

EXECUTIVE SUMMARY

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

A Breakdown in Enforcement of Workers' Rights

New York's workers are increasingly facing violations of their most basic rights to a minimum wage and overtime. Across the state, wage-and-hour violations are becoming standard practice in many industries – ranging from construction, agriculture, and industrial laundries to home health care, restaurants, grocery stores, and building services. Unscrupulous employers know there is a minimal risk of being caught, and even if caught, they are unlikely to face significant penalties.

All New Yorkers bear the costs of this problem. Workers in low-wage industries count on every dollar to support their families – and lost overtime pay 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. Law-abiding employers are forced into a race to the bottom when their 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

State government must be an active partner in the solution. The New York State Department of Labor (NYSDOL) is the state agency primarily charged with enforcing minimum wage and overtime laws. But while New York's economy has changed, the NYSDOL's strategies and resources have failed to keep pace. Today, the agency faces a daunting backlog of complaints. At the same time, employment relationships have gotten more complex, and the workforce has become more diverse.

The new administration has a unique opportunity to transform the state Department of Labor to meet these challenges. With a modest increase in staff resources, the NYSDOL could significantly improve its effectiveness by pursuing a more strategic approach to enforcement. In doing so, the agency would send a strong signal to employers that it is unacceptable to violate minimum wage and overtime laws in New York – an important first step to changing the business culture in low-wage industries.

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

Six Recommendations for Better Wage-and-Hour Enforcement

1. Aggressively investigate complaints and pursue all remedies provided by law

Workers in low-wage industries face significant obstacles to recovering lost wages. Their claims are typically too small to attract a private attorney, and legal services programs around the state are strained. Moreover, workers who file individual complaints with the NYSDOL may have to wait years to recover money – and often only receive a fraction of what they are entitled to under state law. The upshot is that currently, unscrupulous employers may actually find that the incentive is *not* to comply with the law.

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 their progress.
2. Use targeted individual complaints as a trigger for investigating entire workplaces.
3. Pursue all damages and penalties available to remedy violations.
4. Protect workers from retaliation for asserting their rights.
5. Identify employees during investigations who are misclassified as “independent contractors.”

2. Systematically and proactively investigate high-violation industries

Simply waiting for individual complaints is not enough. The NYSDOL must proactively identify and correct what in many cases is systemic non-compliance at the industry level. Even in the absence of an individual complaint, the NYSDOL has ample legal authority to track, investigate, and prosecute non-compliant employers – a strategy called “investigation-driven enforcement.” Both the New York State Attorney General and the United States Department of Labor have had success with this strategy, and the NYSDOL’s own Fair Wages Task Force represents a first step in the same direction.

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 wage-and-hour laws, drawing on enforcement data, field research, and pooled intelligence from stakeholders.
2. Proactively investigate employers within these targeted industries so that there is a tangible likelihood of inspection, sending the signal that the agency will pursue violations even if workers are dissuaded from filing complaints.

3. Partner with community and labor groups for expertise and worker outreach

New York’s community and labor groups can help the NYSDOL reach out to workers and monitor high-violation industries. Workers in high-violation industries often turn to local organizations that they trust for help in enforcing their rights. As a result, many of these community and labor groups have developed strong networks of affected workers. These groups are also often the best source of information regarding trends in employers’ evasion tactics in high-violation industries.

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

1. Coordinate with community and labor groups to inform investigation-driven enforcement – for example, in targeting employers that drive the culture of noncompliance in their industry.
2. Improve the resolution of individual complaints by working with community groups to identify trends in violations and improve investigations.
3. Partner with community and labor groups to educate workers about their rights and NYSDOL services.

“Given the prevalence of violations across the state, the state DOL 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

4. Improve responsiveness to the needs of immigrant workers

It is well established as a matter of law that a worker's immigration status is not relevant when investigating wage-and-hour violations. Unfortunately, there is a perception among immigrant communities that the NYSDOL is screening complaints on the basis of immigration status. This perception creates an additional barrier for immigrant workers who may already fear retaliation from their employers for trying to assert their rights. Meanwhile, the NYSDOL still fails to deliver adequate services to people who have limited English proficiency.

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

1. Conduct an internal audit to identify agency actions that create the perception that the NYSDOL is screening based on immigration status, and discontinue these practices. For example, suspend the practice of requiring individuals to provide their social security numbers, which is inconsistent with sound public policy and the federal Privacy Act.
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, in keeping with the New York State Attorney General's opinion letter on the matter.
3. Improve the resources available to workers with limited English proficiency.

5. Improve coordination with state and local enforcement agencies to protect workers

Low-wage workers rarely experience only one type of workplace violation. Employers who pay less than the minimum wage will often try to cut costs in others ways as well – for example, by skimping on health and safety protections. Coordinating the enforcement of these laws not only increases efficiency, it also raises the stakes for potential violators.

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 – for example, refer prevailing wage violations to the NYSDOL Bureau of Public Work.
2. Partner with agencies that protect workers' rights and enforce wage-and-hour, health-and-safety, right-to-organize, and anti-discrimination laws. Train investigators to recognize diverse violations and increase cross-agency referrals to protect workers' rights.
3. Strategically refer cases to the New York Attorney General for high-impact enforcement actions.

6. Make the NYSDOL more accessible, accountable, and transparent

In order to successfully implement the reforms outlined in this report, the NYSDOL will need to generate and analyze data that will allow it to continually monitor its effectiveness and fine-tune strategies. Reporting detailed enforcement data to the public also enables advocates, lawmakers, and other stakeholders to assist in monitoring the agency's performance – and sends an important signal to potential violators that wage-and-hour laws are being enforced.

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, including data on the number of workers affected and wages recovered.
2. Record the industry classification code for employers it investigates, and publish data by industry groups.
3. Make key forms, policy manuals, and procedures available to the public in a variety of languages.
4. Respond to additional requests for data made pursuant to the Freedom of Information Law within statutorily mandated timeframes.

“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 . . . 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

Legislative Enhancements for the Long Term

All of the reforms proposed above can be implemented using the NYSDOL's existing (and substantial) legal authority. But in the longer term, the NYSDOL will need additional authority to further enhance its enforcement of wage-and-hour laws. A recent report by the National Employment Law Project, *Holding the Wage Floor* , provides a comprehensive list of legislative enhancements. Among them are three categories of legislation that could be especially important to improving state-level enforcement:

1. Better protection of workers from being misclassified as independent contractors;
2. Stronger penalties for employment law violations; and
3. Broader protection of workers from retaliation by employers when filing claims.

This report is a project of the Campaign to End Wage Theft. Supporting organizations include:

Asociación Tepeyac	The New York Immigration Coalition (coordinator)
Brennan Center for Justice at NYU School of Law	New York Unemployment Project
Cortland Workers' Rights Board	Northern Manhattan Coalition for Immigrants' Rights
Farmworker Legal Services of New York, Inc.	Project Hospitality
Latin American Integration Center	Puerto Rican Legal Defense and Education Fund
The Latin American Workers Project, Inc.	The Restaurant Opportunities Center of New York
Long Island Immigrant Alliance	Taxi Workers Alliance
Make the Road by Walking	Tompkins County Workers' Center
MFY Legal Services, Inc.	Workers' Rights Law Center of New York, Inc.
National Employment Law Project	The Workplace Project
Neighborhood Economic Development Advocacy Project	YKASEC – Empowering the Korean American Community
New York Committee for Occupational Safety and Health	

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

“The New York State Department of Labor came by my restaurant one day, after some guys told them that we didn’t get overtime . . . 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 guys got some money, but nothing close to what they were owed.”

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