

Unregulated Work

Is enforcement the next battle in the fight for workers' rights?

BY SIOBHÁN MCGRATH AND NINA MARTIN

Guillermo regularly puts in 70-hour weeks as a prep cook in a New York City restaurant. He came to the United States from Ecuador six years ago because he heard that “you can earn something for your family.” But these aspirations soured after he wasn’t paid for three weeks. Small sums of money and continued promises from the boss keep Guillermo returning to work each day for his 12-hour shifts.

Non-payment of wages plagues Guillermo and his co-workers, but their employer uses other tactics to reduce labor costs as well. Guillermo explains, “Workers have to punch out as if they had worked eight hours. So after eight hours, they punch out and then work four more hours. It is almost like a threat that if you don’t punch the card, you’re fired.” With an average wage of about \$300 per week, these long hours translate into just over \$4 per hour. Some of Guillermo’s co-workers have left the restaurant for other jobs, usually at food establishments, but often the working conditions they face are frustratingly similar.

Brenda, an African-American grandmother, is a child care worker in Brooklyn. Formerly a home health care worker, Brenda’s own health no longer permits her to make the long commute to her patients’ homes. Caring for children in her home seemed like a good way to replace this lost income. The parents of the children she cares for receive subsidized child care as they move from welfare to work. Brenda has no sick days or vacation days, and she only has health insurance through her husband’s job.

Worse, her pay often dips below minimum wage. But the city’s Human Resources Administration, which cuts her check, maintains that this does not break the law. Even though the city effectively sets her pay, it classifies her as an “independent contractor,” rather than an employee. So Brenda doesn’t have the same rights as a regular employee, such as the minimum wage, overtime, or paid leave.

Unfortunately, the experiences of Guillermo

and Brenda are far from unique. Violations of employment and labor laws are a growing problem in U.S. workplaces. Employers in many sectors of the economy are breaking the law in order to cut costs, gain a competitive edge, and boost profits, and workers are suffering the consequences. In some industries, the abuses have become so common that they are now routine practice. And enforcement by the government has steadily declined, so that more and more workers are facing abusive and unsafe conditions at work. Anyone who pays attention knows that U.S. workers in certain industries and occupations have long been vulnerable to employer abuses. But today, illegal and abusive practices are becoming common in a far larger swath of the economy, and the will and resources to enforce worker-protection laws are shrinking.

We are part of a large research team working out of three universities that is studying this phenomenon—what we call “unregulated work”—in New York City and Chicago. Over the past two years we have conducted in-depth interviews with over 400 workers, employers, government officials,



PHOTO BY CLEMENT GOMES, HS FOR ART & DESIGN STUDENT, FROM AN EXHIBIT ENTITLED “WORKING” SPONSORED BY THE BREAD AND ROSES CULTURAL PROJECT OF SEIU 1199

community groups, union staff, and policy advocates. The next phase of our project will be a survey of workers in unregulated jobs, in order to estimate the size of this hidden zone of the economy. To date, we have found unregulated work in 14 industries. While many people are familiar with the conditions faced by garment workers and construction day laborers, the tentacles of unregulated work stretch into many other sectors of the economy, including workplaces as diverse as restaurants, grocery stores, security companies, nail salons, laundries, warehouses, manufacturers, building services firms, and home health care agencies.

We have documented considerable variety in how employers violate laws. They pay their workers less than minimum wage, fail to pay them overtime, refuse to pay them for all hours worked, or simply don't pay them at all. They disregard health and safety regulations by imposing unsafe conditions, forcing employees to work without providing necessary safety equipment, and failing to give training and information. The list of ways employers break the law goes on: they refuse to pay Unemployment Insurance or Workers' Compensation; they discriminate against workers on the basis of race, gender and immigration status; they retaliate against attempts to organize; they refuse medical leaves.

Such stories of substandard working conditions may sound familiar—they carry strong echoes of the experiences of workers at the beginning of the *last* century. At that time, the solution was to pass laws to create wage minimum standards, protect workers who speak up for their rights, and eventually, guarantee workplace safety and outlaw discrimination. That these very laws are now being so widely violated poses new challenges. While efforts to pass new laws raising workplace standards are still critical, a new battle has emerged to ensure that existing laws are enforced.

WHAT EXPLAINS UNREGULATED WORK?

The rise of unregulated work is closely tied to many of the same factors that are thought to be responsible for declining wages and job security in key sectors of the economy. Over the last 30 years, for example, global economic competition has been extinguishing the prospects of workers in manufacturing. Local manufacturers struggle to drive down their costs in order to compete against firms located in Asian or Latin American countries where wages and safety standards are lower.

Yet unregulated work cannot be explained simply as a by-product of globalization. It's true that the competitive pressure felt in manufacturing may ripple through other parts of the economy, as wage floors are lowered and the power of labor against capital is diminished. But we found businesses that serve distinctly local markets—such as home cleaning companies, grocery stores, and nail salons—engaging in a range of illegal work practices, even though they are insulated from global competition.

Declining unionization rates since the 1970's also contribute to the spread of unregulated labor. One effect has been a general rise in inequality accompanied by lower wages and workplace standards: a weaker labor movement has less influence on the labor market as a whole, and offers less protection for both unionized and non-union workers. More directly, union members are more likely to report workplace violations to the relevant government authority than non-union workers, as a number of studies have shown. So it makes sense that employers are increasingly committing such violations in the wake of a long-term decline in the percentage of workers in unions.

But even the powerful one-two punch of globalization and de-unionization provides only a partial explanation. Government policy is also instrumental in shaping unregulated work—not only employment policies per se, but also immigration, criminal justice, and welfare “reform” policies

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that create pools of vulnerable workers. In this environment employers can use a variety of illegal and abusive cost-cutting strategies. Perhaps most significantly, they are deciding whether or not to break the law in an era of declining enforcement, when they are likely to face mild penalties or no penalties at all.

IMMIGRATION POLICY

The deeply flawed immigration policy in the United States creates a labor supply that is vulnerable at work. For example, employers often convince undocumented workers that they have no rights at the workplace. If undocumented workers demand to be paid the minimum wage, their employers threaten not just to fire them, but also to “call immigration.” Armed with such threats, employers break the law with little fear of being held accountable. Yet this strategy is only possible because US immigration policy currently denies an estimated 10 million undocumented immigrants legal recognition, thereby ensuring a steady stream of vulnerable workers. In spite of the protections they have on paper, undocumented workers consistently report feeling that government assistance is off-limits because of their immigration status.

The victims of unregulated work are not, however, limited to undocumented immigrants. Immigrants who are authorized to work are also a significant part of this workforce. Employers sometimes simply assume that people from certain countries are undocumented. Some workers are hampered by a lack of proficiency in English. Many new arrivals

also lack knowledge of U.S. labor and employment laws and employers can, and do, exploit this ignorance.

For example, the newly arrived Polish women we interviewed who work at A-1 Cleaning in Chicago are usually very pleased to have quickly found work that does not require a full command of English. A Polish immigrant founded the home cleaning company, using his ties in the community to find new workers. But this is not a story of ethnic solidarity. This employer often fails in his duty to inform these workers that their rights under U.S. law include such novel concepts as a minimum wage and overtime pay, and routinely violates these rights. If employees don't fully understand workplace regulations and their rights under the law, an unscrupulous employer can get them to work for less than minimum wage.

PRISON, WELFARE, AND DISCRIMINATION

Immigrants are not the only workers made more vulnerable to workplace exploitation by government policies. Many workers, like Brenda, were born and raised in the United States but face barriers to employment in the more regulated part of the labor market. Predictably, race, ethnicity, and gender play a role in determining who ends up in the unregulated workforce. In addition, people leaving the welfare rolls or coming out of prison are especially vulnerable: they are pushed to find work as soon as possible, yet the stigma attached to having been on welfare or in prison limits the options available to them. For "ex-offenders," this is compounded by the fact that they are legally barred from certain jobs. Similarly, some features of welfare reform policies, such as abrupt or arbitrary benefit cutoffs, or "work first" policies that force people to take the first job offered, only make it more difficult to find a satisfactory job. Ironically, the only stable employment history some workers are able to build is in unregulated work, but because they are "off the books" this does not translate into better prospects in formal jobs, so they stay mired in exploitative jobs.

Employers also keep workers trapped in unregulated jobs through illegal discrimination. In New York City's restaurant industry, for example, a white college student applying for a job will be given a front-of-the-house job such as waiting tables, seating people, or operating the cash register. A Mexican worker, regardless of language skills or immigration status, will instead be funneled into a back-of-the-house job such as dishwashing, cooking, or janitorial work. These behind-the-scenes workers are then more vulnerable to violations and extremely unlikely to be promoted to better positions.

EXTERNALIZATION AND EXCLUSION FROM LEGAL PROTECTION

New business strategies in recent decades have produced a clear shift towards the "externalization" of work. Vari-

ous forms of subcontracting and outsourcing are now widespread, and allow employers to evade responsibility for mistreating workers. When workers complain about abusive or illegal practices, the firm and its subcontractor can always point fingers at each other. Overall, the growth of outsourcing has driven many jobs into spaces where the reach of regulation is weak or nonexistent.

Employers also insulate themselves from workers' demands for improved working conditions by hiring temporary workers or using subcontractors. Some use placement agencies to do their dirty work, routinely asking them to screen workers on the basis of gender, race, age and other characteristics. In one of the most egregious examples we discovered, some employment agencies in New York demand sensitive health information from job seekers. A group of workers explained to us that these agencies also post signs refusing job applications from western Africans or South Africans. In this way, they seem to believe that they are screening out potentially HIV-positive candidates for their clients. One of the main services these agencies provide, then, is to discriminate simultaneously on the basis of national origin and disability.

Tapping into a contingent workforce of day laborers allows many employers to keep their costs to an absolute minimum. The emergence of day labor corners in many cities is one of the most visible examples of unregulated work. Day laborers are hired for a variety of jobs, including construction, cleaning, and moving. Besides the often dangerous and difficult working conditions they face, day laborers may work for employers who scrimp on promised wages or fail to pay them at all. (See "Just in Time: Emerging Alliances between Unions and Day Laborers," *Dollars & Sense*, March/April 2004, for an in-depth look at day laborers' efforts to organize.)

Chicago's largest day labor corner is on the city's northwest side, in the parking lot of a gas station. Known colloquially as the "slave station", the corner is the morning destination for large numbers of men who hope to find a day's work. Many of the men are Polish; others are Mexican, Ecuadorian, Guatemalan, and Ukrainian. They have often just arrived in the city and have large debts incurred while traveling to the United States. Contractors actively try to bid down wages of workers by playing them off against one another. While the going wage in the area for these jobs is between \$8 and \$10 per hour, day laborers are sometimes forced to accept as little as \$4 per hour rather than go without work.

Some workers are especially vulnerable to employers' abuses because they are located outside the reach of some, or even all, legal protections. For example, although domestic workers are covered by minimum wage laws and other protections, they are not covered by the National Labor Relations Act, and so they don't have the right to organize. This

means that their employers are effectively given free reign to fire them for complaining about their jobs or demanding better treatment. Farm workers are similarly vulnerable, since they are exempt from protection of many labor laws.

Employers are increasingly misclassifying their workers as “independent contractors” in order to evade workplace regulations. The problem, as Cathy Ruckelshaus of the National Employment Law Project points out, is that this classification is only supposed to be applied to independent businesspersons. “You have to ask yourself, especially in the case of some of the low-wage workers,” she says, “whether these people are actually running their own businesses or not.” Child care workers, construction day laborers, janitors, street vendors, delivery people and bathroom attendants have been placed into this category, when in fact they were dependent upon their employer for scheduling, job assignments, equipment and training—signaling their status as traditional employees.

THE ENFORCEMENT PROBLEM

Our fieldwork indicates that unregulated work is a growing feature of business strategies at the bottom of the labor market. Very few attempts have been made to estimate the prevalence of workplace violations, but our preliminary findings are in line with evidence gathered by other researchers. For example, in the late 1990s the U.S. Department of Labor (DOL) carried out several surveys to assess compliance with the Fair Labor Standards Act (FLSA)—the law that regulates the minimum wage, overtime, and the use of child labor. Among their results: in 1999, only 42% of restaurants in Chicago and only 35% of garment shops in New York City were in compliance with FLSA.

Unfortunately, just as employer violations appear to be increasing, the resources allocated to enforcement are waning. Data we recently received from the Department of Labor shows that while the number of workplaces in the United States more than doubled between 1975 and 2004, the number of compliance actions by the DOL’s Wage and Hour Division (WHD) declined by more than a third. As Howard Wial, a senior researcher at the Brookings Institution, writes, “The general picture that emerges ... is that there has been a long-term decline in the adequacy of enforcement resources, which has probably resulted in a long-term decline in the amount of attention that the WHD pays to low-wage workers.”

So employers are unlikely to be the target of WHD inspections, and if they are, penalties are unlikely to be high enough to provide a deterrent. An unprincipled employer may find that it is cheaper to break the law—and run the slight risk of getting caught—than it is to comply. David Weil, an economist at Boston University, conducted a cost-benefit analysis of compliance in the garment industry, including data on the annual likelihood of inspection, the average underpayment

per worker, and the median civil penalty. He found that for an apparel contractor with 35 workers, “the potential cost of not complying [with minimum wage requirements] is \$121 versus a benefit of \$12,205, implying that an apparel employer should clearly choose not to comply.”

The problem of unregulated work is not just a “race to the bottom.” It is a race that is taking place *below* the bottom. The legal floors on wages and working conditions are increasingly irrelevant to American employers. For the workers who populate this segment of the labor market, there is no guarantee that workplace laws will protect them.

WORKERS PUSH BACK

The good news is that on the ground, community groups and other advocates are taking action. Workers are protesting for the wages owed them even as they are filing complaints with the Department of Labor or filing suits in court. In New York, workers have also collaborated with the state Attor-

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ney General’s office, which has undertaken a number of initiatives to bring law-breaking employers into compliance. Immigrant workers in particular are organizing, either with unions or through Worker Centers, on the basis of industry and occupation. Day-labor groups across the country are creating “job centers,” where wage rates and rules for hiring are collectively set and enforced by workers.

Advocates are also using legislation to pressure the relevant government agencies to enforce the law to protect workers. Campaigns are also underway to pass state legislation that would tie businesses’ operating licenses to their compliance with labor and employment laws. In 2003, a new law in California increased employers’ responsibility for violations carried out by their subcontractors. And a local law passed the same year in New York City increased the responsibility of employment agencies for the actions of their clients who hire domestic workers.

Clearly, a greater commitment to workplace enforcement, backed up by sufficient resources, will be necessary to combat the increasing number of violations of workers’ rights. Yet more enforcement alone will not be enough. A deeply flawed immigration policy also needs to be fundamentally changed, so that all workers enjoy the minimum standards

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AFL-CIO

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all workers in small businesses who need workplace organization. If AFL-CIO and CTW unions are serious about building power, they must provide resources for independent local organizing that permits rank-and file workers to determine conditions and actions on the job.

Unfortunately, Change to Win offers more of the same top-down, hierarchical control. Unions in the coalition prefer press conferences and scripted blogs to worker insurgency. Bent on building “critical mass” by increasing union density and leveraging power at the top, CTW leaders have ignored organized and unorganized worker demands for independence and power on the job.

Unions must also provide a vision of social justice. While workers want better wages and working conditions, most also aspire to a more just society based on greater racial and gender equality and a new vision for the future. Workers don’t want Bush’s ownership society but an inclusive, democratic, and independent voice in their workplaces. However, CTW does not offer any social vision that can inspire workers to join en masse.

The challenge today is to build working-class power at a time when U.S. workers face high levels of unemployment and jobs in which they are repressed and overworked. This

challenge is made all the more difficult by the fact that workers are disillusioned with the ability of unions to protect their rights in a politically hostile environment. If unions are to meet this challenge, they will have to provide an alternative to business as usual. It is not enough to fight for the right to organize if the upshot is wage slavery under better conditions. Unions must advance a new social contract based on democracy, participation, control, and worker rights. And they must tap into workers’ self-organizing, rather than simply looking to density to build strength down the road. ■

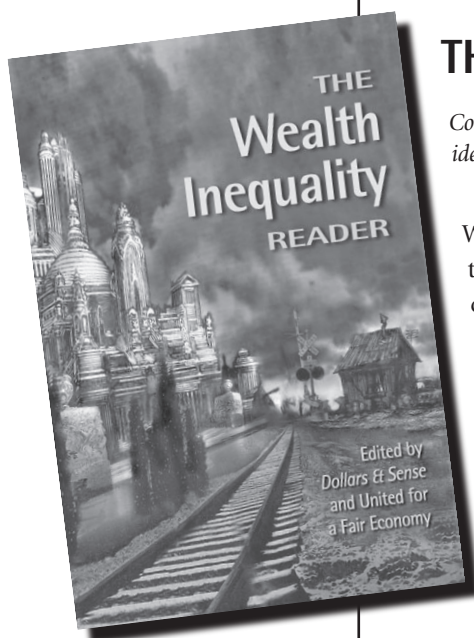
Immanuel Ness is professor of political science at Brooklyn College—City University of New York. His books include Immigrants, Unions, and the New U.S. Labor Market and Organizing for Justice in Our Communities. Ness is editor of WorkingUSA: The Journal of Labor and Society.

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under the law, regardless of their citizenship status. In practice, our current immigration system accepts people into the country but then effectively denies them rights in the workplace. This creates a steady stream of vulnerable workers. Comprehensive immigration reform, with a sound path to legalization, is an essential component of efforts to guar-

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antee workers' rights. Similarly, comprehensive changes to welfare and penal policies would make people returning to the workforce less vulnerable to exploitation in the unregulated workforce.

The growth of unregulated jobs has created a new terrain in the battle for workers' rights. While continuing efforts to raise the minimum wage and improve workplace standards are critical, in practice employers are routinely violating the standards that already exist. A greater commitment to enforcement, comprehensive reform in a range of areas of government policy (including immigration, penal, and welfare policy), and efforts to close the loopholes employers are currently taking advantage of, will all be necessary to fulfill the promise of protective labor legislation. ■

Siobhán McGrath is a Policy Research Associate with the Economic Justice Project at the Brennan Center for Justice. She holds a Master's degree in Economics from the New School for Social Research. Nina Martin is a Researcher at the Center for Urban Economic Development (CUED). She is a Ph.D. candidate in the College of Urban Planning & Public Affairs at the University of Illinois at Chicago and holds a Master's degree in Urban Planning from the London School of Economics.

The Brennan Center and CUED, together with the Department of Black and Hispanic Studies at Baruch College (CUNY), have been working together to document the growth of unregulated work in New York City and Chicago. The names of workers have been changed.

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