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Improving the Quality of Jobs Through Better Labor Standards

By Ross Eisenbrey

The dynamic of full employment does more than increase the quantity of jobs, it also tends to raise compensation and enhance job security and job quality. But what happens when labor markets slacken? Without institutionalizing rules that protect workers and mandate basic job quality, firms will be free, as they mostly are now, to cut their costs by lowering wages, denying overtime pay, skirting wage and hour laws, and using undocumented workers, part-timers, unpaid interns, and so-called independent contractors to avoid the regulations designed to protect the labor force.

Working families cannot afford to wait for full employment to begin improving job quality and compensation, and, absent better policy, even full employment has been inadequate in the past to assure strong and broad wage gains. To that end, this paper proposes a broad set of ideas to raise the quality of jobs and their compensation, especially for low- and middle-wage workers.

The most fundamental labor standard is the provision in the Fair Labor Standards Act (FLSA) for a minimum wage. The minimum wage, when it rises, is a significant source of upward pressure on income. When workers on the bottom rung of the wage ladder get an increase, firms have to raise wages for the workers just above them and, to a certain extent, for workers on up the ladder. If the minimum wage were increased over three years from $7.25 an hour to $10.10, 17 million workers would receive an increase directly, and another 11 million would benefit from the "spillover effect." Thus, raising the minimum wage by a little less than $3.00 over three years would improve job quality for 28 million workers.[1]

Minimum wage increases have always been dependent on ad hoc legislation at the federal level. Twice since 1981, presidential or congressional opposition has delayed increases for more than nine years (from 1981 to 1990, and from 1997 to 2007), and it is now nearly five years since the minimum wage was last increased in July 2009.

Because of inflation, these delays decrease the real value and purchasing power of the minimum wage and undermine wages for workers farther up the scale, since employers can maintain the spread between entry-level or minimum wages and the next rungs on the ladder without raising wages at all. When the minimum wage is frozen, the wages of better-paid workers also erode. The solution is to index the minimum wage to the inflation rate or to the national average wage, so that it maintains its purchasing power.

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[1] David Cooper, *Raising the Federal Minimum Wage to $10.10 Would Lift Wages for Millions and Provide a Modest Economic Boost,* Economic Policy Institute, 2013, http://www.epi.org/publication/raising-federal-minimum-wage-to-1010/.

But it does little good to index from a wage so low that no one can live on it. Even though the nation is richer and minimum wage workers are better educated than in the past, the average value of the minimum wage in the first decade of the 2000s was $1.56 per hour less than in the 1970s: $6.46 versus $8.02.[2] Its relation to the average wage has fallen as well, from about 50% to about 37% of the national average wage for production, non-supervisory workers.[3]

It seems fair that the minimum wage should maintain some rough parity with productivity (a measure of how much the average worker produces each hour), because productivity increases determine the nation's capacity to raise its income. By that measure, since productivity has increased by 80 percent since 1973, the minimum wage should be about 80 percent higher in real terms than it was in 1973; instead of $7.25, it would be $15.15. Such an increase is not so far-fetched when one takes into account the increased educational attainment of low-wage workers. In the 1970s, 75 percent had only a high school education or less, versus 57 percent today.[4]

Another indexing option is to set the minimum wage high enough to keep a full-time worker with a family out of poverty. In 2013, that would require $11.30 an hour.

By nearly all of these measures, the level called for in legislation introduced by Rep. George Miller (D-CA) and Sen. Tom Harkin (D-IA) — $10.10 an hour in 2016 — is at the low end of what is appropriate and desirable.

Fears that a higher minimum wage will lead to job losses, especially for teens and minority workers, have not been consistently borne out in the past. In an exhaustive study of minimum wage differences across county and state borders from 1990 to 2006, Dube, Lester, and Reich[5] found no adverse employment effects. And analyses by Wolfson and Belman[6] and Doucouliagos and Stanley[7] of research studies on the employment effects of minimum wage increases found that the results cluster around zero, evidence that the increases had no discernable impact on employment.

Conversely, the Congressional Budget Office's analysis of the Miller/Harkin plan[8] estimated that, while 24 million workers would benefit from the increase, 500,000 jobs would be lost.[9] Various analysts have

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[2] Lawrence Mishel, Josh Bivens, Elise Gould, and Heidi Shierholz, *The State of Working America, 12th Edition,* An Economic Policy Institute Book, Ithaca, NY: Cornell University Press, 2012.

[3] Mishel et al.

[4] John Schmidt and Janelle Jones, "Low-Wage Workers Are Older and Better Educated Than Ever," Center for Economic and Policy Research, 2012, http://www.cepr.net/index.php/publications/reports/low-wage-workers-are-older-and-better-educated-than-ever.

[5] Arindrajit Dube, T. William Lester, and Michael Reich, "Minimum Wage Effects Across State Borders: Estimates Using Contiguous Counties," Institute for Research on Labor and Employment, 2010, http://www.irle.berkeley.edu/workingpapers/157-07.pdf.

[6] Dale Belman and Paul Wolfson, "Does Employment Respond to the Minimum Wage? A Meta-Analysis of Recent Studies From the New Minimum Wage Research, Upjohn Institute, 2013, http://www2.gre.ac.uk/__data/assets/pdf_file/0004/824377/Dale-Belman-and-Paul-Wolfson-Does-Employment-Respond-to-the-Minimum-Wage-a-meta-analysis-of-recent-studies-from-the-New-Minimum-Wage-Research.pdf.

[7] Hristos Doucouliagos and T. D. Stanley, "Publication Bias in Minimum Wage Research? A Meta-Regression Analysis," Deakin University Economic Series, 2008/14, https://www.deakin.edu.au/buslaw/aef/workingpapers/papers/2008_14eco.pdf.

[8] "The Effects of a Minimum-Wage Increase on Employment and Family Income," Congressional Budget Office, 2014, http://www.cbo.gov/sites/default/files/cbofiles/attachments/44995-MinimumWage.pdf.

criticized that estimate, correctly noting that it down-weighted newer, high-quality work that finds no adverse job effects from moderate increases in the minimum wage. But even if CBO is correct, its findings show the 98 percent of targeted workers would benefit from the Miller/Harkin increase, at no cost to the federal budget.

Tipped employees also deserve a better deal from the minimum wage. Approximately 3.3 million workers regularly receive tips as part of their compensation,[10] and the minimum wage they receive has been frozen at $2.13 an hour since 1991. Part of the price for raising the minimum wage in 1996 was fixing the tip wage at $2.13, instead of at half the minimum wage, where it had been pegged since 1966. Even at half the current full minimum, the tipped amount would be only $3.63 an hour.

Six states require employers to directly pay the full minimum wage to tipped employees, without counting tips, and many others require employers to pay more than the federal requirement of $2.13 an hour. There is no evidence that these policies have done any harm to restaurant employment in those states. Unsurprisingly, the higher the mandated minimum wage is for tipped employees, the higher their earnings tend to be and the less likely they are to fall into poverty (tipped workers are more than twice as likely, and waiters almost three times as likely, to fall beneath the federal poverty line as the average worker).

Raise the Coverage Salary Level Threshold for Overtime to Guarantee Overtime Pay to More Workers

The FLSA pushes up wages for millions of workers by requiring that employers pay them 150% of the regular rate of pay for any time they work beyond 40 hours in a week. The law increases wage income, and it discourages employers from scheduling employees for more than 40 hours in a week, thereby spreading work to more employees.

This time-and-a-half for overtime provision applies to almost all hourly workers as well as to millions of salaried workers who are not excluded by certain exemptions, most notably the exemptions for professional, administrative, and executive employees. "Exempt" employees are not entitled to any pay at all for their overtime work, and they are also exempt from the minimum wage. The exemptions, found in Title 29, Part 541 of the Code of Federal Regulations, include both "duties" tests (is the primary duty of the job executive, administrative, or professional?) and a salary test (is the employee paid a bona fide weekly salary and does it exceed $455 a week?). The salary test, if set high enough, could by itself protect tens of millions of workers from exemption, since anyone who makes less than the threshold is automatically outside the exemption and therefore entitled to overtime pay.

From 1938 until 1975, the salary level was adjusted frequently to account for wage growth and inflation. But the Carter Administration raised the level so late in its term that President Reagan was able to withdraw the rule before it took effect. There was no increase between 1975 and 2004, so the salary threshold for exemption fell below weekly earnings at the minimum wage. In 2004, the George W. Bush Labor Department set the threshold at an unreasonably low level of $455 a week, which amounts to $23,660 a year, a poverty income (the poverty level is $23,850 for a family of four) and a salary far below what a true executive or professional would be paid.

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[9] CBO estimates that 16.5 million low-wage workers would directly benefit and another 8 million would indirectly benefit.

[10] Sylvia A. Allegretto and Kai Filion, "Waiting for Change: The $2.13 Federal Subminimum Wage," Economic Policy Institute, Briefing Paper, 2011, http://epi.3cdn.net/9f96b520034e8a6621_dom6i2alu.pdf.

The Government Accountability Office (GAO) in 2000 reported that an increasing number of American workers — between 19 and 26 million (20 to 27 percent of the full-time workforce) in 1998 — were subject to the exemptions. The higher estimate of 26 million represents an increase of 9 million workers over GAO's 1983 estimate of 17 million exempt full-time wage and salary workers.

Returning the salary threshold for exemption to its 1975 level (adjusted for inflation) would mean a cutoff of $984 per week. At this level, an estimated 5 to 10 million salaried workers would be newly guaranteed the right to overtime pay. The threshold should be indexed to inflation hereafter.

Another anomaly in the salary thresholds needs attention. So-called computer professionals are exempt even if they are paid hourly, as long as their wage exceeds $27.63 an hour. This threshold was originally set in 1991 at 6.5 times the minimum wage, but in 1996 Congress froze it at 6.5 times $4.25 (the minimum wage of 1991), rather than allowing it to adjust upward over time. If the threshold had kept pace with the minimum wage, it would be about $47 an hour today. The computer professional salary threshold should be restored to its original relationship with the minimum wage, i.e., 6.5 times greater.

Invigorate Wage and Hour Enforcement

When Congress enacted the FLSA in 1938, it funded one Wage and Hour Division (WHD) investigator for every 11,000 workers. By 2007, when there were only 731 WHD investigators for the entire nation, the ratio had fallen to 1 inspector for every 164,000 covered employees. Even today, with around 1,000 WHD investigators, the odds of any particular employer being inspected in any given year are trivial.

We assume that today's investigators are more productive than their counterparts in the 1930s and 1940s, but enforcement statistics don't show much progress since 1980, when there were about 50 percent more investigators per employee than there are today. Equally important, the number of regional Department of Labor lawyers, the staff that must litigate the legal cases when employers contest citations, is smaller today than it was in 1980, and the ability to bring enforcement actions in court is about half what it was then.

From fiscal years 1997 to 2007, the number of WHD enforcement actions decreased by more than a third, from approximately 47,000 in 1997 to just under 30,000 in 2007.[11] According to WHD, the total number of actions decreased over this period because of three factors: the increased use of more time-consuming comprehensive investigations, a decrease in the number of investigators, and the screening of complaints to eliminate those unlikely to result in violations. In FY 2013, WHD completed 33,146 compliance actions, and obtained agreements to pay nearly $250 million in back wages for more than 269,000 workers.[12]

This decades-long enforcement decline has contributed to widespread lawlessness and the loss of billions of dollars of wages each year. A survey of 4,387 low-wage workers in New York, Los Angeles, and Chicago[13] found that one in four workers were paid below the minimum wage in a given workweek; 76 percent of those who worked overtime were not paid the required time-and-a-half; more than two-thirds

[11] David Weil, *Improving Workplace Conditions Through Strategic Enforcement,* Boston University 2010, http://www.dol.gov/whd/resources/strategicEnforcement.pdf.

[12] "FY 2015 Department of Labor Budget in Brief," http://www.dol.gov/dol/budget/2015/PDF/FY2015BIB.pdf.

[13] Annette Bernhardt et al., "Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities," Center for Urban Economic Development, National Employment Law Project, and UCLA Institute for Research on Labor and Employment, http://www.unprotectedworkers.org/index.php/broken_laws/index.

did not get the meal breaks they were entitled to; and, of those who came in early or stayed late, 70 percent did not get any pay at all for the work they performed outside their regular shifts. In any given week, two-thirds suffered from wage theft to one degree or another. Total wages lost in a year in just three cities amounted to $3 billion.

As federal enforcement has declined, private litigation has filled some of the gap. The number of FLSA lawsuits filed in federal court each year has more than quadrupled since 2000, from 1,854 to 7,764.

A great deal needs to be done to restore law and order to the low-wage labor market and to wage and hour compliance generally. First, Congress needs to increase funding for the Wage and Hour Division. We recommend doubling the number of investigators and the legal staff required for effective enforcement. Second, the outdated fines in Section 16(e) of the FLSA must be increased to make non-compliance expensive and painful for violators, rather than just a routine cost of doing business. The maximum civil money penalty for a willful or repeat violation of the minimum wage or overtime requirements is $1,100; this should be increased to at least $5,000. The maximum penalty for a willful violation of the child labor laws is $10,000, a figure unchanged since 1990. It should be raised to at least $20,000 and indexed for inflation thereafter. Third, over the last 15 years the WHD has sought civil money penalties in fewer than half of the cases it prosecuted involving repeat violations. The WHD should be instructed to seek penalties in every case where they are available.

For fiscal year 2015, the Department of Labor has requested $39 million for an additional 300 investigators. To double the current compliance staff would require an additional 700 investigators, at a cost of about $90 million. The Solicitor's Office provides legal services for the entire Department of Labor; the part devoted to WHD litigation is a small part of the total $85 million spent on personnel.

Crack Down on Unpaid Internships

Unpaid internships present a special case of lax enforcement. Under the FLSA, all private, for-profit employment must be compensated at a level equal to or greater than the minimum wage, but vocational training and certain internships, where the intern is closely supervised and the employer does not derive an immediate economic advantage from the internship, are not considered employment. Unfortunately, millions of young people, and even older workers, have worked for employers that called their employment an internship and chose (illegally) not to pay them the minimum wage — or any wage.

The illegal unpaid internship is a growing phenomenon and is so firmly rooted in certain industries like publishing, fashion, film, and the media that it is difficult to obtain entry-level, paid employment without having worked as an unpaid intern. This practice is especially hard on today's college students and graduates, many of whom assume huge debts to pay for their education. The practice is spreading to law firms, public relations firms, and other businesses.

One effect of these unpaid internships is to make the bottom rung on the career ladder harder to reach: by delaying the point at which young people begin to be paid for their work, it also delays later raises. Another effect is to change norms and persuade employers that they are entitled to have employees work for free, that it is enough that they are giving young people "work experience" without actually paying them for the work they do. Once businesses believe they can hire college graduates without paying them, why would they pay any new worker, whatever his or her age? The employer can rationalize that the worker is getting the benefit of work experience and a line on a resume.

Unpaid internships lower young workers' expectations and demands, and undermine the notion that the minimum wage is the wage floor beneath which no employer may crawl. Evidence from surveys

conducted by the National Association of Colleges and Employers shows that unpaid internships lead to poorer employment opportunities than paid internships, both in terms of the likelihood of receiving job offers and in the salary offered.

We recommend that the Labor Department greatly increase enforcement of the minimum wage with respect to unpaid internships, and we encourage the Department of Labor to initiate high-profile prosecutions in the near future.

Address Underwork and Unstable Work Schedules

In 2000, at the peak of the 1990s business cycle, 3.2 million people were working part time but would have preferred full-time work. In 2007, the next business-cycle peak, the number was 4.4 million, a 38 percent increase.[14] In 2012, there were 8.1 million involuntary part-timers, nearly double the 2007 number.[15] Much of the shift to part-time workers is due to the weakness of the economy, but some of it is due to new labor practices that increase profits at the expense of workers' financial and physical health.

A growing problem for workers, particularly in the service sector, is scheduling instability and the lack of full-time work. More firms are adopting "just-in-time" part-time scheduling to cut labor costs. Under these practices, firms try to maximize the number of part-time employees to avoid paying the benefits that come with full-time work. Firms also adjust employees' work hours week-to-week, day-to-day, and even within a shift due to customer traffic and also to avoid paying overtime.[16]

Burt P. Flickinger III, a consultant for the retail industry, says that, "Over the past two decades, many major retailers went from a quotient of 70 to 80 percent full time to at least 70 percent part time across the industry."[17] David Ossip, a workforce scheduling software maker, says, "Many employers now schedule shifts as short as two or three hours, while historically they may have scheduled eight-hour shifts."[18]

Unlike in the past, many of these part-time workers have no long-term fixed schedules. A former Banana Republic employee states, "My schedule was always posted at the last minute, sometimes only two or three days in advance."[19] A former Wal-Mart employee says, "From week-to-week, I never had the same hours, and it was never consistent in the week. I'd have mid-shift one day, night the next, and then on the next day have the morning."[20]

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[14] Mishel et al, p. 350.

[15] Authors' analysis of Current Population Survey data from the U.S. Bureau of Labor Statistics.

[16] Charlotte Alexander and Anna Haley-Lock, "Not Enough Hours in the Day: Work-Hour Insecurity and a New Approach to Wage and Hour Regulation," IRP Discussion Paper No. 1417-13, Madison, WI, Institute for Research on Poverty, University of Wisconsin-Madison, 2013; Peter Downs, "How Part-Time Schedules and Irregular Hours Keep Working Americans Poor," *Commercial Appeal* (Memphis), December 16, 2012; Steven Greenhouse, "A Part-Time Life, As Hours Shrink and Shift." *New York Times*, October 27, 2012; and Stephanie Luce and Naoki Fujita, *Discounted Jobs: How Retailer Sell Workers Short* (New York: Retail Action Project), 2012.

[17] Greenhouse.

[18] Greenhouse.

[19] Luce and Fujita, 8.

[20] Downs.

While these practices may increase a firm's profits, they increase the financial hardship of workers. In the service sector, wages are already low[21] and may not be sufficient to lift a family out of poverty, especially when one assumes realistic family budgets.[22] Restricting low-wage workers to part-time schedules makes it difficult for workers to survive, and leads to increased reliance on food stamps and Medicaid.[23]

These practices also place limits on workers' upward mobility. Erratic schedules make it nearly impossible for a part-time worker to obtain a second part-time job to make ends meet. It also makes it difficult for workers to attend school to improve their credentials and skills.[24] Irregular work schedules also can have negative physical and mental health effects by leading to poor sleep, lack of exercise, and social isolation.[25]

These practices also potentially have negative intergenerational effects. Erratic work hours make scheduling child care difficult, thereby increasing the risk that children will be poorly supervised or completely unsupervised. Children growing up with a parent or parents subject to just-in-time part-time work may also be victims of the effects of their parents' low wages and poor physical and mental health. None of these conditions is beneficial to children's well-being.

A full-employment economy makes it more difficult for employers to engage in these practices. Employers cannot employ three part-time workers to fill one full-time position if they can find only one worker to hire. If employers have to compete for part-time workers, the firm offering predictable work schedules will win out over the firm with erratic just-in-time scheduling. It is the many years of a slack labor market that makes just-in-time scheduling possible.

While we wait for the development of a full-employment economy, workers need protections. In the past, unions would protect workers from the abuse of erratic work schedules, but with the decline of unions in general and the weakness of union density in the service sector in particular, union protection is, at present, a limited solution.[26]

Workers should be paid for a minimum number of hours if they are called in for work. Currently, in most states workers can be scheduled for a six-hour shift, for example, but be sent home after one hour and receive only one hour of pay, even though commuting costs might exceed the pay they receive. So-called reporting-pay laws require that workers receive a minimum number of hours of pay even if their work shift is cut short or cancelled at the last minute. In New York, a worker sent home after one hour of a six-hour shift must nevertheless be paid for four hours of work.[27] This kind of reporting-pay law should be replicated in every state.

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[21] See the median wage for "food preparation and serving related occupations" and "sales and related occupations," in *Occupational Employment and Wages — May 2012,* U.S. Department of Labor, Bureau of Labor Statistics, Table 1, 2013.

[22] See the Economic Institute's Family Budget Calculator at http://www.epi.org/resources/budget/.

[23] Downs; Greenhouse; Luce and Fujita.

[24] Downs; Greenhouse; Luce and Fujita.

[25] M.F.J. Martens, F.J.N. Nijhuis, M.P.J. Van Boxtel, and J.A. Knottnerus, "Flexible Work Schedules and Mental and Physical Health: A Study of a Working Population With Non-Traditional Working Hours," *Journal of Organizational Behavior* 20: 35-46, 1999; and Ann Levin, "Working Irregular Hours Can Be Hazardous to Your Health, Psychologists Say," *Los Angeles Times*, June 28, 1992.

[26] Alexander and Haley-Lock.

[27] Alexander and Haley-Lock, pp. 12-15.

The problem for just-in-time workers, however, is greater than just showing up for work and being sent home without work or pay. They need more predictable schedules so that they can plan their lives, properly take care of their children, and develop regular sleep and recreation schedules. At minimum, work schedules should be set a month in advance. By January 1, for example, workers should be able to know when they will be working in February. While a small minority of workers in a large firm may be allowed to have "on-call" schedules — schedules that are set the day of the work — these workers should receive additional compensation at least comparable to overtime pay. Additionally, the law should place limits on the number of part-time and on-call workers per firm for larger firms. These policies together with full employment will put workers back on track to having jobs that will allow them to take care of themselves and their families.

Reform Immigration Laws to Block the Legal and Illegal Use of Foreign Workers to Lower Wages and Job Quality

The Supreme Court's 2002 holding in *Hoffman Plastic Compounds v. NLRB,* that so-called illegal aliens have no right to work in the United States and therefore can have no remedy under the National Labor Relations Act (NLRA) for a termination in retaliation for union activity, has emboldened employers to use illegal firings to break strikes and discourage union organizing. In the recent case of Palermo's Pizza in Milwaukee, for example, the company reported striking undocumented employees to the Department of Homeland Security and terminated 75 of them.[28]

Whatever the overall effect of immigration might be on wages, an effect that in theory depends greatly on whether the immigrants compete with or complement domestic workers, there is little dispute that deportable, vulnerable undocumented workers with no enforceable right to organize drag down wages for everyone.

Research by Atlanta Federal Reserve Bank economist Julie Hotchkiss and colleagues finds that workers employed by single-establishment firms that hire undocumented workers can expect to earn wages somewhat lower than they would at a firm that does not employ undocumented workers.[29] The largest negative impact is found among workers in agriculture employed in firms in which 20 percent or more of the employees are undocumented. Documented workers in these firms earn roughly 3 percent less than they would if employed in an agricultural firm that does not hire undocumented workers.

A more significant effect is seen at the firm level. Employing undocumented workers reduces a firm's hazard of exit (i.e., increases its survival rate) by 19 percent, because the firm receives an advantage over competitor firms that employ only documented workers. The advantage to firms from employing undocumented workers increases as more firms in the industry do so, decreases with the skill level of the firm's workers, increases with the breadth of a firm's market, and increases with the labor intensity of the firm's production process.

To protect the interests of documented and undocumented workers, *Hoffman Plastic* should be repealed legislatively, and as many as possible of the 8 million undocumented workers in the United States should be given legal status.

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[28] Worker Rights Consortium, "Worker Rights Consortium Assessment: Palermo Villa, Inc. (Milwaukee, WI) Findings, Recommendations, and Status," 2013, http://www.news.wisc.edu/assets/30/original/WRC_Assessment_re_Palermo_Milwaukee_WI_2-5-2013.pdf?1360263103.

[29] Julie Hotchkiss, Myriam Quispe-Agnoli, and Fernando Rios-Avila, *The Wage Impact of Undocumented Workers,* Federal Reserve Bank of Atlanta Working Paper Series No. 2012-4.

The ills of America's immigration system do not start and end with undocumented workers. U.S. guestworker programs, which grant visas for foreign workers to come to the United States for various kinds of employment, have three fundamental flaws:

- The wage-setting process virtually guarantees that guestworkers will undercut domestic wages. The extent varies by program, but has been 25% or more in the case of the H-2B and H-1B visas (through which U.S. employers temporarily hire foreign workers). The J visas (for work- and study-based exchanges) don't mandate a prevailing wage at all, and L visas (for intra-company transfers to the United States by multinational companies) allow payment of home-country wages, even when a U.S. employee is displaced by an L visa holder.
- The fact that the foreign workers are tied — sometimes very tightly — to a single employer and are in a vulnerable status limits their bargaining power. H-1B visa holders can spend six years or longer virtually indentured to a single employer (and always are limited to working for an employer certified in the H-1B program).
- The weak or non-existent labor market tests allow employers to ignore the supply of local workers. The result is higher unemployment and less employee bargaining power.

At first glance, these three problems might appear to be minor shortcomings because the number of guest workers in any given visa program seems small — but only at first glance. The H-2A program admitted 65,000 seasonal farmworkers in 2012; the H-2B program admits 115,000 low-wage workers, and there are currently more than 650,000 H-1B highly skilled non-immigrant working in the United States; the L-1 and L-2 visas intra-company transfer visas have brought in more than 600,000 workers, and the J-1 and J-2 student, trainee and internship programs admit about 250,000 workers a year. Even without the additional guestworkers provided for in the comprehensive immigration reform legislation Congress is debating, 1.8 million guestworkers are currently employed in the United States.

The statutes authorizing guestworker visas should be amended to require payment of a wage no lower than the average wage for the occupation in that locale.

End the Misclassification of Employees as Independent Contractors

Employers that misclassify their employees as independent contractors typically are motivated by tax avoidance and by an urge to cheat on workers' compensation premiums rather than by wage theft. But employers nevertheless do try to escape FLSA or state law overtime liability by calling their employees independent contractors, as in a Utah case prosecuted by the Department of Labor in 2013 involving 800 construction workers.[30] In another case last year, the department recovered over $1 million for cable installers in Kentucky who had been wrongly misclassified.[31]

Audits show that misclassification is a widespread and costly problem. In a 2009 report, GAO found that independent contractor misclassification cost the federal government approximately $2.72 billion in 2006.

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[30] Wage and Hour Division, "U.S. Labor Department Sues Salt Lake City Companies to Secure Overtime Back Wages and Damages for More Than 800 Workers," Press Release, U.S. Department of Labor, 2013, http://www.dol.gov/whd/media/press/whdpressVB3.asp?pressdoc=Southwest/20130411_1.xml.

[31] Wage and Hour Division, "U.S. Department of Labor Recovers More Than $1 Million in Back Wages and Damages for 196 Employees Misclassified as Independent Contractors," Press Release, U.S. Department of Labor, 2013, http://www.dol.gov/whd/media/press/whdpressVB3.asp?pressdoc=Southeast/20130509.xml.

The Joint Committee on Taxation estimated that $7.6 billion in additional revenue could be raised over 10 years if the proposals in the President's fiscal year 2013 budget to issue guidance about worker classification and require reclassification of all misclassified workers were carried out.

According to the National Council of State Legislators,

> Rhode Island estimated that more than 6 percent of its workers were improperly classified as independent contractors, costing the state an estimated $50 million in uncollected income, unemployment and other payroll taxes. A study on misclassification in Illinois showed the state lost close to $125 million in income tax revenue from 2001 to 2005. A New York task force investigating workplace fraud found that, in 2008, misclassification cost the state more than $4.8 million in unemployment taxes alone, a significant loss when that tax revenue is needed to pay unemployment claims.[32]

In California in 2009, 29 percent of audited businesses erroneously treated workers as subcontractors; the Employment Development Department estimated that the misclassification resulted in the loss of $137 million in state taxes.[33] And a review of state studies by the National Employment Law Project found that 30 percent or more of employers in some states misclassified their employees as independent contractors.[34]

Misclassification hurts honest businesses, particularly unionized employers that pay into health and welfare funds in addition to workers' compensation, unemployment insurance, and Social Security. In California, workers' compensation premiums average 2 percent of payroll overall but 6 percent in the construction industry. Firms that cheat can underbid their competition. When law-abiding firms lose work or go out of business, it leads to a race to the bottom and lower wages.

Employees classified as independent contractors cannot organize unions and bargain collectively under the National Labor Relations Act.

Fight Back Against Anti-Union Laws and Attacks on Collective Bargaining

As much as one-third of the growth in income inequality has been attributed to the decline in unionization since 1973.[35] Many factors enter into this decline — from a high of 34 percent of the private-sector workforce to a current 7 percent — including employer hostility to unions, international trade and globalization, deregulation of various industries in which unionization was supported by limits to entry and minimum pricing rules, failures of the unions to invest in organizing, and changes in corporate structure. This includes the overall transformation of the employment relationship so that workers increasingly are excluded from coverage or somehow prevented from bargaining with the real party in control, as in the case of janitors hired by a management company who work in buildings owned by another company or hotel maids who work for a contractor rather than the name brand hotel company. But the changes in the

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[32] National Conference of State Legislatures, "Employee Misclassification, n.d., http://www.ncsl.org/research/labor-and-employment/employee-misclassification-resources.aspx.

[33] Robert Dresser, "Re: Friends of the Board Brief by National Employment Law Project," Letter, National Employment Law Project, September 26, 2012, http://nelp.3cdn.net/97c605879ea7da684b_k6m6ixadj.pdf.

[34] Sarah Leberstein, "Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries," National Employment Law Project, 2010, http://www.faircontracting.org/PDFs/independent_contractor/IndependentContractorCosts.pdf.

[35] Bruce Western and Jake Rosenfeld, "Unions, Norms, and the Rise in U.S. Wage Inequality," *American Sociological Review* 76:513, 2011, http://scholar.harvard.edu/files/brucewestern/files/american_sociological_review-2011-western-513-37.pdf.

legal rules governing labor relations and norms of conduct over the last 40 years have also been hugely important in driving down union coverage.

Collective bargaining as a wage-raising mechanism has been undermined in three major ways.

First, *the ability to get a union and engage in bargaining at all has been undermined by employer practices and court rulings:*

- In *Lechmere v. NLRB* (1992), the Supreme Court gave employers the right to keep non-employee union organizers off their property — even their parking lots.
- Courts have given employers the right to deliver captive-audience speeches (where employees are compelled to listen to anti-union propaganda without challenge) while denying unions access to employees. In *NLRB v. Prescott Industrial Products Co.* (1974), the U.S. Court of Appeals refused to enforce an NLRB decision that disallowing employee questioning during a captive-audience meeting constituted an unfair labor practice; in *Litton Systems, Inc.* (1968) the National Labor Relations Board announced that "[a]n employee has no statutorily protected right to leave a meeting."
- Employer lawlessness is widespread and aggressive: illegal threats against union supporters, interrogation, discipline, and firings are common. In her research, Cornell researcher Kate Bronfenbrenner has documented an intensification of illegal anti-union activity.[36]
- Managers and even workers with minimal supervisory authority have been excluded from the NLRA's definition of "employee" and cannot be unionized.[37]
- College and university faculty have been excluded from coverage on the grounds that they are management.[38]
- As discussed above, the Supreme Court's 2002 holding in *Hoffman Plastic Compounds v. NLRB* means that undocumented workers are effectively unprotected.

Second, *courts have ruled that unions have no right to be involved in the most important decisions affecting the right of employees to be employed and earn wages:*

- Unions cannot compel management to bargain over decisions about investment or withdrawal of capital. In *Darlington v. NLRB* (1965), an employer closed its plant after a union won an election to represent the employees; the Supreme Court said a decision to go out of business was lawful even if motivated by hostility to the union. In *First Nat'l Maintenance Corp. v. NLRB* (1981), the court held that no bargaining is required over plant-closing decisions. And in *International Union, UAW v. NLRB* (1972), the U.S. Court of Appeals held that the sale of a business unit is not a mandatory subject of bargaining. The law thus gives employers an almost unlimited right to abandon the bargaining relationship; the threat looms over all wage bargaining.
- Several key cases have weakened successorship protection, so that even when employees remain employed, they can lose their contractual rights and the right to bargain. In *NLRB v. Burns*

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[36] Kate Bronfenbrenner, "No Holds Barred: The Intensification of Employer Opposition to Organizing," Economic Policy Institute, 2009, http://www.epi.org/publication/bp235/.

[37] *NLRB v. Bell Aerospace* (1974); *NLRB v. Kentucky River Community Care, Inc.* (2001).

[38] *NLRB v. Yeshiva University* (1980).

International Security Services, Inc. (1972) and *Howard Johnson Co. v. Detroit Local Joint Exec. Bd.* (1974), the Supreme Court ruled that successor employers do not have to honor an arbitration clause and can set new terms and conditions even when they retain a majority of the predecessor's employees.

Third, *unions have had their economic weapons weakened even as employers' weapons have been strengthened.* From the beginning, the NLRA was insufficiently protective of collective rights and the bargaining power of employees and unions; remedies for employer violations of the right to organize or act collectively, for example, are so weak as to have little or no deterrent effect. But decades of amendments to and reinterpretation of the law have further weakened employee power:

- By 1959, the Taft-Hartley Act and the Landrum-Griffin Act had eliminated the unions' most powerful economic weapons, the secondary boycott (which allowed a union to pressure other employers to stop doing business with an employer with whom the union had a dispute) and hot cargo agreements (which required employers to refuse to do business with non-union companies).
- The NLRA prohibits discrimination against employees who engage in protected concerted activity, including strikes. But permanent replacement of strikers is legal even when the employer refuses to rehire union members who engaged in a protected economic strike.[39]
- In *Brown Food Store* (1965) the Supreme Court approved the use of defensive lockouts (where the employer, in anticipation of a strike, refuses to let employees work in order to protect its products or customers) and even the use of replacement workers during a lockout.
- In *American Shipbuilding* (1965) the Supreme Court approved the previously illegal offensive lockout, where the employer shuts out the workers to pressure them into quickly agreeing to the employer's terms.
- Finally, the NLRB and various appeals courts approved offensive lockouts combined with replacement of the employees — an especially harsh way for the employer to pressure employees.[40]

The institution of collective bargaining has also been limited by attacks on the ability of unions to support themselves financially, a fight that happens largely at the state level but which has its foundation in federal law.

Right-to-work laws, which states use to outlaw union security agreements (collectively bargained contracts that require employers to enforce the employees' duty to pay dues or fees to support collective bargaining) were authorized by the Taft-Hartley Act in 1947. Seventeen states had passed right-to-work laws by 1958; one state was added in 1963; one in 1975, one in 1985, one in 1993, one in 2001, and most recently, Indiana and Michigan, for a total of 24.

Research by Heidi Shierholz and Elise Gould[41] shows that the presence of a right-to-work law in a state is associated with lower wages and with a reduced chance that an employer will provide health insurance coverage or a pension to employees. Wages in those states are 3.2% lower than in states that allow union security agreements, after controlling for demographic and socioeconomic variables as well as state

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[39] *NLRB v. MacKay Radio and Tel. Co.* (1938).

[40] *NLRB v. Harter Equipment* (1987).

[41] Heidi Shierholz and Elise Gould, The Compensation Penalty of "Right-to-Work" Laws, Economic Policy Institute, 2011, http://www.epi.org/publication/bp299/.

macroeconomic indicators. The average worker in a right-to-work state earns about $1,500 a year less than a similar worker in a non-right-to-work state.

In order to enhance workers' bargaining rights and allow them to conduct negotiations on a bare semblance of a level playing field, every case mentioned above should be overturned legislatively. The right of unions to engage in secondary boycotts should be restored; Section 14(b) of the NLRA, which authorizes right-to-work laws, should be repealed; and significant penalties should be legislated for unfair labor practice violations that impair the right of employees to bargain collectively. The National Labor Relations Board has the authority to make its election process more efficient by eliminating wasteful waiting periods and taking limited steps to provide unions better access to employees. The procedures for representation cases the NLRB recently proposed[42] deserve support and should be issued as a final rule.

These changes, and others, will be needed to restore employee bargaining power and enable a fairer distribution of corporate revenues. It may be the case that the NLRA model is obsolete or irretrievably broken and that an entirely new system of collective bargaining based on industry sectors, rather than individual companies — perhaps with active government involvement — will be required to provide employees with sufficient bargaining power to share fairly in corporate revenues.

Conclusion

Globalization, technology change, and other large forces have had a negative impact on the bargaining power and wages of the typical American worker. But public policy has also played an important role in weakening the ability of workers to demand higher wages. The results are there for all to see: the bottom 60 percent of wage earners are paid less in inflation-adjusted terms today than they were in 1973, despite huge increases in national income and wealth. If wages for the typical worker are ever to increase, if we are ever to recreate the shared prosperity of the postwar decades, we will need broad changes in labor standards and their enforcement, including the changes outlined in this paper.

[42] Office of Public Affairs, "The National Labor Relations Board Proposed Amendments to Improve Representation Case Procedures," NLRB, 2014, http://www.nlrb.gov/news-outreach/news-story/national-labor-relations-board-proposes-amendments-improve-representation.