



COLUMBIA LAW SCHOOL
NATIONAL STATE ATTORNEYS GENERAL PROGRAM

Enforcement of State Wage and Hour Laws: A Survey of State Regulators

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EXECUTIVE SUMMARY

In an effort to determine the extent and nature of state enforcement of state wage and hour laws, the National State Attorneys General Program at Columbia Law School developed a comprehensive survey on wage and hour enforcement, distributed it to state agencies responsible for such enforcement, and analyzed the responses. Thirty-seven states and the District of Columbia completed at least some portion of the survey. The results are shared here for the purpose of creating an objective depiction of state activity in wage and hour enforcement that we hope will serve as an inspiration and jumping-off point for further research, by the states and others. A major goal of the project was to determine not only the methods and extent of enforcement, but also states' procedures and abilities to track and share data about their enforcement efforts. No study of this breadth has been conducted on a national scale.

For nearly one hundred years, state laws have played a crucial role in protecting employees' rights and creating a level playing field for businesses. Minimum wage laws exist in 45 states, of which 16 (plus the District of Columbia) set a standard higher than the federal minimum. Thirty-two states also have overtime laws.

The mere existence of state wage and hour laws does not mean the standards they establish are followed. In fact, pervasive violation of both federal and state wage and hour laws across the United States is well documented. Without meaningful enforcement by state regulators, some employers will simply disregard their legal obligations, putting the majority who abide by the law at a significant competitive disadvantage. This creates a regulatory race to the bottom by states as they compete to attract businesses. Insufficient enforcement therefore has a considerable negative impact on employees and their families, law abiding businesses, and the communities in which they reside.

The survey sought information pertaining to these basic questions:

- Which division of state government is responsible for enforcing the wage and hour laws of each state?
- What resources and methods does this agency bring to bear in fulfilling its mandate?
- What data does each state collect and have accessible regarding its enforcement efforts?
- What have been the results of each state's enforcement efforts?
- How have the answers to these questions changed over the last five years?

In seeking answers to these questions, the survey sought specific numerical data relevant to evaluating state wage and hour enforcement efforts (such as the number of wage complaints received and the total amount of wages recovered), as well as contextual information (such as the types of procedures used and the budget allocated to wage and hour enforcement). The report's observations of trends in data, and possible explanations for these trends, were informed by interviews with various state officials and stakeholders in the area of wage and hour enforcement.

Due to the breadth of the survey, the range of information provided by respondents and the difficulty in securing responses to follow-up questions, we did not attempt to verify the accuracy of all data. In addition, in many instances, states provided information that was not responsive to the question posed, or did not provide any response at all. Each state should therefore conduct a comprehensive study of wage and hour enforcement

within its borders, and to seek out the perspectives of the business community, private bar, non-profits advocacy organizations and other stakeholders in this area.

The report's discussion section, though by no means exhaustive of the multifarious issues implicated by this research, offers basic observations regarding trends in the data and in the states' execution in responding to the survey. It also identifies areas that could benefit from further study and structural dynamics that might be at play in various areas of wage and hour enforcement. Some highlights of the discussion section follow:

WORKFORCE STATISTICS

- With only a few exceptions, states saw a large increase in the number of low-wage workers in 2009. This has coincided with cuts or freezes in the amount of resources dedicated to wage and hour enforcement in most states. If it is true that more low-wage workers will generate more wage and hour violations, then state wage and hour regulators are being stretched ever thinner in their efforts to enforce the law.

WAGE AND HOUR ENFORCEMENT ENTITIES

- Representatives from Alabama, Florida, Georgia, Louisiana and Mississippi reported that they do not have a state agency that enforces wage and hour standards. In these states, inquiries regarding wage and hour enforcement are referred to federal regulators or private attorneys.
- In most states, primary responsibility for wage and hour enforcement is assigned to a labor agency that also address such issues as workers' compensation, employment discrimination, public works, employee misclassification, child labor, licensing and certification, and worker training. About a third of the states locate wage and hour enforcement within a discrete wage and hour unit.
- It is difficult to track the resources and authority allotted to wage and hour enforcement entities, because internal shifts in funding and personnel may be made toward or away from wage and hour enforcement, while the publicly reported budget and human resources of the broader division of which the wage and hour entity is a part remains unchanged.
- The state attorney general's office was the agency most frequently cited as providing substantive support to the wage and hour enforcers. Attorneys general perform functions including representing the primary labor agency in civil and collections matters, serving as the hearing officer for administrative hearings in wage and hour investigations, and enforcing the orders of the primary labor authority. In two states, Massachusetts and New York, the attorney general's

office pursues its own independent wage and hour investigations and enforcement measures.

HUMAN RESOURCES

- Over the last five years, most state governments saw reductions in full-time equivalent (FTE) employees, instituted furloughs, or both. Reductions in budgets corresponded with reductions in staff, and budget increases correlated with increases or maintenance of staff levels.
- Although staffing levels might fluctuate for numerous reasons, the data suggests that the reduction of enforcement FTE's occurred because of the overall decrease in state revenues and not a shift in priorities.

METHODS OF IDENTIFYING VIOLATIONS

- The most common method for identifying wage and hour abuse was individual wage claims filed by employees. Only Kansas, Kentucky, Maine, New York and Massachusetts made significant use (more than 5% of enforcement work) of procedures other than individual complaint processes. Several respondents, including the District of Columbia, Kentucky, Massachusetts, Nebraska and Utah, noted that their use of methods other than an individual complaint process was limited due to budget and staffing shortages.
- Those states that engaged in proactive enforcement generally targeted these efforts on particular industries, employers and types of law. The most common areas of focus for proactive investigations were prevailing wage and employee misclassification violations, particularly within the construction industry.
- Because they rely largely on the initiative of employees to commence the complaint process, the extent to which individual complaint systems are successful depends on employees' awareness of their rights and on their belief that they will not be subject to retaliation for filing a complaint. Research should be performed into the substance and enforcement of states' anti-retaliation laws. Additionally, generating data on the demographics, occupations, positions and salaries of those who file wage complaints would help identify the classes of employees that are affected by wage and hour violations, as well as the classes that are sufficiently informed and empowered to file complaints.

ENFORCEMENT PROCEDURES AND RESOURCES

- In order to enforce determinations that a wage and hour violation has occurred, most states use a combination of mediation between the employer and employee, administrative hearings, civil lawsuits by Labor Department representatives or the attorney general's office, and private rights of action.

- While most states did not have attorneys housed within the departments of their primary wage and hour enforcers, nearly all have access to government lawyers of some kind. Legal action by states against violators is rare. It appears that most legal action against employers is undertaken by the private bar and by nongovernmental organizations. Referral to the attorney general's office is generally reserved for particularly large or complex cases involving multiple employees.
- Further research is needed to determine the relative success of various enforcement procedures within and across states. This would require the creation of an accurate measurement of "success." This research would reveal what procedures are the most cost-efficient and effective, and whether any procedures are more effective for one type of industry than for another.

ENFORCEMENT DATA

- For the states providing detailed year-by-year data, there was a general trend of an increase in complaints between 2005-06 and 2008-09 and then a decrease from 2008-09 until the present. At least one respondent, Wisconsin, noted specifically that they had experienced reduced numbers of complaints during poor economic times in the past. Further research should examine the correlation between economic conditions and the number and type of wage and hour violations, the willingness of workers to file complaints and the ability of enforcers to collect wages/fines assessed.
- Few states could provide detailed data on the resolution of claims. A study of the systems used by state wage and hour enforcers to collect, track and access data on their own activities could assist in determining the extent to which both regulators and legislators are able to appraise past performance and make informed policy decisions.
- Although few states cited the use of mediations specifically, the piecemeal data provided suggests that across states, a large majority of complaints are resolved through negotiation or mediation without resort to more coercive measures.
- Only a few states regularly refer cases to their attorney general's office or district attorney for civil or criminal litigation. These include California, Connecticut, North Dakota, Oregon, West Virginia and Wisconsin. New York, while it does not regularly refer cases to its attorney general, regularly conducts administrative hearings.
- A particularly noticeable trend was the rarity of criminal prosecution reported by respondents. This may simply be a consequence of information of criminal prosecutions being tracked or collected elsewhere, such as the offices of the attorneys general. Alternatively, local prosecutors might be solely responsible for pursuing criminal penalties and they, in turn, may never notify the state labor

agency of their actions. Greater communication between labor departments, attorney general's offices and local prosecutors would enhance both enforcement efforts and the tracking of these efforts.

- It would be useful to explore further the use of criminal sanctions to address wage and hour violations. Because a number of states set prison sentences for wage theft, it would be important to know if criminal prosecution and jail time are indeed as rare as they appear and, if so, what are the goals and philosophy behind states' decision to treat wage theft differently from other forms of theft.

COMPLAINT PROCESSING AND COMPLAINT TIMES

- Complaint processing and resolution times vary according to how such times are measured by each state. In states such as Indiana and South Dakota that rely on voluntary compliance or referral to the employee for private action, resolution by the state enforcement agency will likely be achieved much more quickly than in states such as California, New York and Connecticut that utilize extensive administrative and legal proceedings to secure compliance.
- Less than a third of respondents reported data on how response times had changed in the past five years. Of those that did, a slim majority reported that processing timelines had gone down or stayed the same. A minority reported that resolution times had increased over the past five years. Several states, Rhode Island, Kentucky, Wisconsin and Hawaii, cited staff shortages as reasons for longer processing times.
- States that have had success lowering or maintaining processing times in spite of funding, staffing or workload challenges could likely provide beneficial information to others. The Interstate Labor Standards Association provides a valuable forum for such communication.
- Approximately two-thirds of respondents provided detailed data on the amount of wages recovered each year over the last five years. Of these, nearly twice as many saw an increase in the wages collected as saw a decrease.

RESULTS OF WAGE AND HOUR ENFORCEMENT

- Information provided by states on the amount of criminal referrals and penalties each year was too sparse to be able to identify any significant trends. It would be beneficial to examine the extent to which states treat wage theft as a criminal matter, and particularly about the role of local prosecutors, about which this survey did not ask.
- A majority of states do not appear to make significant use of fines or penalties. Employers have little incentive to obey wage and hour laws if the only repercussion for violating them is to have to pay wages owed in the first place. It

would be useful to know whether there is a positive correlation between the use of fines and other metrics of success.

- It would be extremely useful for further research to generate a formula for measuring the effectiveness of wage and hour enforcement in each state. Such a formula could include ratios dealing with the number of wage and hour investigators, number of complaints, the amount of wages and fines/penalties assessed, and how much of what is assessed is actually collected. It would also need to measure the impact of enforcement on compliance within the states. A tool to measure the deterrent effect of various methods of enforcement could greatly assist policymakers in designing their state's approach to regulation.

PREVAILING WAGE ENFORCEMENT

- Of the states that have prevailing wage laws – which establish wages for public works projects – the vast majority located enforcement of these laws in the same division as other wage and hour enforcement. It is difficult to tell how housing prevailing wage enforcement with other wage and hour enforcement might affect either, without knowing the extent to which agency resources were divided between the two. Research into the division of resources and the performance of states in each area could provide a better sense of how much attention and resources prevailing wage enforcement receives, and the impact of this on an agency's other duties.

EMPLOYEE MISCLASSIFICATION

- The practice of misclassifying employees as independent contractors – or of paying employees entirely off the books – negatively affects state tax revenues as well as workers' compensation and unemployment funds, and it denies misclassified employees access to overtime, pension plans, and employers' health insurance. Given how widespread the practice of misclassification is, stringent enforcement could raise non-compliant employers' costs significantly, while lowering the costs born by employers who obey the law. Further research should be performed into the efficacy of misclassification enforcement.

RESOURCES FOR NON-ENGLISH SPEAKERS

- The states' ability to adequately address wage and hour violations across all vulnerable populations is dependant on their ability to communicate with non-English speaking employees.
- Many states provide education and outreach materials in languages other than English.

- Most states also have bilingual staff or access to interpreters as needed. California, Massachusetts and Hawaii reported having interpreters and materials in the widest range of languages.
- Alaska, New Hampshire and West Virginia were the only states that reported having no resources for non-English speakers.

PRIVATE RIGHTS OF ACTION

- Although the survey did not ask regulators about private enforcement of wage and hour laws, the report acknowledges the important role that private litigation plays in the enforcement of state wage and hour standards. All states except for Alabama, Mississippi, North Dakota, and Tennessee provide a statutory right of action to enforce one or more wage and hour laws.
- It is difficult to determine the degree to which private enforcement is carried out in those states that provide for it by statute. Private actions often result in confidential settlements that make research in this area difficult. Non-profit advocates report that the past decade has seen a marked increase in private enforcement of both state and federal law.
- Comparing the total amount in private class action settlements and damage awards with the total amount of wages and fines recovered by state regulators might provide a sense of the comparative impact and value of each type of wage and hour enforcement. We recommend such additional research to gauge the approximate impact of private enforcement on the wage and hour landscape.