

Protecting New York's Workers

How the State Department of Labor Can Improve Wage-and-Hour Enforcement

Recommendations from New York's community groups, immigrant advocates, and legal assistance providers

This report is a project of the Campaign to End Wage Theft

Supporting organizations include:

Asociación Tepeyac

Brennan Center for Justice at NYU School of Law

Cortland Workers' Rights Board

Farmworker Legal Services of New York, Inc.

Latin American Integration Center

The Latin American Workers Project, Inc.

Long Island Immigrant Alliance

Make the Road by Walking

MFY Legal Services, Inc.

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Taxi Workers Alliance

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The Workplace Project

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Introduction

In Brooklyn, workers at a grocery store work for tips alone, sixty hours a week, and take home what amounts to less than \$3.50 an hour. In Dutchess County, construction workers are promised \$100 a day and work for three weeks, ten hours a day; but at the end of the project, they are left unpaid when the subcontractor that hired them disappears. In the Adirondacks, room cleaners work at multiple tourist hotels, paid by the room, not by the hour, and often take home less than the minimum wage. And on Long Island, kitchen staff at a local restaurant regularly work more than sixty hours a week but do not receive overtime pay.

These stories are played out every day in cities and towns across New York, as workers increasingly face violations of their most basic rights to a minimum wage and overtime. Unscrupulous employers understand that there is a minimal risk of being caught for these violations — and even if they are caught, that they will likely pay no more than a portion of the wages they owe. In effect, workplace violations are becoming standard practice in many of the state's low-wage industries.

Comprehensive data are not available to quantify the prevalence of these violations, but researchers and advocates have started to survey workers in several industries to document the problem. In New York City, for example, a recent survey found that 67% of domestic workers received no overtime pay,¹ and in a survey last year of gourmet grocery workers, many reported frequently working up to 60 hours per week without overtime pay.² Another study found pervasive violations of both overtime and minimum wage standards in Brooklyn's small retail stores.³ Likewise, in a 2005 study, 59% of surveyed restaurant workers reported not being properly compensated for their overtime hours, with 13% not paid the minimum wage.⁴ And about half of day laborers surveyed in 2003 experienced non-payment of wages — that is, they were not paid at all.⁵

Government enforcement agencies provide data on several other industries. In the late 1990s, the United States Department of Labor (USDOL) documented violations using a series of industry-specific compliance surveys. It found that nearly 33% of residential health care facilities were violating wage-and-hour laws in New York City, with nearly double that rate in Albany.⁶ In New York City's garment industry, it found that 65% of employers were violating minimum wage and overtime laws.⁷

These studies, however, are only measuring the tip of the iceberg: on the ground, community and legal advocates are seeing pervasive violations across the full spectrum of industries in New York's economy. They are also seeing the very real and immediate impact that violations have on our economy. Workers in low-wage industries count on every dollar to support their families, and even a small amount in lost wages in a given day can translate into thousands of dollars annually. Immigrant communities are especially hard hit, with the highest rates of workplace violations but the fewest resources to address them.

But all New Yorkers bear the costs of this endemic problem. Law-abiding employers are forced into a race to the bottom when unscrupulous competitors pay below the minimum wage, setting off a downward spiral that erodes labor standards throughout the economy. And local governments lose significant tax revenues when workers are underpaid.

Fulfilling the Promise of Workplace Protections

The New York State Department of Labor (NYSDOL) is the agency primarily charged with enforcing minimum wage and overtime laws through its Division of Labor Standards. But while New York's economy has changed, the NYSDOL's strategies and resources have failed to keep pace. Today, the

agency faces complex workplaces, an increasingly diverse workforce, and a daunting backlog of complaints.

New York's next administration has a unique opportunity to meet these evolving challenges. With modest increases in staff resources, the NYSDOL could improve its effectiveness by implementing a smarter approach to enforcement, leveraging its current legal authority, and taking advantage of new strategic partnerships. In doing so, the NYSDOL would send a strong signal to employers that it is simply unacceptable to violate basic minimum wage and overtime laws in New York — an important first step to changing the business culture in low-wage industries and throughout the economy.

In this report, we present six recommendations to improve the enforcement of New York's workplace standards. We focus on specific, realistic administrative reforms that the NYSDOL can implement within its existing legal authority. Many of these reforms are motivated by model practices from other states and the federal government. And all of these reforms are supported by a diverse coalition of community groups, legal advocates, service providers, and unions, all of whom have a vested interest in ensuring that employers follow the law for the good of our workers, our communities, and our economy.

Six Recommendations for Improving Wage-and-Hour Enforcement by the New York State Department of Labor

- Recommendation 1: Aggressively investigate complaints and pursue all remedies provided by law
- Recommendation 2: Systematically and proactively investigate high-violation industries
- Recommendation 3: Partner with community and labor groups for expertise and worker outreach
- Recommendation 4: Improve responsiveness to the needs of immigrant workers
- Recommendation 5: Improve coordination with state and local enforcement agencies to protect workers
- Recommendation 6: Make the NYSDOL more accessible, accountable, and transparent

Recommendation 1

Aggressively investigate complaints and pursue all remedies provided by law

“The New York State Department of Labor came by my restaurant one day after some workers told them that we didn’t get overtime. They only talked to the two dishwashers who work in the morning, but didn’t stick around to talk to any of us who work in the evening. The investigators didn’t understand Spanish, so the chef sent one of his friends to translate. The translator didn’t tell the inspectors what the dishwasher had really been saying about his overtime pay. We heard that some workers got some money, but nothing close to what they were owed. The rest of us decided it wasn’t worth asking the DOL to come back, so we started organizing on our own with ROC-NY.”

– Cesar, Line Cook, member of the Restaurant Opportunities Center of New York

Workers in low-wage industries face significant obstacles to recovering their lost wages. Their claims are typically too small to attract a private attorney. Legal services programs have the resources to meet only a fraction of the need for legal representation, and federally funded programs are not allowed to assist many immigrants. Community groups can help to fill the gap, but lack the resources to pursue all of the violations that are outstanding.

The government has a crucial role to play in enforcing labor standards by sending strong signals about the consequences of non-compliance. But currently, workers who file individual complaints with the NYSDOL may have to wait years to recover money — and often they only receive a fraction of the money to which they are entitled under state law.

A range of factors contributes to the problem. The NYSDOL has insufficient investigators to address a tremendous backlog of individual complaints — it has approximately 120 investigators on board, compared to the more than eight million workers in the state.⁸ Employers too can delay settlements, allowing individual complaints to languish in the investigative stage.

But several NYSDOL policies also undermine the agency’s enforcement efforts. At present, investigators are discouraged from taking aggressive steps to signal that violations are not tolerated. For example, the NYSDOL is disinclined to issue an Order to Comply — a final agency determination that can include damages and fines as well as wages, and that has the effect of a court judgment (unless challenged).⁹ Nor does the NYSDOL provide workers with regular status updates about their investigations, which causes many workers to lose track of their claims. Finally, the NYSDOL’s policies encourage negotiated settlements that amount to a fraction of the total compensation available to workers. For example, workers may recover up to six years’ worth of unpaid wages and additional penalties and damages under New York law. However, the NYSDOL’s policy is to demand only two years’ worth of unpaid wages and none of the additional penalties and damages available.¹⁰

Nor are the NYSDOL’s policies designed to maximize the impact of its enforcement efforts. The agency rarely requires investigations of an entire workplace based on a worker’s complaint, despite the fact that many types of violations typically affect more than just one worker. In addition, its policy is not to investigate all parties who may be held liable under state law as “employers,” focusing instead only on the corporate entity.¹¹ This is particularly problematic in industries where owners close their businesses and reopen under different corporate names, or where the use of subcontractors is prevalent.

The upshot is that currently, unscrupulous employers may actually find that the incentive is *not* to comply with the law. In the unlikely event that the NYSDOL declares an employer out of compliance, that employer would likely pay only a fraction of the wages owed, years down the road.

In enforcing the law, the NYSDOL should be especially aware of two strategies that some employers are increasingly using to cut corners. First, some employers are using retaliation as a tool to dissuade workers from enforcing their rights. Although illegal, such retaliation typically goes unchecked and represents a major barrier to the enforcement of workplace rights. Second, some employers misclassify employees as “independent contractors” either to avoid liability for employment law violations, or to avoid paying payroll taxes and insurance premiums. For workers, “misclassification” means not only that they are exempt from core workplace protections, but also that they are left without a safety net when unemployed or injured on the job.

Suggested Administrative Reforms

The NYSDOL should aggressively investigate suspect workplaces and vigorously pursue remedies provided by law:

- 1. Investigate complaints promptly and thoroughly, and keep workers informed of the progress of investigations.**
 - a. Investigate all parties who may be held liable as “employers” under state law, including individual owners and shareholders, not just corporate entities.
 - b. Establish guidelines for issuing an Order to Comply (when applicable) for all available damages if employers and workers are unable to agree on settlement terms within a designated period of time.
 - c. Provide workers with regular updates on the status of their pending claims.
- 2. Use individual complaints as a trigger for investigating entire workplaces.**
 - a. Establish new guidelines for identifying individual complaints that warrant broader workplace investigations, such as:
 - Underpayment of wages claims by current employees;
 - Complaints in industries marked by frequent violations;
 - Misclassification of employees as independent contractors; and
 - Other claims identified by investigators or community groups as likely to be part of a pattern.
 - b. Audit an entire workplace when such individual complaints arise.
 - c. Routinely re-inspect firms with a pattern or history of widespread violations.
 - d. Develop better data tracking systems to identify repeat offenders, for example by assigning employer ID numbers.
 - e. Establish an on-line database that will connect workers to any back wages they are owed due to these ongoing investigations.
- 3. Pursue all damages and penalties available to remedy violations.**
 - a. Advise employers and workers of the full range of penalties that workers are entitled to recover by law, including any unpaid wages in the previous six-year period and an additional 25% of that amount as liquidated damages. Disclose all

available damages and penalties in settlement demands to employers and when presenting offers to workers.

- b. Establish a protocol requiring investigators to seek approval before presenting workers with settlement offers that do not provide a significant portion of the damages available to workers under law.
 - c. Pursue all civil penalties, court costs, and attorneys' fees available by law to help fund enforcement.
- 4. Protect workers from retaliation for asserting their rights.**
- a. Adopt a formal policy that prohibits the disclosure of the name of the employee who filed a complaint unless or until it is necessary and the employee consents. For example, the NYSDOL need not disclose which employee filed the initial complaint when investigating an employer's records. Instead, it can choose a sampling of employee records to review.
 - b. Seek fines in the administrative process or refer appropriate cases to the attorney general for criminal prosecution when employer retaliation occurs.
- 5. Identify employees who are misclassified as independent contractors in records reviewed during investigations, and report misclassification to the proper authorities.¹²**

Recommendation 2

Systematically and proactively investigate high-violation industries

“Our three attorneys cover a nine-county region of the state, and we can only confront a fraction of the violations that we encounter. The state DOL has to be a dependable resource for low-wage workers who want to file complaints. Given the prevalence of violations across the state, the state DOL also has to be strategic about maximizing its impact. If it launched more proactive investigations to find unreported violations, it would send employers the message that breaking the law has consequences.”

– *Kate Griffith, attorney and Skadden Fellow at the Workers' Rights Law Center of New York, Inc., in Kingston*

While the NYSDOL can use individual complaints as a starting point for enforcing the law, the agency can not rely solely on a reactive strategy to address the growing enforcement gap. That's because the scale of the problem is simply too big to be tackled on a case-by-case basis. Even if the agency had the required resources, it is unrealistic to expect workers to bear the full burden of identifying violations and pursuing actions against employers—the threat of retaliation is too real and has been used all too often. In fact, some of the worst violations occur in workplaces where workers are most disempowered and least able to act. In short, focusing solely on resolving individual complaints prevents the NYSDOL from identifying and correcting the deeper, systemic problems of non-compliance in high-violation industries.

Instead, the NYSDOL should adopt what is known as “investigation-driven enforcement.” That is, the agency should devote significant resources to systemically tracking, investigating, and prosecuting non-compliant employers in high-violation industries. Existing state law provides the NYSDOL

ample authority to undertake this type of enforcement, and both the New York State attorney general and USDOL have had success with this strategy (see sidebars).

The NYSDOL itself has experimented with proactive enforcement. In 1987, the Legislature created an Apparel Industry Task Force to address violations in the garment industry, and in 2005, the Fair Wages Task Force was created to address a broader set of low-wage industries.¹³ In many ways, these task forces have not been optimally implemented. Their resources are focused on New York City, excluding much of the state from aggressive enforcement.¹⁴ They still prioritize individual complaints, rather than resolving systemic violations across low-wage industries.¹⁵ Finally, advocates report that even when the Apparel Industry Task Force conducts proactive inspections, it concentrates on enforcing industry-specific business registration requirements, rather than seeking redress for wage-and-hour violations.¹⁶ Nonetheless, the task forces represent a first step toward a more proactive enforcement model that the NYSDOL should implement to maximize its impact.

Legal Authority

The NYSDOL has sufficient authority to conduct proactive investigations regardless of the industry. State law provides that the NYSDOL “[s]hall cause proper inspections to be made of all matters prescribed” by the law. N.Y. Labor Law § 21(2). The NYSDOL also has the mandate to “inspect every place which is, or which they have reasonable cause to believe is, *affected by*” the state’s labor laws. *Id.* at § 25 (emphasis added). More specifically, investigators may search any records that an employer is required to keep by law, and employers must answer investigators’ questions and provide them access to workplaces to conduct inspections. *Id.* at § 26, 31. The NYSDOL has the additional authority to enforce the business registration requirements specific to the garment industry as well. *Id.* at § 343.

Success Story: USDOL’s Investigation-Driven Enforcement

In the late 1990s, the United States Department of Labor’s Wage and Hour Division (WHD) pioneered a new emphasis on targeted investigations in low-wage industries. WHD sought to promote compliance and reduce recidivism using an innovative, multi-pronged approach for enforcement: investigations, compliance education, and partnerships.

Among its innovations, WHD targeted particular industries to investigate. It chose industries for each region of the country based on prior enforcement data (from WHD and other agencies), worker demographics, and an industry’s characteristics. In those industries, WHD began to expand investigations of randomly selected employers and key industry leaders. It entered into partnerships with community groups to improve enforcement as well.

At the height of the program, WHD reported substantial progress in implementing investigation-driven enforcement to encourage compliance in low-wage industries, including garment manufacturing, health care, agriculture, and local service industries.

For a variety of reasons, WHD’s emphasis on investigation-driven enforcement has declined in recent years. But the experience of the USDOL in the late 1990s provides a promising model for an innovative enforcement strategy leveraging scarce resources to encourage broader compliance with employment laws.

Suggested Administrative Reforms

The NYSDOL should proactively and aggressively enforce workplace laws using industry-based strategies:

- 1. Identify industries in each region of the state that are marked by systemic violations of basic wage-and-hour laws.**
 - a. Identify and target high-violation industries in each region of the state, based on: prior enforcement data, investigators' experiences, field research, and pooled information from stakeholders such as community groups whose members are workers in these industries.
 - For example, researchers have found the following low-wage industries in New York City are characterized by high rates of violations: construction and landscaping, retail (both food and non-food), restaurants and food services, domestic work, home health care, child care, manufacturing, industrial laundries, building maintenance and security, for-hire urban transportation, auto services, and personal services.¹⁷
 - Other regions of the state have a somewhat different mix of high-violation industries. For example, upstate legal services providers see frequent complaints in the hotel industry, agriculture, warehouses, and health care.
 - b. Draw from the experiences of community groups, workers, and other stakeholders to learn about each targeted industry, including: which types of violations are prevalent; how violations are hidden from investigators; and which worker classifications are most susceptible to cost-cutting pressures.
- 2. Proactively investigate employers within these targeted industries to send the signal that the agency will pursue violations even if workers are deterred from filing complaints.**
 - a. Strategically select employers (and subcontractors) to investigate to provide the greatest impact.
 - For example, in some industries a handful of key players have the market power to establish industry standards and create downward competitive pressures.
 - Other industries are marked by smaller employers and have no central dominant powers. In such industries, random inspections or high-profile investigations of egregious violators can send strong signals.
 - Stakeholders like community groups can help identify employers to target to maximize the impact of enforcement actions. (See Recommendation 3 below.)
 - b. Send teams of investigators to conduct unannounced, workplace-wide audits of selected employers in targeted high-violation industries. Avoid establishing identifiable patterns for investigations (e.g. time of year, time of day).
 - c. Begin enforcement actions to correct violations identified in investigations, and conduct comprehensive (unannounced) re-inspections of employers where violations were found.
 - d. Collect data on violations discovered during workplace-wide audits to compile "compliance surveys" that document changing industry trends.
 - e. Communicate the results of enforcement efforts to industry groups, community groups, and the public.

Success Story: New York State Attorney General's Greengrocer Campaign¹⁸

In 2002, New York State Attorney General Eliot Spitzer's Labor Bureau took proactive steps to stem the tide of workplace violations in New York City's greengrocer industry, establishing a voluntary "Greengrocer Code of Conduct." The Code established a set of minimum conditions for greengrocer employers, including that they: pay the minimum wage and overtime required by law; provide for reasonable sick and vacation days and days of rest; attend a state labor law seminar; display a poster about the Code; and maintain payroll records and allow the attorney general to access to such records. While the Code was voluntary, greengrocers who agreed to abide by the Code received two major benefits: they avoided investigations into past violations of employment laws, and they could display a Code of Conduct seal in their stores.

The Code has had some success in its early implementation. Monitors found that greengrocers who signed the Code remained in the program, and were largely in compliance with minimum wage and overtime requirements. As Hofstra Law Professor Matthew Bodie assessed, "If greengrocers continue to sign up and comply with the Code's requirements, the Code will have succeeded in completely reshaping the employment landscape for hundreds of greengrocer workers."

Recommendation 3

Partner with community and labor groups for expertise and worker outreach

"Our organization has worked closely with the United States Department of Labor with good results. For the last year and a half, we referred various cases to them for non-payment of wages and overtime, especially in the restaurant industry, and many employers have been forced to pay their workers through this effort. We have had less success with the New York State DOL, though. We have sent workers there, but the process takes a very long time. Even when they find that the employer owes a worker back wages, they do not exert real pressure to make them pay."

– Jaime Vargas, organizer at The Workplace Project on Long Island

Low-wage industries constitute a moving target for the NYSDOL, with employer strategies that are complex and continually changing. In some industries, unscrupulous employers have developed techniques for concealing workplace violations from inspectors (for example, garment factories relocate often to evade detection). Other industries are characterized by numerous small workplaces, making it difficult to identify common employers (for example, one individual may own a series of seemingly unconnected small retail stores through different corporate entities). The NYSDOL also faces challenges in reaching out to impacted workers in these industries to educate them about their legal rights and to tap their knowledge of violations due to language barriers and fear of retaliation. (See Recommendation 4 below).

New York's community and labor groups are in a unique position to help the NYSDOL. Workers in high-violation industries often turn to local organizations that they trust for help in enforcing their

rights. As a result, many community and labor groups have developed strong networks of affected workers and are the best source of information on high-violation industries. Because of their reach in local communities, they also have the ability to assemble larger cases against egregious employers. And on a day-to-day basis, they serve as advocates who can assist the NYSDOL by strategically referring cases and (with proper training) helping workers fill out forms.

Suggested Administrative Reforms

The NYSDOL should use local community and labor groups as a resource for understanding industry violations and conducting worker outreach:

- 1. Coordinate with community and labor groups to inform investigation-driven enforcement, working with them to:**
 - a. Strategically select high-violation industries to target;
 - b. Identify key employers that establish industry practices and that are egregious offenders, against whom enforcement actions would have the greatest impact;
 - c. Understand common industry violations and the means by which they may be concealed from investigators; and
 - d. Provide ongoing support to investigators about emerging industry trends.

- 2. Improve the NYSDOL's resolution of individual complaints by working with community groups to identify trends in violations and improve investigations.**
 - a. Engage in regular meetings with community and labor groups to identify trends in violations that they have documented among their clients and/or constituent communities.
 - b. Allow community and labor groups to assist the NYSDOL as it investigates workers' complaints—for example by sharing information (with the worker's permission).

- 3. Partner with community and labor groups to educate workers about their rights and the NYSDOL's services.**
 - a. Hold an annual training for community and labor groups to teach them how to complete forms and document violations in a way that is most helpful for the NYSDOL's investigators.
 - b. Partner with community groups to have departmental materials translated and/or checked for readability.
 - c. Disseminate the NYSDOL's outreach materials through the worker networks of community groups.

Success Story: Partnerships with Community Groups

In several states, government officials are partnering with community groups to facilitate the filing of wage complaints and to improve enforcement of state labor standards. Two such examples are California's Coalition of Immigrant Worker Advocates and the Chicago Area Workers Rights Initiative, which have used government partnerships to advance workers' rights in industries such as day labor construction, restaurants, and garment manufacturing.

California's labor agency has institutionalized an innovative community-government partnership by creating the Low-Wage Industries Office (LWIO). The LWIO works with groups such as the Coalition of Immigrant Worker Advocates to improve enforcement of California's labor laws on behalf of low-wage workers. The LWIO, through a statewide Low-Wage Industry Advisory Board, works to strategically bring more government resources to the low-wage industries that are most in need of additional labor law enforcement. The LWIO, among other things, educates the public about workers' rights, expands access to speakers with limited English proficiency, and facilitates the complaint process for low-wage workers.

Meanwhile, the Chicago Area Workers Rights Initiative (CAWRI) partners with Illinois Attorney General Lisa Madigan to identify which employers to target for enforcement. For instance, the Chicago Interfaith Committee on Worker Issues, a CAWRI member, collects data on violations faced by members to help identify high-violation industries so that the attorney general can investigate. Increased enforcement is sending signals to employers and workers around the Chicago area that employers must comply with these basic labor laws.

Recommendation 4

Improve responsiveness to the needs of immigrant workers

“The state Department of Labor provides inadequate services for workers with limited English proficiency. They do not have forms available in Spanish or other languages that workers speak. Some of our clients have tried to file complaints with the state DOL, but were told to come back another day because there were no Spanish-speaking investigators available. Many of our members are immigrants who fear approaching government agencies anyway because they fear retaliation or harassment aimed at their families and friends, regardless of whether they themselves have immigration status. Worse yet, the state DOL recently told a client that he could not file a claim if he didn't have immigration status. This discourages workers who have been exploited from coming forward. The state DOL is not an immigration enforcement agency and should not be acting like one.”

– *Julissa Bisono, coordinator of the Immigrant Workers Program at the Latin American Integration Center in Queens*

It is well established as a matter of law that a worker's immigration status is not relevant when investigating wage-and-hour violations. The New York State attorney general has issued an opinion letter confirming that the NYSDOL has the authority to enforce wage violations on behalf of workers regardless of their immigration status.¹⁹ In addition, the federal Privacy Act limits the collection of workers' social security numbers.²⁰

Unfortunately, there is a perception among immigrant communities that the NYSDOL is screening complaints on the basis of immigration status. Whatever the source, this perception creates an additional barrier to recovering lost wages for immigrant workers, who (like all workers) are already deterred from filing claims by a more general fear of retaliation.

Beyond these systemic obstacles to filing claims, another challenge for wage enforcement is that a large percentage of New York’s workforce is limited English proficient (LEP). Census data indicate that the most common languages spoken by immigrant workers include Spanish, French, Korean, Chinese, Haitian Creole, Urdu, Bengali, Russian, and many others. Yet currently, despite a department-wide plan for providing “meaningful access to its services” for those with limited English proficiency,²¹ adopted consistent with federal mandates,²² the NYSDOL lacks sufficient resources to communicate effectively with these workers while resolving complaints, let alone to reach out and inform workers of their workplace rights.

Suggested Administrative Reforms

The NYSDOL should improve its responsiveness to the needs of immigrant workers:

- 1. Identify agency actions that create the perception that the NYSDOL is screening based on immigration status, and discontinue these practices.**
 - a. Suspend any requirements that individuals provide social security numbers to investigators—a practice that is inconsistent with sound public policy and the federal Privacy Act. Requiring social security numbers deters workers from filing wage claims, and is not necessary for assessing a wage claim’s validity. The negative consequences of this practice outweigh any administrative convenience it might provide. Concrete steps to eliminate this practice include:
 - Conform the NYSDOL’s complaint form to the requirements of the Privacy Act by eliminating the space for social security numbers or providing an explanation that providing a social security number is not required;
 - Inform staff not to ask for social security numbers improperly when investigating a complaint; and
 - Educate the public that it is not required to provide a social security number.
 - b. Perform an audit of other investigation procedures that might improperly send workers the signal that the NYSDOL screens claims based on immigration status. Take steps to dispel these perceptions.
- 2. Use formal statements and community outreach to send workers a strong signal that the NYSDOL neither enforces immigration law nor screens claimants based on immigration status.**
- 3. Improve the resources available to workers with limited English proficiency.**
 - a. Develop and implement a procedure for determining the languages spoken by workers in each region of the state, based on census data and information from local community groups.
 - b. Ensure that NYSDOL staff speak key languages and provide adequate translation and interpretation services for workers in the full range of languages identified.

- c. Coordinate with community groups to reach out to workers with limited English proficiency, including translating printed materials into a broader range of languages and providing public education to alert workers to these new policies and programs. The attorney general’s office has done this successfully in the past to alert communities to minimum wage increases.

Recommendation 5

Improve coordination with other state & local enforcement agencies to protect workers

“In working with a group of night-time janitors, we discovered that not only were they paid grossly below the minimum wage, with no overtime, they were also subject to really outrageous health and safety risks on the job. The workers were routinely locked inside the stores they cleaned overnight without any means of getting out in case of an emergency. Our experience organizing with workers, especially immigrant workers, is that they rarely face just one problem.”

– *Artemio Guerra, director of organizing at the Fifth Avenue Committee in Brooklyn*

Low-wage workers rarely experience only one workplace violation. Employers who pay less than the minimum wage will often try to cut costs in other ways — for example, by skimping on health and safety protections. If the NYSDOL trained its Division of Labor Standards inspectors to recognize a range of other workplace violations, the inspectors could refer these violations to other NYSDOL divisions or to other state and local enforcement agencies.

Coordinating the enforcement of these laws not only increases efficiency, it also raises the stakes for potential violators. Employers would have increased incentives to comply with wage-and-hour laws if violations resulted in greater scrutiny of their compliance with other laws and regulations, ranging from building codes to health-and-safety protections.

Suggested Administrative Reforms

The NYSDOL should coordinate with state and local agencies that protect workers’ rights in the workplace:

- 1. Train the state’s wage-and-hour investigators to identify other NYSDOL-enforced violations and refer them as appropriate.**
 - a. For example, refer prevailing wage violations to the NYSDOL Bureau of Public Work or to the New York City Comptroller’s office.
- 2. Partner with agencies that protect workers’ rights and enforce wage-and-hour, health-and-safety, right-to-organize, and anti-discrimination laws.**
 - a. Train investigators to recognize a range of these basic violations, and increase cross-agency referrals to protect workers’ rights.
 - b. Establish formal collaborations with other agencies, organized by region or by industry, as appropriate.
 - c. Publish joint-agency “know your rights” educational materials for workers covering various workplace protections and how to enforce them.

3. **Strategically refer appropriate cases to the New York attorney general for high-impact enforcement actions.**
 - a. Consider the relevant factors in deciding which cases to refer: the higher burden of proof required for a criminal prosecution; the potential deterrent value of criminally prosecuting high-profile cases; and the attorney general’s enhanced subpoena and deposition power.
 - b. In significant cases, the NYSDOL and the attorney general can work together to make the most of their respective grants of legal authority. The NYSDOL has the legal authority to investigate proactively (without a complaint), while the attorney general can use subpoenas and discovery (including depositions) to gather more information once the NYSDOL asks them to pursue an action.

Success Story: Inter-Agency Coordination

At the urging of the Chicago Interfaith Committee on Worker Issues, the Illinois Workers Compensation Commission (IWCC) has entered into a strategic partnership with the federal Occupational Safety and Health Administration (OSHA) to improve workplace safety. IWCC and OSHA realized that Workers Compensation claims rarely arise without health-and-safety violations, and vice versa. They have therefore entered into an information-sharing agreement that allows the agencies to alert each other when claims are filed. Each agency can leverage the others’ investigative resources to identify violators and target enforcement.

Recommendation 6

Make the NYSDOL more accessible, accountable, and transparent

“[Federal law] calls on agencies to identify their core missions, establish meaningful challenging goals, and develop measures that will give Congress, the public and the agencies themselves a clear indication of the extent to which progress is being made towards the intended program results. [The law] requires agencies to develop strategic plans, structure their goals and measures, and focus their energies on achieving significant improvements in program results.”

– *United States Department of Labor, 1999-2000 Report on Initiatives 4 (2001)*

In order to successfully implement the reforms outlined in this report, the NYSDOL will need to generate and analyze data so that it can continually monitor its effectiveness and fine-tune its strategies. Those data should also be reported to the public, allowing advocates, lawmakers, and other stakeholders to assist in monitoring the agency’s performance. And publicizing enforcement efforts will send an important signal to employers that the risks of getting caught for violating wage-and-hour laws are growing.

Currently, the NYSDOL makes only very limited summary enforcement data available to the public. As a result, stakeholders are unable to judge the agency’s effectiveness and employers are unaware of its enforcement efforts.

Suggested Administrative Reforms

The NYSDOL should take steps to make the agency more accessible, accountable, and transparent:

- 1. Provide comprehensive data on complaint-driven and investigation-driven enforcement, broken down by month.**
 - a. *Individual complaints (by month)*: Data should include (1) number of new individual complaints filed (by type of violation — including underpayments and failure to pay wages); (2) number of individual complaints resolved (by type of resolution); (3) wages owed versus wages recovered for individual complaints; (4) number of pending individual complaints; and (5) model settlements.
 - b. *Investigation-driven enforcement (by month)*: Data should include (1) number of workplaces proactively investigated (i.e. not triggered by an individual complaint); (2) resulting enforcement actions commenced; (3) wages recovered through investigations; and (4) workplaces reinvestigated after previous violations discovered.

- 2. Record the detailed industry classification code (NAICS) of any employer involved in a complaint or investigation-driven enforcement action.**
 - a. Publish comprehensive enforcement data (described above) by major industry groups.
 - b. Make detailed industry breakdowns available to the public upon request without requiring a formal request under the Freedom of Information Law (FOIL).

- 3. Make key forms, policy manuals, and procedures available to the public in a variety of languages.**
 - a. Work with community groups to help translate materials as appropriate.

- 4. Improve the agency's communication with the public regarding its enforcement activities.**
 - a. Conduct affirmative outreach to inform workers, employers, and community groups around the state of the NYSDOL's new enforcement strategies.
 - b. Provide on-line access to information about enforcement actions so that state and local governments and consumers can make informed choices about the businesses they patronize.
 - c. Respond to additional requests for data made pursuant to the FOIL within statutorily mandated timeframes.

Legislative Enhancements

All of the reforms proposed above may be implemented using the NYSDOL's existing (and substantial) legal authority. Nonetheless, in the longer term, the NYSDOL will require additional authority to improve its enforcement of wage-and-hour laws. The National Employment Law Project's publication, *Holding the Wage Floor* , provides a comprehensive list of legislative enhancements that would intensify and broaden the impact of the NYSDOL and encourage more workers to seek relief from the agency.²³ However, even within the immediate context of the administrative reforms that are the focus of this report, three categories of legislation could be especially important:

- 1. Ensure that workers and the beneficiaries of their work are properly classified as “employees” and “employers,” respectively, so that workers are adequately protected.** For example, establish a presumption that workers in targeted low-wage industries are “employees” rather than “independent contractors.” New Mexico law provides this presumption in the construction industry, while Massachusetts law does so for all service industries. Arizona's new minimum wage law provides that an employer has the burden of proving that an employee is an independent contractor by clear and convincing evidence.
- 2. Strengthen the consequences for employment law violations so that unscrupulous employers are deterred from relying on violations as a business practice.** For example, increase the damages and civil penalties available for violations. While New York provides liquidated damages of an additional 25% of the unpaid wages, states such as Arizona, Florida, and Ohio provide damages equal to 200% of the unpaid wages, in addition to back wages owed.
- 3. Protect workers from adverse employment actions for enforcing their rights under wage-and-hour laws.** For example, establish a presumption that adverse employment actions are retaliatory in nature if they are taken shortly after a worker asserts his or her rights. Arizona provides such a rebuttable presumption that adverse employment actions taken within 90 days of a worker asserting his or her rights are retaliatory in nature.

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For the executive summary or additional copies of this report, please visit the following website: <http://www.brennancenter.org/nysdolreform.html>. For more information about this document or about the campaign, contact Milan Bhatt at the New York Immigration Coalition, (212) 627-2227 ext. 233, mbhatt@thenyc.org; or Raj Nayak at the Brennan Center for Justice, (212) 992-8639, raj.nayak@nyu.edu.

Endnotes

- ¹ DOMESTIC WORKERS UNITED & DATACENTER, HOME IS WHERE THE WORK IS: INSIDE NEW YORK'S DOMESTIC WORK INDUSTRY 2 (2006), <http://www.domesticworkersunited.org/homeiswheretheworkis.pdf>.
- ² NEW YORK JOBS WITH JUSTICE, ET AL., IS YOUR GOURMET GROCERY A SWEATSHOP? A REPORT ON WORKING CONDITIONS AT UPSCALE GROCERIES IN NEW YORK CITY 5 (2005), http://brennancenter.org/stack_detail.asp?key=97&subkey=9916.
- ³ MAKE THE ROAD BY WALKING & RETAIL, WHOLESALE, AND DEPARTMENT STORE UNION, STREET OF SHAME: RETAIL STORES ON KNICKERBOCKER AVENUE 2-3 (2005), http://www.maketheroad.org/publications/reports/mrbw_streetsshameeng_may05.pdf.
- ⁴ RESTAURANT OPPORTUNITIES CENTER OF NEW YORK, BEHIND THE KITCHEN DOOR: PERVASIVE INEQUALITY IN NEW YORK CITY'S THRIVING RESTAURANT INDUSTRY 14 (2005), http://www.rocny.org/documents/RocNY_final_compiled.pdf
- ⁵ ABEL VALENZUELA JR. & EDWARD MELÉNDEZ, DAY LABOR IN NEW YORK: FINDINGS FROM THE NEW YORK DAY LABOR SURVEY ii (2003).
- ⁶ To measure compliance, USDOL asked its regional wage-and-hour offices throughout the country to conduct a series of randomized compliance surveys, targeting key low-wage industries. Each local office followed up with pre-test site investigations to determine whether to conduct a full compliance study and follow-up enforcement investigations. See UNITED STATES DEPARTMENT OF LABOR—EMPLOYMENT STANDARDS ADMINISTRATION WAGE AND HOUR DIVISION, 1999-2000 REPORT ON INITIATIVES (Feb. 2001). Since then, no further data has been reported.
- ⁷ *Id.* at 13.
- ⁸ NEW YORK STATE DEPARTMENT OF LABOR, NONFARM EMPLOYMENT BY INDUSTRY (NAICS) (Oct. 2006), <http://www.labor.state.ny.us/workforceindustrydata/apps.asp?reg=nys&app=emp>.
- ⁹ The NYSDOL's current training manual discourages investigators from obtaining an Order to Comply and instructs them instead to look for “business friendly options” for resolving a complaint.
- ¹⁰ In a meeting with advocates on January 18, 2005, NYSDOL representatives verified that as a matter of course, they pursue only two years' of back wages despite the fact that state law provides them the authority to seek back wages for six years. At the same meeting, the NYSDOL confirmed that they do not seek liquidated damages available to workers, nor the damages authorized by the Unpaid Wages Prohibition Act.
- ¹¹ NYSDOL representatives indicated in a meeting with advocates on April 5, 2005, that the agency does not seek to enforce wage claims against individual owners and directors—as the law allows—unless the employer corporation has declared bankruptcy or unless they are pursuing a criminal action.
- ¹² See NATIONAL EMPLOYMENT LAW PROJECT, 1099'D: MISCLASSIFICATION OF EMPLOYEES AS “INDEPENDENT CONTRACTORS” (July 2005).
- ¹³ See SPECIAL TASK FORCE FOR THE APPAREL INDUSTRY, 2005 ANNUAL REPORT 7, 9-10 (2006), <http://www.labor.state.ny.us/agencyinfo/PDFs/AITF%20Annual%20Report%202005.pdf>.
- ¹⁴ *Id.* at 14-15.
- ¹⁵ *Id.* at 13.
- ¹⁶ See, e.g., Andrew Elmore, Comment, *State Joint Employer Liability Laws and Pro Se Back Wage Claims in the Garment Industry*, 49 UCLA L. Rev. 395, 420 (2001).
- ¹⁷ See forthcoming report by the Brennan Center for Justice at NYU School of Law.
- ¹⁸ See Matthew T. Bodie, *The Potential for State Labor Law: The New York Greengrocer Code of Conduct*, 21 HOFSTRA EMP. L.J. 183, 185-86 (2003-04).
- ¹⁹ Op. N.Y. Att'y Gen. 2003-F3, http://www.oag.state.ny.us/labor/AG%20Hoffman%20Opinion%202003_F3.pdf
- ²⁰ See, e.g., 5 U.S.C. § 552a (Privacy Act).
- ²¹ NEW YORK STATE DEPARTMENT OF LABOR, LIMITED ENGLISH PROFICIENCY PLAN (Apr. 2005).
- ²² See 29 C.F.R § 31, Exec. Order No. 13,166, 65 Fed. Reg. 50,121 (Aug. 16, 2000).
- ²³ NATIONAL EMPLOYMENT LAW PROJECT, HOLDING THE WAGE FLOOR (Oct. 2006), <http://nelp.org/docUploads/Holding%20the%20Wage%20Floor%202006.pdf>.