is determining who is in control of the work being performed. The test sets forth three criteria, which must all be met in order for someone to be considered an independent contractor and not an employee. In addition to whether the person working is under the direction or control of the employer, it must also be established that the work being done is not a part of the employer's normal business operations and that the person working operates as his/her own business or enterprise. Following are the three criteria, as normally adopted:

Service performed by an individual shall be deemed to be employment unless and until it is shown that:

- A** Such individual has been and will continue to be free from control or direction over the performance of such services, both under his contract of service and in fact; and
- B** Such service is either outside the usual course of the business for which such service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and
- C** Such individual is customarily engaged in an independently established trade, occupation, profession or business.

Variations on the ABC test have been adopted in some states, either by dropping one of the criteria (the "AC Test"), adding additional criteria, or spelling out conditions for satisfying criterion C (the "ABC plus 123 Test"). Though each state needs to consider its own statutory needs and context, the essential framework and criteria of the basic ABC Test is still seen as the best model for addressing misclassification.

misclassification policies. Of those five, four have either adopted the ABC test or moved in that direction with a hybrid or modified version of it. The ABC test is preferred for several reasons:

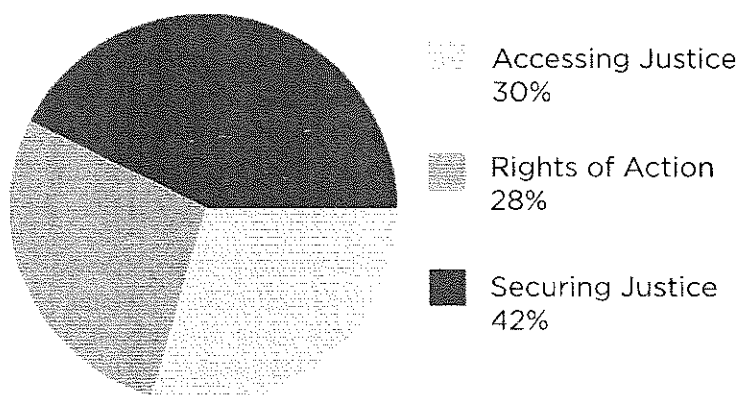
- It is simple and straightforward in its terms.
- It gets to the heart of the employer-employee relationship.
- Its application leaves little room for subjective interpretation.

## Wage Theft 3.0

In practice, ABC is preferred by both worker advocates and wage-and-hour enforcement departments as a way of dealing with misclassification. Agencies that handle related issues seem to differ on which test they prefer (e.g., for addressing misclassification related to tax fraud or eligibility for workers' compensation). This may be for practical reasons, such as the eligibility criteria for workers' comp coverage, or because of the way the tax law and its enforcement procedures apply to employers. However, as a means of addressing misclassification related to wage theft and other workplace standards, reliance on the ABC test is the best practice.

Together, the policies that comprise the wage theft and misclassification scores represent a comprehensive body of laws that protect and empower workers, establish a clear paper trail, and ensure that unscrupulous employers are held accountable. However, several states are going beyond the basics to enact innovative policies, which ensure that their laws are always relevant and can address problems that arise as industries and other factors shift. In particular, the following policies are worth highlighting as emerging trends that are beneficial to workers:

### How the Misclassification score was calculated



- Private Attorneys General
- Earmarking Penalties to Fund Enforcement
- Expanding the Scope of Retaliation Protection
- Wage Liens
- Revocation of Business Licenses or registration
- Shareholder Accountability

Misclassification - Topic	Points	% of Score
Definitions	10.5	23%
State Regulations	3	7%
Right to Contest	4	9%
Civil Action	5.5	12%
Litigation Costs	3	7%
Damages	6	13%
Penalties	13	29%

### Private Attorneys General

Even when attorney fees and court costs are covered, the small monetary value of most wage claims may provide too little incentive for private attorneys to take on workers' cases. At the same time, given the scale of the problem, most state enforcement agencies do not have the capacity to take on all the cases that may come their way. At the very least, this "capacity gap" can create untenable delays for workers in reclaiming stolen wages.

A crucial solution can be to "deputize" private attorneys and empower workers to assist in enforcing the law through a Private Attorneys General policy. Already in place in California and under Illinois's misclassification law, Private AG provisions enable workers, through a civil action, to collect the civil penalties an employer would owe to the state, with a portion being paid to the state. In practice, this creates a strong financial incentive for more attorneys to take on workers' cases, and can be a valuable tool for increasing overall enforcement capacity to crack down on wage theft.

## **Earmarking Penalties to Fund Enforcement**

One simple way for states to cost-effectively increase enforcement capacity is to create a dedicated funding stream. Civil penalties collected in wage claim cases are an excellent source, feeding the fines violators pay back into the system to investigate and prosecute other violations. This can also be an important piece of the puzzle for bringing enforcement to scale with the problem. By strategically targeting enforcement to known violators and industries, enforcement agencies can build their capacity to take on more difficult wage theft cases. Arizona and Illinois have incorporated such a provision into their wage theft laws, and can be looked to as models for other states.

As noted above, Earmarking Penalties for Enforcement can be a powerful companion to a Private Attorneys General policy. Private AG cases can generate additional revenue to expand agency enforcement, without expending agency resources. This could be a valuable fiscal engine to bridge the gap between existing agency capacity and the potential for expansion. One pitfall to be watchful of, particularly in lean fiscal years, is not to let the presence of a dedicated penalties provision become an excuse to cut funding to the agency. Sustaining an enhanced wage theft enforcement program can reclaim substantial amounts of unpaid taxes, and should be seen as an investment in the state's fiscal health, as well as worker justice and economic stability.

## **Expanding the Scope of Retaliation Protection**

We analyzed retaliation laws according to a basic rubric in which workers are adequately protected. However, states can go beyond the basics and implement statutes that make it less daunting for workers to come forward with complaints. A presumption of employer retaliation is one way to do this. The policy, which assumes that any adverse action taken against a worker within a certain time period after a complaint has been filed is retaliatory unless the employer can prove otherwise, is already a reality in Arizona, as well as in San Francisco and Santa Fe. Shifting the burden of proof from worker to employer ensures that employers can still make

necessary decisions about their workforce, as long as they can prove that such actions were for legitimate reasons.

States can also expand the types of complaints that are covered under the law. For example, specifying that workers are protected from retaliation for oral, in addition to written, complaints is key, as well as ensuring that protections kick in when third parties enter the picture — whether third-party worker organizations are filing a complaint on behalf of a worker or whether a third party is taking adverse action against a worker.

## **Wage Liens**

Liens are an effective means of ensuring that employers comply with judgments in wage claim cases. Such statutes prevent the sale of property like houses or crops until the amount of the lien has been paid by the property owner. Because of the popularity of these laws across the states — every state has enacted laws enabling mechanic's liens or some variant thereof — wage liens are a natural addition that would meld well with existing statutes.

Like a crop lien, a wage lien would give a worker a claim against property such as real estate and bank accounts until a wage payment claim is resolved, providing a financial incentive for employers to both abide by the law and pay lost wages when they do not.

Though several states, including New Hampshire, Texas, and Washington, have some form of wage lien statute on the books, Alaska currently has the best law in the country. While other states require a state agency to file the wage lien, Alaska allows a worker to file a first priority lien within 90 days of any violation of wage payment law, with no cap on damages or time limit.

## **Revocation of Business Licenses or Registration**

Like liens, tying the issuance of a business license or registration to a record clear of wage violations is a powerful incentive that helps keep employers honest. Adding a condition requiring the payment of all outstanding wages to the list of terms that



must be met before licenses can be issued or renewed has the added bonus of sending a strong message to an entire industry: entrenched behavior must change.

A variety of licenses can be targeted, including liquor, contractor, and operating licenses. Though many such campaigns and recent successes — San Francisco, most notably — occur at the city level, it is possible for state campaigns to thrive. For example, California has a law in place that requires garment manufacturers to disclose any delinquent wage judgments in an application for licenses or registration. If an applicant with an outstanding judgment cannot prove his or her ability to pay the order, the application is rejected.

## **Shareholder Accountability**

Even if a worker manages to go through the lengthy process and emerge victorious from a wage claim or suit, the battle is hardly over. Collecting on a wage judgment becomes nearly impossible when employers use a variety of technically legal tactics to evade the law. In particular, the 21st-century economy has seen a rise in short-term, subcontracted work where workers are performing work for someone they have never met, rather than the employment agent or subcontractor by whom they are actually paid. It is also common for employers to shut down their business only to open later as a “new” entity. These are potent means of evading both workers and the authorities. However, laws that ensure shareholder accountability are an effective way to bolster enforcement efforts and ensure that workers are able to recoup their lost wages.

Miami-Dade County, Florida passed a historic wage theft ordinance in 2010, which includes a provision allowing employees to recover wages from the officers and owners of a corporation. It is the only law of its kind in the country, and one that will help prevent scenarios in which workers cannot collect their rightful wages.

# Endnotes

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# State Scores, Alphabetical

State	Accessing Justice	Transparency & Accountability	Securing Justice	Wage Theft	Misclassification
	No Score	No Score	No Score	No Show	No Score
Alabama	No Score	No Score	No Score	No Show	No Score
Alaska	D-	F	F	F+	No Score
Arizona	F+	F	F	F	No Score
Arkansas	F	F	F	F	F-
California	D+	C-	F+	D	F+
Colorado	F+	F	F	F	F
Connecticut	C-	F+	D	D	F
Delaware	C-	D-	F-	F+	F+
District of Columbia	F+	F	F	F	No Score
Florida	F	No Score	F	F	No Score
Georgia	F-	F	F-	F-	No Score
Hawaii	F+	D+	F	F+	F-
Idaho	F+	F	F	F	No Score
Illinois	B-	F+	D-	D	B
Indiana	F+	F	F	F	F-
Iowa	F+	F+	F	F	F-
Kansas	F+	F	F-	F	F-
Kentucky	F	F	F	F	No Score
Louisiana	F-	F	F-	F-	No Score
Maine	F	D-	F+	F	F
Maryland	F+	D+	F	F+	D
Massachusetts	B	F	A-	C	C
Michigan	D-	F	F	F	No Score
Minnesota	F+	D-	F	F+	F
Mississippi	No Score	No Score	No Score	No Show	No Score
Missouri	F+	F	F	F	F-
Montana	F	F-	F	F-	F-
Nebraska	F-	F-	F-	F-	F-
Nevada	F	F+	F	F	No Score
New Hampshire	D+	F+	F	F+	F
New Jersey	D+	F	F	F	F
New Mexico	F	F	F+	F	F-
New York	A	C-	C	C+	F
North Carolina	B	F	D-	D	No Score
North Dakota	C-	F-	F-	F	F-
Ohio	D-	F	D-	F+	No Score
Oklahoma	F	F	F	F	No Score
Oregon	C+	F	F-	F	F-
Pennsylvania	F+	F	F	F	F
Rhode Island	C-	F	F	F+	F-
South Carolina	F-	F	F-	F-	No Score
South Dakota	F	F-	F-	F	F-
Tennessee	F-	F-	F-	F-	F-
Texas	F-	F	F-	F-	F-
Utah	F	F	F-	F	F
Vermont	F-	F	F	F	F
Virginia	F-	F-	F-	F-	No Score
Washington	F	F+	F-	F	F
West Virginia	F	D-	F-	F	No Score
Wisconsin	C	F	F+	F+	F-
Wyoming	F-	F	F-	F-	No Score

# State Scores, by Wage Theft Ranking

State	Accessing Justice	Transparency & Accountability	Securing Justice	WageTheft	Misclassification
New York	A	C-	C	C+	F
Massachusetts	B	F	A-	C	C
Connecticut	C-	F+	D	D	F
Illinois	B-	F+	D-	D	B
North Carolina	B-	F	D	D	No Score
California	D+	C-	F+	D	F+
Hawaii	F+	D+	F	F+	F-
New Hampshire	D+	F+	F	F+	F
Wisconsin	C	F	F+	F+	F-
Ohio	D-	F	D-	F+	No Score
Minnesota	F+	D-	F	F+	F
Alaska	D-	F	F	F+	No Score
Rhode Island	C-	F	F	F+	F-
Delaware	C-	D-	F-	F+	F+
Maryland	F+	D+	F	F+	D
Maine	F	D-	F+	F	F
Michigan	D-	F	F	F	No Score
New Jersey	D+	F	F	F	F
New Mexico	F	F	F+	F	F-
Pennsylvania	F+	F	F	F	F
Indiana	F+	F	F	F	F-
Oklahoma	F	F	F	F	No Score
Arizona	F+	F	F	F	No Score
Missouri	F+	F	F	F	F-
Oregon	C+	F	F-	F	F-
Iowa	F+	F+	F	F	F-
Colorado	F+	F	F	F	F
District of Columbia	F+	F	F	F	No Score
Kentucky	F	F	F	F	No Score
Idaho	F+	F	F	F	No Score
North Dakota	C-	F-	F-	F	F-
Nevada	F	F+	F	F	No Score
West Virginia	F	D-	F-	F	No Score
Utah	F	F	F-	F	F
Kansas	F+	F	F-	F	F-
Arkansas	F	F	F	F	F-
Florida	F	No Score	F	F	No Score
South Dakota	F	F-	F-	F	F-
Vermont	F-	F	F	F	F
Washington	F	F+	F-	F	F
Montana	F	F-	F	F-	F-
Wyoming	F-	F	F-	F-	No Score
South Carolina	F-	F	F-	F-	No Score
Nebraska	F-	F-	F-	F-	F-
Texas	F-	F	F-	F-	F-
Louisiana	F-	F	F-	F-	No Score
Virginia	F-	F-	F-	F-	No Score
Georgia	F-	F	F-	F-	No Score
Tennessee	F-	F-	F-	F-	F-
Mississippi	No Score	No Score	No Score	No Show	No Score
Alabama	No Score	No Score	No Score	No Show	No Score