

PASO DEL NORTE CIVIL RIGHTS PROJECT,  
BORDER NETWORK FOR HUMAN RIGHTS,

DR. MARIA CRISTINA MORALES,

ERIC MURILLO

AND

THE LABOR JUSTICE COMMITTEE

HUMAN RIGHTS REPORT

June 2011

**EL PASO'S NEWEST CRIME WAVE:  
A Wage Theft Epidemic in the Borderlands**

*“Trabajo Hecho, Trabajo Pagado”*

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CIVIL RIGHTS PROJECT**



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## **WHO WE ARE**

### **PASO DEL NORTE CIVIL RIGHTS PROJECT**

Paso del Norte Civil Rights Project (PCRCP) was founded in 2006 as a part of the Texas Civil Rights Project, which operates under the aegis of Oficina Legal del Pueblo Unido, Inc., a non-profit community-based foundation organized in 1978. Since its beginning, PCRCP has worked to achieve substantial systemic gains in ensuring justice for the people of West Texas. PCRCP uses education and litigation to help make structural changes in areas such as law enforcement and border patrol misconduct, disability rights, housing discrimination, due process, expressive freedom, and Title IX in secondary education. PCRCP's Economic Justice Program aims to stem widespread labor abuses occurring in the border region through organization of community members, public campaigns, and litigation. PCRCP also represents victims of domestic violence, trafficking, and other crimes in their efforts to regularize their immigration status.

### **DR. MARIA CRISTINA MORALES**

Dr. Maria Cristina Morales received her Ph.D. from Texas A&M University. Dr. Morales has published in several areas related to labor, inequality, and Latina/os, including job access and wages, ethnic resources of workers, how masculinity operates to mask discriminatory practices in immigrant workplaces, and wage disparities among women along the border. She is currently collecting interviews with Latina/o construction workers in Las Vegas and with Hñáñú indigenous return migrants in El Valle de Mezquital, México, and is writing on transnational social networks.

### **ERIC MURILLO**

Eric Murillo is a student of Sociology in El Paso. He is the founder and co-organizer of the Retail Workers Rights Committee. He previously worked as head organizer at ACORN and plays various roles at El Paso's Mercado Mayapan.

### **LABOR JUSTICE COMMITTEE**

The Labor Justice Committee (Comité de Justicia Laboral, or CJL) was organized during the summer of 2009 because of rampant wage theft in El Paso. Its members, who are all volunteers, hold weekly meetings that are open to any community member who has been a victim of wage theft or is interested in joining the struggle for labor justice. The group focuses on education, empowerment, and recovery of unpaid wages, using strategies as varied as phone calls, letters, delegations, and direct actions.

### **BORDER NETWORK FOR HUMAN RIGHTS**

The Border Network for Human Rights (BNHR) is a leading immigration reform and human rights advocacy organization in the United States. Based in El Paso, BNHR has more than 700 member families, or close to 4,000 individuals, in West Texas and Southern New Mexico. BNHR also helps organize other civic-minded groups along the border and is the force behind the Texas-

wide Reform Immigration for Texas Alliance. BNHR's mission is to organize border communities through human rights education and mobilize its members to ignite change in policy and practice for the benefit of the community at large.

## **ACKNOWLEDGEMENTS**

This Report would not be possible without the efforts of dozens of volunteers working with Paso del Norte Civil Rights Project, the Labor Justice Committee, and the Border Network for Human Rights, who helped conduct these surveys. In particular, the authors want to thank BNHR staff and regional coordinators Martina Morales, Miguel Miranda, Claudia Diaz, Irma López, Susana Herrera, Marie Arceo, Maria de Lourdes Cruz, and Eva Hinojosa.

The authors also want to thank the following volunteers from both the Labor Justice Committee and Paso del Norte Civil Rights Project who interviewed hundreds of workers: Shalini Thomas, Alyssa Telander, Lidia Cruz, Gabriela Barraza, Josefina Torres, Miguel Gamboa, Rosa Chávez, Yana García, Ariana Flores, and Vivian Hernández. Finally, many thanks to Christopher Benoit, Liane Noble, James Harrington, Shalini Thomas, Patricia Kelly, Aracely Galván, and Emily Timm for their suggestions, edits, and assistance in drafting this report.



## EL PASO WAGE THEFT REPORT

### INTRODUCTION

Jorge<sup>1</sup> was a worker for a local small roofing company, “Danny’s Roofing,” earning \$50 a day. After several months with the company, his employer informed him there was no longer any work for him. When Jorge asked for his wages for the last two weeks, the employer told him to wait another week. He called back the next week, but the company told him that it didn’t have the wages. When Jorge said he would make a complaint, his employer said, “Good luck.” Indeed, Jorge complained to the Texas Workforce Commission, but nothing happened. Finally, when Jorge went back to the company to ask again for wages, his former boss threatened to call the police and have Jorge arrested for trespassing on the property.

Jorge’s story is typical of countless other workers and is part of an ongoing crime wave in El Paso. It is a crime wave that takes place on the margins of the El Paso economy and at times happens without the victims’ knowledge. And it is occurring on the job. Wage theft, as identified in recent years, includes “a variety of infractions that occur when workers do not receive their contractually promised wages.”<sup>2</sup> This can also include violations of laws requiring payment of minimum wage, overtime, and the deliberate misclassification of workers as independent contractors. At the root of this crime wave is a lack of effective enforcement by government entities, lack of education among workers about their labor rights, and fear on the part of workers to stand up to their employers.

Wage theft in El Paso correlates closely with El Paso demographics. Nearly a third of all El Paso residents are “foreign-born, many of them from Mexico and undocumented and struggling financially.”<sup>3</sup> Wage theft is particularly prevalent among immigrant workers, and “work-related exploitation appears to be growing along with the country’s immigrant population.”<sup>4</sup> In addition to fear of losing their jobs, immigrants without legal status are also less likely to report incidents of wage theft for fear of immigration detention and deportation.<sup>5</sup>

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<sup>1</sup> Names of workers whose testimony is public are quoted with their full names throughout this report. Others are identified by a one-name pseudonym for their protection and anonymity for fear of retaliation.

<sup>2</sup> Interfaith Worker Justice, *Stop Wage Theft*, <http://www.wagetheft.org/> (accessed March 1, 2011).

<sup>3</sup> Elizabeth Llorente, *Sheriff Fears Texas Gov. Perry's Anti-Illegal Immigration Push*, FOX NEWS LATINO (Jan. 13, 2011) (available at <http://latino.foxnews.com/latino/politics/2011/01/13/sheriff-safest-city-says-took-years-gaining-trust-immigrants/>) (reporting that El Paso Sheriff Richard Wiles is concerned about using local law officers to enforce immigration laws because “gaining trust of immigrants has been key to keeping a low crime rate in his area.”).

<sup>4</sup> James Pinkerton, *Day workers plagued by wage theft: Local advocates hope to recoup pay in problem plaguing nation*, HOUSTON CHRON. (July 30, 2007) (available at <http://www.chron.com/dispatch-story-mp/metro/5010068.html>).

<sup>5</sup> Lornet Turnbull, *Proposal Would Make Wage Theft a Crime*, SEATTLE TIMES (March 30, 2011) (available at [http://seattletimes.nwsource.com/html/localnews/2014643197\\_wagetheft31m.html](http://seattletimes.nwsource.com/html/localnews/2014643197_wagetheft31m.html)) (“If you talk to a recent immigrant in any of these [low-wage] industries, you won't find one who hasn't been cheated many times over.”).

Wage theft perpetrators in El Paso range from small businesses and sole proprietors to large corporations. For instance, many day laborers, hired by small-time contractors or construction companies, report high incidence of wage theft. Conversely, employees of large corporations, such as Family Dollar, also fall prey to wage theft.

El Paso suffers from wage theft, but is not alone. In fact, workers in Chicago, Los Angeles, and New York City lose approximately \$56.4 million per week as a result of employment and labor law abuses, including minimum wage and overtime violations.<sup>6</sup> The trends of wage theft and retaliation found in El Paso are also reflective of eroded worker protections in Texas generally.

This report, based on more than 250 surveys of low-income workers throughout the El Paso region, provides the first-ever statistical look into the incidence of wage theft in low-wage employment in our community. The results are staggering. Although high-violation industries, such as construction and domestic service, have responsible employers who understand the importance of complying with their basic obligations to workers, an unacceptable number of employers knowingly violate employment laws at an alarming rate.

It is the hope of the many volunteers and advocates who helped bring this report together that local officials will review the results of this survey and seriously consider the recommendations for local action on this matter. The livelihood and stability of thousands of working families from Horizon City to Anthony, Texas, depends on real change and justice.

## **EL PASO: A STABLE ECONOMY, BUT FOR WHOM?**

In recent years, while the rest of the country suffered through a recession, El Paso fared fairly well in terms of economic growth and job creation. From June 2009 until the first half of 2010, El Paso ranked as one of the top 20 strongest metropolitan economies in the country.<sup>7</sup> The region weathered the storm through construction and new services related to the expansion of Fort Bliss and the influx of residents from neighboring Ciudad Juárez, Mexico, fleeing the violence of that City. Job growth is expected to improve in Texas and El Paso in 2011.<sup>8</sup>

But the question facing El Paso, along with the rest of Texas, is, “What kind of jobs are we creating?” A recent report cast doubt on the optimism of Texas’ newfound job growth. According to the U.S. Bureau of Labor Statistics, Texas ranks as one of two states, along with Mississippi, with the highest percentage of workers making at, or below, the federal minimum

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<sup>6</sup> Annette Bernhardt, et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America’s Cities*, at 50 (2009) (available at <http://www.nelp.org/page/brokenlaws/BrokenLaws-Report2009.pdf?nocdn=1>) (accessed May 26, 2011).

<sup>7</sup> Howard Wial and Richard Shearer, *MetroMonitor: Tracking Economic Recession and Recovery in America’s 100 Largest Metropolitan Areas*, THE BROOKINGS INSTITUTION (METROPOLITAN POLICY PROGRAM), March 2011.

<sup>8</sup> Vic Kolenc, *2011 Outlook: El Paso’s Economy, Job Market Expected to Grow*, EL PASO TIMES (Jan. 2, 2011) (available at [http://www.elpasotimes.com/business/ci\\_16988756](http://www.elpasotimes.com/business/ci_16988756)).

wage.<sup>9</sup> Of Texas' 5.7 million hourly workers, 550,000 earned at or below federal minimum wage in 2010.<sup>10</sup> El Paso statistics mirror these state-wide trends. Around eighty percent of low-wage workers interviewed in El Paso for this report earn less than \$10 an hour. It is doubtful these are the kind of jobs that will create a healthy economy and sustain El Paso families and communities in the long-run.

## **LEGAL BACKGROUND: WORKERS LEFT UNPROTECTED**

A confounding patchwork of federal and state laws protect workers in El Paso: minimum wage and overtime, minimum standards for salaries, safety on the job, protection from discrimination, and the right to organize. Workers in theory can turn to these laws for protection from unscrupulous employers, irrespective of their immigration status, nationality, or place of origin. What this report shows, however, is that this fabric of protection is unraveling. As a result of a diminished ability to enforce the law at the federal and state level, low-wage employees have few places to turn to seek justice in the workplace.

### **Workers' Basic Rights . . . On Paper**

#### *Minimum Wage Protections*

Federal and state laws require that all employers pay at least the federal minimum wage, which is currently \$7.25 per hour.<sup>11</sup> New Mexico requires employers to pay employees at least \$7.50 per hour.<sup>12</sup> Neither federal nor state laws in the region mandate paid rest breaks or meal time.

#### *Overtime Protections*

The federal Fair Labor Standards Act (FLSA) obliges most employers to pay an overtime rate of one-and-one-half times a worker's regular rate of pay for all hours worked in excess of forty hours per week. Texas state law does not guarantee overtime compensation for any workers. Therefore, workers in Texas must seek relief under the federal law for unpaid overtime. New Mexico, however, does guarantee overtime compensation for employees in the state.<sup>13</sup>

#### *Wage Payment Protections*

The Texas Payday Law (TPL) requires employers to pay workers at least twice a month, give them a written pay statement at the time, and compensate employees on a regularly-

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<sup>9</sup> Steve Clark, *Texas Leads Nation in Minimum Wage Workers*, BROWNSVILLE HERALD (March 29, 2011) (available at <http://www.brownsvilleherald.com/articles/wage-124497-workers-leads.html>).

<sup>10</sup> *Id.*

<sup>11</sup> See 29 U.S.C. § 206 (2011) and Tex. Lab. Code §§ 62.002(4), 62.051 (2011) (requiring employers to pay all employees who are "permitted to work").

<sup>12</sup> § 50-4-22 N.M. Stat. 1978 (2011).

<sup>13</sup> § 50-4-22(D) N.M. Stat. 1978 (2011).

mandated pay day.<sup>14</sup> All pay statements must be in writing and calculated on the basis of time, contract, or commission, with information regarding vacation, severance, or other lawful deductions. No employer in Texas may make a deduction from employees' wages without written consent.<sup>15</sup>

Similarly, the New Mexico wage payment statute requires that paydays be no more than 16 days apart for hourly workers and requires a written pay statement with each paycheck.<sup>16</sup> New Mexico also requires employers to pay employees their promised wages every payday.

### *Misclassification of Workers as Independent Contractors*

Employers frequently attempt to circumvent their responsibilities to pay workers minimum wage or overtime by classifying them as “independent contractors.” Employers do this either by providing workers with an IRS form 1099, instead of the legally required W-2, or by paying them wages without proper state and federal withholding. By misclassifying these workers, employers attempt to avoid paying minimum wage, unemployment compensation, and health insurance benefits; and they push the entire tax burden of the work relationship onto the employee.

Misclassification of workers hurts not only the workers but also other responsible businesses, as well as the local economy. By decreasing payroll costs, a misclassifying construction contractor can easily underbid another contractor playing by the rules.

### **Workers' Basic Rights In Action: Enforcement of Wage Standards**

The law provides basic labor standards on paper. In reality, however, the scarcity of effective enforcement has left workers with few places to turn to recover their wages and penalize unscrupulous employers.

### *Enforcing Nonpayment of Wages: Texas Workforce Commission*

Though the Texas Payday Law (TPL) protects workers from common instances of wage theft, lack of enforcement has stripped away its potentially strong enforcement mechanism. The Texas Workforce Commission (TWC) is the only agency in the state charged with enforcing the payday law.

Several obstacles stand in the way of a worker. First, though the statute of limitations for an action under state minimum wage law is two years, a worker only has six months after the date of non-payment to file a TPL complaint. Six months is a short period for workers who likely do not know that the Commission exists.

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<sup>14</sup> Tex.Lab. Code § 61.011 (2011).

<sup>15</sup> *Id.* at § 61.018 (2011).

<sup>16</sup> § 50-4-22 N.M. Stat. 1978 (2011).

**LIDIA:** Lidia worked for a local trucking company. She filed a complaint with the U.S. Department of Labor at the end of 2009 to recover thousands in unpaid wages. Because her claim for minimum wage and overtime violations under the law could only extend back three years, every day that she waited for a DOL investigator was a day for which she would not be able to recover unpaid wages. After four months of government inaction, she finally abandoned her DOL claim and filed a lawsuit. As a result of the DOL's lack of action and the statute of limitations, she will never be able to recover her unpaid wages for those four months.



Second, even if workers make a complaint on time, they likely won't receive a response for several months. Currently, there are only 24 investigators in the entire state for the thousands of wage claim complaints made every year. Every investigator works out of an office in Austin. As a result of policy and the lack of resources, these investigators have not conducted a field investigation since 1993.<sup>17</sup> Finally, the law provides no independent right of action for workers who do not receive their earned wages.

### ***Enforcing Minimum Wage and Overtime: Private Right of Action***

A worker also has the option to file a lawsuit to enforce federal and state minimum wage and overtime provisions. New Mexico, Texas, and federal minimum wage laws allow employees to collect liquidated damages and attorneys' fees upon a favorable judgment.<sup>18</sup> Nonetheless, many attorneys will not accept these cases because small claims do not provide a high profit margin.

### ***Enforcing Minimum Wage and Overtime: United States Department of Labor***

Other than a private right of action and the TWC, employees have only one other avenue to which they can turn: the U.S. Department of Labor Wage and Hour Division (DOL). The U.S. Department of Labor is in charge of enforcing the Fair Labor Standards Act (FLSA), the main federal wage and hour law.<sup>19</sup> Unfortunately, statistics and workers' accounts point to lax enforcement of wage and hour violations by this federal agency for several reasons.

<sup>17</sup> Julien Ross, *A Fair Day's Pay: The Problem of Unpaid Workers in Central Texas*, 10 TEX.HISPANIC J.L. & POLICY 117, 154 (2004).

<sup>18</sup> 29 U.S.C. § 216(b) (2008); Tex.Lab. Code § 62.205 (2011); § 50-4-26 N.M. Stat. 1978 (2011).

<sup>19</sup> Because DOL is only able to enforce FLSA and other federal worker protection statutes, it cannot investigate wage and hour violations in workplaces of employers who are not involved in interstate commerce or have an annual gross revenue of less than \$500,000. *See* 29 U.S.C. §§ 206, 207. On the other hand, DOL does have jurisdiction to investigate a large swath of local employers, including all domestic service employers. *Id.*

-- Lack of Resources --

First, as with the TWC, the DOL lacks sufficient resources. In 2007, the federal Government Accountability Office found that the Wage and Hour Division initiated 37 percent fewer enforcement actions against employers breaking federal wage laws than ten years before.<sup>20</sup> Even in 2011, “the U.S. Department of Labor ... has just over 1,000 investigators nationwide who are tasked with enforcing these federal laws in more than seven million workplaces ... [E]stimates are that the chances of a workplace inspection by the Department of Labor in any given year are well below one in 100,000.”<sup>21</sup> Though enforcement has improved slightly under the Obama Administration, enforcement numbers are still anemic.<sup>22</sup>

A lack of resources leads to slow responses to employees’ complaints, which can cause workers to irreversibly lose their right to recover unpaid wages. Under federal law, an employee is entitled to recover unpaid wages up to two or three years prior to the filing of an enforcement action or lawsuit.<sup>23</sup> As a result, each week that the agency waits to file an action against an employer is a week of unpaid wages that the worker will never be able to recover. The statute of limitations is not tolled until an action is actually initiated in court. Many employees in the border region, particularly domestic workers, are consistently paid under minimum wage. Therefore, when these employees make a complaint to the DOL, they will only be able to recover unpaid wages for the last two to three years, even if they are owed wages for a longer period of time.

As a result, if a worker is owed more than three years of unpaid wages then every day that the DOL waits to file an action against an employer is a day of lost wages that the worker will never be able to recover in the future. Despite this reality, the DOL office in El Paso has failed to *assign* an investigator in several cases in 2009 and 2010 for many months. Recently, a worker in El Paso became frustrated after waiting for several months to have his case reviewed. After seven months, the DOL had not even assigned an investigator to his case. He decided to file a lawsuit in court, but was unable to recover wages for the months he lost waiting in vain for the DOL to take action.

-- Lack of Advocacy for Workers --

Second, the DOL complaint process creates an uneven playing field for complainant workers vis-à-vis their employers. María, a domestic service employee, worked for several years

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<sup>20</sup> Anne-Marie Lasowski, *Fair Labor Standards Act: Better Use of Available Resources and Consistent Reporting Could Improve Compliance*, WASHINGTON: UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE (2008).

<sup>21</sup> José Rodríguez, *Lawmakers Would Encourage Wage Theft*, MIAMI HERALD (April 14, 2011) (available at <http://www.miamiherald.com/2011/04/14/2167800/lawmakers-would-encourage-wage.html>).

<sup>22</sup> U.S. Dept. of Labor, *FY 2012: Congressional Budget Justification: Wage and Hour Division*, at 20-23, <http://www.dol.gov/dol/budget/2012/PDF/CBJ-2012-V2-03.pdf> (accessed on May 13, 2011) (showing increased funding for enforcement in 2010, 2011, and proposed increases for 2012).

<sup>23</sup> 29 U.S.C. § 255(a).

for a local wealthy resident and was never paid the mandated minimum wage. As a domestic worker, she fell directly under the FLSA minimum wage provisions. Based on her calculation of hours worked, her employer owed her more than \$11,000 in unpaid wages. When María brought this information to her investigator, the investigator refused to negotiate for the higher wage rate and refused to accept any other information she had regarding her claim. The investigator only recovered a little more than \$3,000 in unpaid wages, a third of her owed wages

More troubling is the inability of workers to have representation or an advocate when they make a complaint. In the case of María, an attorney represented the employer in negotiations with the DOL investigator. María was unrepresented. After feeling concern over the lack of advocacy in her case, she sought help from the Labor Justice Committee. She then tried to set up a meeting with the DOL investigator about discrepancies in her hour calculations. The investigator told her in no uncertain terms that, if she wanted to have representation of any kind, including a non-attorney community advocate, she would not be able to continue her complaint with the DOL.<sup>24</sup> The investigator informed her that she could pursue the DOL conciliation or she could have an attorney, but could not have it both ways.<sup>25</sup> Worried she would be left without any help, María decided to accept the vastly undervalued DOL settlement. By refusing to let María go to the DOL office with representation of any kind, the local DOL essentially forced her to go through the wage claim process alone, while allowing the employer to have legal representation.<sup>26</sup>

The DOL office in El Paso has made strides in recent years, hired new investigators, and, as the result of increased federal funding, has more capacity to handle cases. Nonetheless, some of the structural issues mentioned in this section still keep the DOL from best protecting workers. The local office may be able to learn from other DOL offices throughout the state. In South Texas, for example, the McAllen DOL branch works closely with worker advocates from legal service organizations and community-based groups to ensure communication and outreach with affected workers. This dialogue ensures that efforts are not duplicated. Instead, each organization and the DOL can fill the gaps to ensure affected workers receive support and recover unpaid wages.<sup>27</sup> In Austin, the community-based Worker Defense Project has a working collaboration with the local DOL office. The Project is able to check in with the DOL regarding its members' cases and has been able to work closely with investigators to ensure that its members receive their wages without the necessity of hiring an attorney or filing a lawsuit.<sup>28</sup>

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<sup>24</sup> Interview with “María,” El Paso, Texas (April 27, 2011).

<sup>25</sup> Upon filing of a lawsuit under the FLSA’s private right of action, the DOL conciliation process is automatically terminated. 29 U.S.C. § 216. Nonetheless, nothing in the FLSA or its regulations stands for the proposition that an employee is never allowed representation or support through the Wage and Hour Division conciliation process. A complainant should have a right to have a representative in the conciliation process, particularly when the employer is represented by an attorney.

<sup>26</sup> Local DOL representative explains that investigators only provide workers one shot to present to them proof of a wage violation and there is generally no need to consult with the complainant other than to provide notice of payment. Interview with Raymond Brito, Assistant District Director, El Paso, Texas (May 24, 2011).

<sup>27</sup> Interview with Elliott Tucker, South Texas Civil Rights Project, by telephone (May 6, 2011).

<sup>28</sup> Interview with Patricia Zavala, Worker Defense Project, by telephone (May 17, 2011).

## Conclusion

The patchwork of federal and state wage and hour provisions do provide strong support for workers earning less than minimum wage or not receiving overtime compensation. Chronic under-enforcement, however, undermines the very backbone of these minimal safeguards. Times have changed; the economy has changed; and many employers are using unscrupulous practices as part of their business model. Enforcement must combat this new reality. Without effective enforcement, employers are increasingly emboldened to violate the law; and workers are left without recourse to recover unpaid wages. It is precisely this lack of enforcement that has pushed the crime of wage theft under the surface.

## SURVEY RESULTS: WORKERS LEFT BEHIND

The survey results demonstrate how a low enforcement environment drastically affects the workers who are most at risk of wage and hour violations. Federal and state violations are standard practice and continue to drive down wages throughout the region.

### Who Makes Up the Low-Wage Workforce?

From June 2010 through March 2011, the authors surveyed 253 workers in bus stations, on the street, and in community meetings throughout south El Paso, El Paso County, and Sunland Park. To qualify for the survey, workers must have been employees in the prior two months in a low-wage industry.

Table 1 provides an overview of the demographic characteristics of this study's interviewees. Gender among the workers was fairly evenly split. More than 93% of the sample was of Latino origin. Despite the proximity of Ciudad Juárez and the common misconception that El Paso's low-wage workforce commutes to work across the border, 54% of workers interviewed had lived in the United States for ten years or more. Further, while El Paso's median age is 31, more than 38% of the sample size was between ages 36-49.<sup>29</sup>

As Table 1 shows, the survey sample covers a cross-section of the El Paso workforce, including health care providers, agricultural, domestic, and construction workers. The results also show that, even in industries that generally pay above minimum wage, such as health care, salaries were nowhere near the national level.<sup>30</sup> Almost 80% of workers interviewed made less than \$10/hour.

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<sup>29</sup> U.S. Census Bureau, *2005-2009 American Community Survey 5-Year Estimates*, <http://www.factfinder.census.gov>; select American Community Survey, select Data Profile, scroll down to Urban Area, scroll down to El Paso, TX (accessed May 23, 2011).

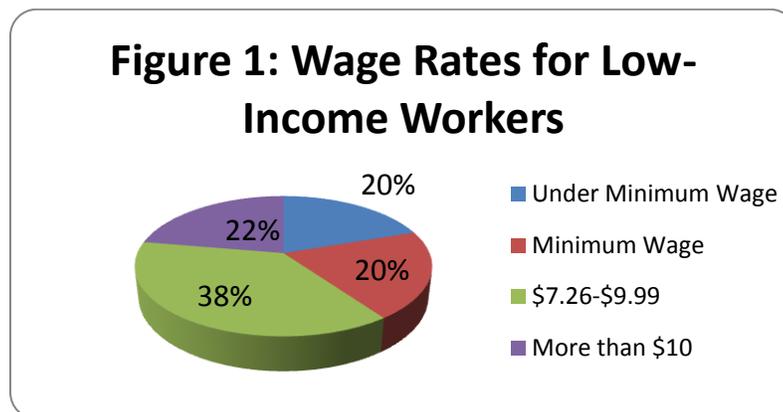
<sup>30</sup> U.S. Dept. of Lab., *Bureau of Labor Statistics, Occupational Employment and Wages, May 2009*, <http://bls.gov/oes/2009/may/oes472061.htm> (accessed May 26, 2011). For example, the national average wage for health care providers is \$10.39/hour; and for construction laborers, \$15.96/hour.

<b>TABLE 1: WORKER CHARACTERISTICS</b>		<b>% of Workers</b>
<b>Age</b>	18-21	4%
	22-35	18%
	36-49	38%
	50-64	34%
	65+	6%
<b>Gender</b>	Male	49%
	Female	49%
<b>English-speakers</b>	English Speakers	48%
	Non-English Speakers	45%
<b>Latina/o-Origin</b>	Latina/o Origin	93%
	Other	4%
<b>Time in the United States (by years)</b>	0-4	8%
	5-10	21%
	10+	54%
	Did not answer	17%
<b>Industries</b>	Restaurant	9%
	Construction	31%
	Domestic service	28%
	Agricultural	3%
	Service sector (retail, etc)	8%
	Manufacturing	3%
	Professional (health care, etc)	8%

## Violations: More Hours, Less Pay

### *Minimum Wage Violations*

Figure 1 shows that 20% of all low-income workers surveyed in El Paso regularly receive below minimum wage for their work. The results are directly in line with the number of workers paid under minimum wage in other major United States Cities.<sup>31</sup> Some of these workers are nickel and dimed on every paycheck, consistently receiving just under minimum wage due to illegal deductions or off-the-clock work. Local organizations, such as the Labor Justice Committee and Paso del Norte Civil Rights Project also regularly assist employees whose wages regularly fall far below the federal minimum wage. In one of PCRCP's recent cases, a domestic service employee received a mere \$1.60 an hour for her labor over the course of one year.<sup>32</sup>



### -- Inequalities in Gender and Across Industries --

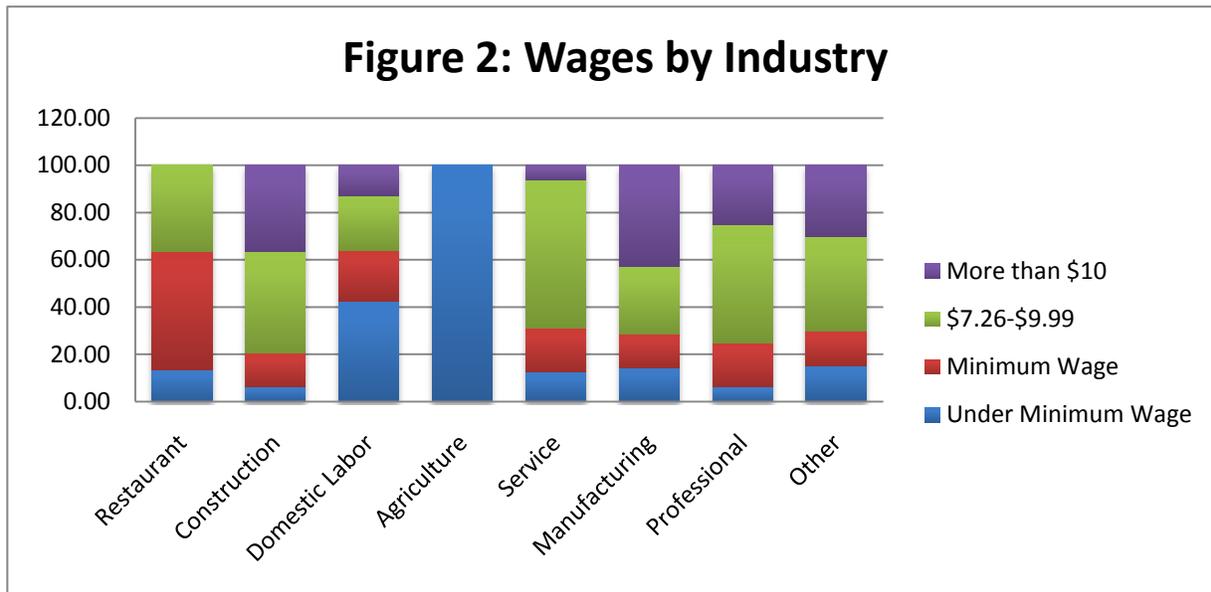
Violations do not happen equally across gender or industry. Women bear the brunt of minimum wage violations. Among women surveyed, over 27% were not paid minimum wage in their principal place of employment. Among men, the number was only 14%. Further, industries that have a predominately female workforce, most notably domestic work, pay far less than industries where men make up the majority of the workforce, such as construction. Forty-three percent of women working as domestic workers in El Paso received less than minimum wage for their labor. Nationally, a recent report showed that 41% of employees in the private household industry experience minimum wage violations.<sup>33</sup>

<sup>31</sup> Bernhardt, *supra* n. 6, at 50.

<sup>32</sup> Alberto Ponce de León, *Denuncian explotación cuidadores de adultos mayores; les pagan \$1.60 por hora*, EL DIARIO DE EL PASO (April 13, 2011) (available at [http://www.diario.com.mx/notas.php?f=2011-04/13&id=dd0\\_02fda49d8c1b6b62e3078a4ebf026](http://www.diario.com.mx/notas.php?f=2011-04/13&id=dd0_02fda49d8c1b6b62e3078a4ebf026)).

<sup>33</sup> Bernhardt, *supra* n. 6, at 50.

**Figure 2: Wages by Industry**



-- The Case of El Paso Domestic Service Employees --

Why are El Paso domestic service employees at such a high risk for wage theft violations? In recent years, several stories in the press have highlighted the fact that domestic workers are vulnerable to the most extreme minimum wage violations. Domestic workers often receive as little as \$1-\$3 per hour for hard work.<sup>34</sup> Many in El Paso and throughout the United States treat domestic service employees very differently from traditional employees. ~~Because~~ Because of its close association with women’s unpaid household labor, and its connection with the intimacies of family life, domestic service has often been devalued as a form of real work.<sup>35</sup>

The intimacy of this work often keeps workers quiet and blurs the line of employer and employee. Local domestic worker, Gabriela Barraza, stated, ~~I~~ I did work throughout the house and spent every week taking care of the employers’ children. I worked long weeks for little pay, but even after I realized how little my employers were paying me, I felt bad about complaining about the pay because I was so close to their child.<sup>36</sup>

Nonetheless, domestic workers take on long hours, often perform duties well beyond their initial contract, and do so in the most intimate of settings.<sup>37</sup> For this, they deserve a basic wage for their work. Domestic workers are employees under federal law, irrespective of their country of origin or residence.<sup>38</sup> As a result, regardless of the unique views by employers and employees

<sup>34</sup> Alberto Ponce de León, *Denuncian dos empleadas domésticas a sus patrones*, EL DIARIO DE EL PASO (January 7, 2010) (available at <http://www.texascivilrightsproject.org/?p=2020>).

<sup>35</sup> Smith, Peggy, *Organizing the Unorganizable: Private Paid Household Workers and Approaches to Employee Representation*, 79 N.C. L. REV. 45 (2000).

<sup>36</sup> Interview with Gabriela Barraza, El Paso, Texas (May 24, 2011).

<sup>37</sup> Kathy Dobie, *Black Women, White Kids: A Tale of Two Worlds*, THE VILLAGE VOICE, pp. 20-27, January 12 1988 (—Many of the women are hired as nannies and then asked if they wouldn’t mind straightening up a bit. They are asked if they wouldn’t clean, then shop, then do the laundry, then, etc.”).

<sup>38</sup> See, generally, 29 U.S.C. §§ 206, 207.



*Gabriela Barraza*

toward domestic service, employers who do not pay domestic workers minimum wage and overtime open themselves to significant liability.

-- Illegal Deductions and Minimum Wage Violations --

Sometimes a salary that appears to be sufficient on its face may result in a payment under minimum wage due to illegal deductions by employers. If an employer chooses to make deductions without consent of the worker, the deduction can reduce the workers' actual salary below the mandated minimum wage.<sup>39</sup>

For example, in 2010, an employee named Van worked for a local subcontractor at the federal courthouse. Though the employer was supposedly deducting some of Van's salary for child support, the employer never actually turned over the payments to the Texas Office of the Attorney General (OAG) as required by law. Thanks to quick advocacy on the part of the Labor Justice Committee,

Van was able to pressure the employer to turn over the deducted wages to the OAG's office before the OAG brought an enforcement action against him.

In another case, an employer deducted thirty dollars per week from an employee's pay for federal taxes, even though the employer never actually reported that money to the federal government. Over two years, these illegal deductions amounted to thousands of dollars.

***ELVIA:** In 2011, Elvia brought a lawsuit against a local adult foster care center. According to her complaint, she worked alone attending to eight patients continually from Friday night to Monday morning for only \$100 per weekend in cash. She constantly worried about nodding off and being ready in case one of her clients fell ill. Because she was on call for her clients, she generally only slept 3-4 hours per night of work.*

***"I had to keep working there because I didn't have any other place to turn."***

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<sup>39</sup> 29 C.F.R. § 531.35 (2011).

### *Violations: Overtime Violations*

Due to the lack of available full-time employment in Texas, more than 200 of the respondents for this report did not work over forty hours a week. Nonetheless, of those who did work more than forty hours a week, 65% did not receive overtime compensation for time worked in excess of forty hours per week. Some of these overtime violations were the result of fixed weekly salaries that did not properly take into account overtime compensation. Other respondents only received their regular hourly rate for time worked in excess of 40 hours a week instead of the required 1 ½ times their regular hourly pay for those extra hours.

**MORE THAN 65% OF WORKERS SURVEYED WHO WORKED MORE THAN 40 HOURS PER WEEK WERE NOT PAID OVERTIME COMPENSATION FOR THOSE HOURS**

Overtime violations are particularly common in the restaurant industry. In 2010, a former employee of Los Gallegos restaurant brought a suit against the restaurant, claiming nonpayment of overtime during his last nine years of employment. Over those nine years, he regularly labored around 70 hours per week without breaks or vacations. In July 2010, his lawsuit settled for tens of thousands of dollars in unpaid overtime compensation and damages.

**Figure 3: If you worked more than 40 hours per week, did you receive overtime pay?**



### *Violations: Wage Theft*

**1 IN 8 WORKERS WERE NOT PAID THEIR PROMISED WAGES IN THE LAST TWO MONTHS BEFORE THE SURVEY.**

Though some El Paso employees receive a promised wage below the federal and state minimum wage, all workers in low-wage industries are at risk of not being paid any wage at all. In El Paso, thirteen percent of low-wage workers surveyed were not paid their promised wage at some point during the last two months preceding the survey. Nationally, 16.6% of low-wage workers receive less than what they were owed.<sup>40</sup>

**José:** A common story among low-wage workers is the simple refusal of an employer to pay any wages at all. José was hired by Mr. Mata to dig ditches and haul dirt in 2010. Mata promised him \$7/hour, which was under minimum wage. José worked for eight days, ten hours a day. In the end, the only thing Mata paid him was one dollar and a hamburger because Mata claimed he “didn’t have the money.” Though Mata swore he would pay José as soon as he had some more income, after two weeks, Mata simply stopped answering his phone.

### ***Violations: Silencing Workers***

The greatest deterrent to workers wishing to stand up for their rights has been the fear that an employer will take retaliatory actions. The clearest example is the employer who fires a worker who complains about his wages. For example, when the owner of a local factory found out that his workers had recently met with an attorney about chronic unpaid wages, the employer fired the entire workforce and told them they could never come back.

Retaliatory actions encompass a much broader range of activity. One of the most common retaliation threats in El Paso is that an employer will call immigration enforcement if a worker tries to recover unpaid wages. Courts throughout the United States recognize the chilling effect of bringing law enforcement into labor disputes.<sup>41</sup>

Employers also often use threats of suit or counterclaims to silence workers in wage disputes. As explained below in Tania’s case, without community support, these threats often succeed in silencing workers and keeping them from standing up for their rights.

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<sup>40</sup> Bernhardt, *supra* n. 6, at 20.

<sup>41</sup> *In re Reyes*, 814 F.2d 168 (5th Cir. 1987); *Flores v. Amigon*, 233 F.Supp.2d 462 (E.D.N.Y. 2002); *Galaviz-Zamora v. Brady Farms, Inc.*, 230 F.R.D. 499 (W.D. Mich. 2005); *Zeng Liu et al. v. Donna Karan International, Inc.*, 207 F.Supp.2d 191, 193 (S.D.N.Y. 2002).

**COUNTERSUITS AND CLAIMS:** *When workers of a factory brought suit for unpaid wages, the employer fired several of them, brought a baseless counterclaim accusing one of them of stealing, and contacted several potential workers threatening to countersue them for baseless claims if they joined suit. Luckily, his tactics failed; and almost twenty workers joined the lawsuit.*

Community support and worker advocacy can reduce that fear and give workers a greater voice. For example, in late 2009, Gabriela Barraza worked with the Labor Justice Committee to recover over \$1000 from her previous employer for domestic work she had performed over the course of a year. Her employers responded to a demand letter by threatening to call law enforcement on her. With the support of community advocates, Ms. Barraza went to the employer's home to demand her wages several times. Eventually, she joined a lawsuit that settled for the unpaid wages a few months later.

The law unequivocally prohibits employers from threatening to call law enforcement authorities to keep workers from exercising their employment rights.<sup>42</sup> The law also prohibits employers from threatening to sue or bringing baseless counterclaims against employees who bring a wage claim.<sup>43</sup> And employers face severe civil liability for retaliatory actions that can prove very costly.<sup>44</sup> Nonetheless, given the lack of criminal penalties and the fear that employers will follow through with their threats, retaliation or threat of retaliation often silences workers.

**TANIA:** *Tania worked for a local restaurant for several years as a cook. In March 2011, with support of the Labor Justice Committee, she sent a letter to her previous employer asking for payment of unpaid overtime.*

*Instead of sitting down to discuss her claim, the employer threatened her with a lawsuit for defamation of character if she didn't "retract" her statement. When Tania hired an attorney in anticipation of the employer's actions, the employer retreated and never filed a lawsuit.*

<sup>42</sup> See, e.g., *Centeno-Bernuy v. Perry*, 302 F.Supp.2d 128, 136 (W.D.N.Y. 2003); *Singh v. Jutla*, 214 F.Supp.2d 1056 (C.D. Cal. 2002).

<sup>43</sup> *Torres v. Gristede's Operating Corp.*, 629 F.Supp.2d 447, 472 (S.D.N.Y. 2008). See also *Bill Johnson's Restaurant v. NLRB*, 461 U.S. 731, 740 (1983); *Ramos v. Hoyle*, 2009 U.S. Dist. LEXIS 61062 (S.D. Fla. July 16, 2009).

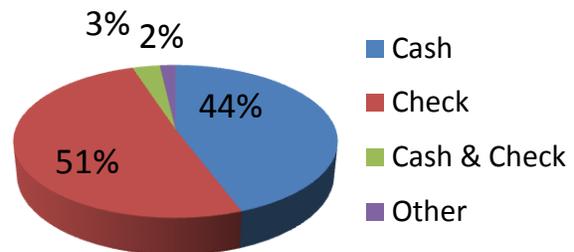
<sup>44</sup> See generally, *Lambert v. Ackerley*, 180 F.3d 997, 1011 (9th Cir. 1999) (upholding \$4 million in damages for retaliation against complaining workers); *Shea v. Galaxie Lumber*, 152 F.3d 729 (7th Cir. 1998).

## COST OF WAGE THEFT: WORKERS AND TAXPAYERS PAY FOR UNSCRUPULOUS BUSINESS PRACTICES

The effect of wage theft falls first and foremost on workers and their families. Wage theft pushes down the already minimal wages that low-income employees receive in El Paso. Financially, wage theft victims, who don't receive the legal or promised wage, fall behind on other payments as well. For example, local construction worker José had to change homes when his employer refused to pay him for his work. Gabriela ended up losing her trailer house as a result of her employer's failure to pay. Countless others find themselves scraping for second jobs or loans from relatives to take care of their families when their employers deny them their legal wage. As one Harris County AFL-CIO officer explained: "[w]hen workers work for free ... it drives down wages for everyone else in the community."<sup>45</sup> In other words, wage theft creates a race to the bottom.

Declining wage and hour standards also have a severe impact on businesses that do comply with the law. Unscrupulous subcontractors, who avoid their responsibility to pay employees correctly and account for payroll taxes consistently, undercut law-abiding businesses. "Companies who abide by the law suffer when unscrupulous companies underbid them for competitive contracts."<sup>46</sup>

**Figure 4: Method of Payment**



When employers shortchange employees, they also shortchange the local economy. Low-income families, who have to spend most of their earnings on basic necessities, are unable to spend, which in turn impedes the circulation of capital through local economies. As one report put it, "[w]age theft robs local communities of this spending, and ultimately limits economic growth."<sup>47</sup> Wage theft also depresses sales tax revenue for local and state governments. Further, it robs state and federal coffers of unemployment taxes. In this report, 47% of workers received all or some portion of their wages in cash. Employers seldom report payroll taxes on most of these cash payments. A recent report among Austin construction workers found that *at least* \$8,618,869 of federal and state unemployment taxes were lost in 2009 due to employers' misrepresentations of worker income and failure to pay payroll records.<sup>48</sup> Wage theft also costs

<sup>45</sup> Pinkerton, *supra* n. 4.

<sup>46</sup> Construction Worker Defense Project, *Building Austin, Building Injustice, Working Conditions in Austin's Construction Industry*, <http://www.carpenters.org/misclassification/ALL%20DOCUMENTS/-Building%20Austin-%20Building%20Injustice-Workers%20Defense%20Project%202009.pdf>) at 42 (2009) (accessed May 26, 2011).

<sup>47</sup> Bernhardt, *supra* n. 6.

<sup>48</sup> Worker Defense Project, *supra* n. 46, at 49.

taxpayers —because many working families must resort to public programs to meet basic needs when wages fall short.”<sup>49</sup> Better wage enforcement is good for business.

## **BEST PRACTICES AND RECOMMENDATIONS**<sup>50</sup>

As noted already, wage theft is not an epidemic unique to El Paso. In the face of inadequate federal and state legislation and enforcement, several local governments around the country have taken matters into their own hands to deal with this injustice. This section assesses local wage theft ordinances from Florida, California, and Washington, and provides recommendations for a local El Paso wage theft ordinance that could increase enforcement and better protect El Paso workers.

### **Local Action:**

#### **Best Practices of Local Wage Theft Ordinances Throughout the United States**

##### *Miami-Dade County, Florida*

In February 2010, Miami-Dade County enacted the —Ordinance Establishing Chapter 22 of the Code of Miami-Dade County; Prohibiting Wage Theft, Providing Administrative Procedures and Private Cause of Action for Wage Theft.”<sup>51</sup> Miami-Dade was able to pass this ordinance despite a state provision prohibiting localities from creating a minimum wage separate from the state minimum wage.

The policy goals of the Miami-Dade Ordinance are set out in the —Declaration of Policy” at the outset of the legislation:

*Eliminating the underpayment or nonpayment of wages earned by persons working in the County serves the public purpose by promoting economic security and dignity for those working in the County; by promoting business and economic development through the elimination of unfair economic competition by unscrupulous businesses that do not pay or that underpay their employees; and by relieving the burden on the public that subsidizes unscrupulous employers whose employees are forced to rely on public assistance because of unpaid or underpaid wages.*

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<sup>49</sup> *Id.*

<sup>50</sup> Dr. Morales’ institutional affiliation is not endorsing any public policy recommendations. Involvement in this project involved consultation on survey and methodological design, data analyses, and quantitative drafting, but no policy recommendations.

<sup>51</sup> Board of County Commrs., *Ordinance Establishing Chapter 22 of the Code of Miami-Dade County, FL; Prohibiting Wage Theft, Providing Administrative Procedures and Private Cause of Action for Wage Theft*, <http://www.miamidade.gov/govaction/matter.asp?matter=100638&file=false&yearFolder=Y2010> (herein —Miami-Dade Ordinance”) (accessed May 26, 2011).

Beyond the strong policy declaration, the Miami-Dade Ordinance contains the following key elements. First, Section 22-3 defines wage theft as the situation when an employer fails to "to pay any portion of wages due to an employee, according to the wage rate applicable to that employee, within a reasonable time from the date on which that employee performed the work for which those wages were compensation." Section 22-2(f) defines a reasonable time as 14 days and allows employers and employees to mutually and expressly agree to a timeframe of up to 30 days, and (g) sets a threshold amount of \$60.

Second, the ordinance creates an investigatory system to handle complaints. To file a complaint, aggrieved employees or members of entities must file a written complaint with the county no more than one year after the date of the last incidence of alleged wage theft. The complaint must set out the facts of the claimed violation with "sufficient specificity." After receiving a complaint and determining that it alleges wage theft, the county serves the complaint and written notice on the person charged with wage theft. The respondent must file an answer within twenty days after receipt. The county has an official policy of encouraging conciliation and will work with parties to that end. If, however, conciliation does not succeed, either party may request a hearing before a Hearing Examiner, appointed by the county, during which parties can submit evidence, cross-examine witnesses, obtain subpoenas, testify under oath, and be heard. The complainant has the burden of proof to establish wage theft by a preponderance of the evidence. Upon conclusion of the hearing, an adjudicative final order shall be issued and served upon the parties, setting forth written findings of fact and conclusions of law.

Third, Section 22-5 of the Miami-Dade Ordinance provides that, if the preponderance of the evidence demonstrates a wage theft violation, the Hearing Examiner will order the employer to pay wage restitution to the employee in an amount equal to three times the amount of back wages. This amount shall include the back wages in addition to liquidated damages as compensation for the economic losses suffered by reason of the employee not receiving the wage at the time it was due. Liquidated damages are awarded to compensate workers according to the time value of money. The enhanced possible damages also increase the possibility of retaining an attorney, thereby increasing the likelihood of a private remedy.<sup>52</sup>

Finally, the Miami-Dade Ordinance ensures a low-cost enforcement mechanism by requiring the employer to pay the Board of County Commissioners an assessment to cover actual administrative processing and hearing costs. If the employer fails to comply within 45 days, the county can grant them an extension; but, if not, the County must require the employer to pay interest on treble damages and on the cost assessment.

The ordinance also allows for private attorneys to take on wage theft cases at which point the County will automatically cease any investigation. Section 22-4(9)(a) provides that the wage theft complaint is withdrawn, if an employee brings a private action "whether under state law, federal law, or both, in any state or federal court to seek unpaid wages based upon the same facts and allegations." The wage complaint will also be dismissed if the County learns that the Florida Attorney General or another body of the state is bringing an enforcement action based on wage

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<sup>52</sup> *Id.*

violations. This is significant because it provides a means for the county to save on enforcement costs.

### *San Francisco*

In contrast to the Miami-Dade Ordinance, the San Francisco Ordinance actually sets a minimum wage, something that is not possible in El Paso due to preemption by Texas law. It also establishes notice, posting, and payroll record-keeping requirements for employers.

The San Francisco Ordinance is enforced and implemented by the city's Living Wage/Living Health Division of the Office of Contract Administration, which utilizes both administrative and civil enforcement mechanisms. Section 12R.7 of the ordinance lays out extensive administrative procedures to enforce the ordinance. Any person may report a suspected wage violation to the agency; reporting is kept as confidential as possible. The section allows the agency, when it has reason to believe that a violation has occurred, to order a temporary or interim relief to mitigate the violation or maintain the status quo, pending completion of a full investigation or hearing.

Section 12R.7(b) provides for civil enforcement of the ordinance, allowing the agency, the city attorney, or any person aggrieved by a wage non-payment to bring a civil action in court. Civil remedies include the payment of back wages, the payment of an additional sum as liquidated damages in the amount of \$50 to each employee or person whose rights were violated, reinstatement in employment and/or injunctive relief, and reasonable attorneys' fees and costs. If the agency holds a hearing, it may order reinstatement, payment of back wages, and payment of an additional administrative penalty in the amount of \$50 to each person. The city also may revoke or suspend any registration certificates, permits, or licenses held or requested by the employer until the violation is remedied.

The San Francisco ordinance accounts for the cost of administrative enforcement by providing that the agency may order the violating employer to pay to the city a sum of not more than \$50 for each day or portion thereof and for each employee or person as to whom the violation occurred. Those funds are then allocated to the agency to offset the costs of implementing and enforcing the ordinance.

Finally, the San Francisco Ordinance has an anti-retaliation provision to protect workers who file a complaint. Section 12R.6 makes it "unlawful for an Employer or any other party to discriminate in any manner or take adverse action against any person in retaliation for exercising rights protected under" the ordinance. It also creates a rebuttable presumption of retaliation when an employer takes ~~adverse~~ action against a person within ninety (90) days of the person's exercise of rights protected under this Chapter." This type of provision, if implemented in El Paso, would fill an important gap left by the Texas Payday Law, which lacks protection against retaliation.

## Seattle

Most recently, on April 25, 2011, Seattle enacted legislation to make it a criminal offense to intentionally not pay an employee for work performed.<sup>53</sup> A March 2011 memo by a Seattle city councilmember details the key statutory components of the proposed ordinance.<sup>54</sup> First, the ordinance modifies the Seattle Municipal Code to more clearly define wage theft and include a list of specific circumstances that can be used to determine whether a defendant intended to commit wage theft. Second, the ordinance clarifies that wage theft can occur either at the place where the agreement for service was made or where the services were performed. This ensures that the wage theft law applies where the agreement was made in the city, but the work was performed outside of the city limits or vice versa.<sup>55</sup> Third, the ordinance grants the city's Director of Finance and Administrative Services the power to refuse, revoke, or deny renewal of a Seattle business license to those convicted of wage theft under the local ordinance or who have been found to have violated state wage theft laws and have not satisfied the judgment. This is similar to the San Francisco provision that allows the agency to request that city agencies revoke or suspend any registration certificates, permits, or licenses held or requested by the wage theft violators until the violation is remedied.

## New Orleans

In New Orleans, where wage theft is up partly because Hurricane Katrina sparked a building boom that attracted unscrupulous contractors," advocates are working with the City Council on an ordinance that will likely to make wage theft a crime.<sup>56</sup> The New Orleans Ordinance has not yet passed, but Section 54-532 of the proposed ordinance makes it unlawful for:

- (1) . . . any person to fail to pay, within a reasonable time, any portion of wages due to any individual hired in the city of New Orleans for employment or employed in the city of New Orleans.
- (2) ... to terminate or take other adverse employment action against an individual or report or threaten to report an individual to law enforcement with intent to influence the individual in his or her report, testimony in any form, or appearance at a judicial proceeding related to wage theft crimes.

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<sup>53</sup> *Seattle City Council makes wage theft a crime*, SEATTLE TIMES (April 25, 2011) (available at [http://seattletimes.nwsourc.com/html/politics/2014874499\\_wages26m.html](http://seattletimes.nwsourc.com/html/politics/2014874499_wages26m.html)).

<sup>54</sup> Tim Burgess, *Seattle City Councilmember: The Problem of Wage Theft*, [http://www.seattle.gov/council/burgess/attachments/2011wage\\_theft\\_memo.pdf](http://www.seattle.gov/council/burgess/attachments/2011wage_theft_memo.pdf) (accessed May 26, 2011).

<sup>55</sup> *Id.*

<sup>56</sup> Emily Bazar, *More lawmakers tackle rise of wage-theft complaints*, ABC NEWS (Aug. 16, 2009) (available at <http://abcnews.go.com/Business/lawmakers-tackle-rise-wage-theft-complaints/story?id=8343-969&page=1>).

(3) ... to intimidate or to attempt to intimidate the individual with the intent to influence him in his or her report, testimony in any form, or appearance at a judicial proceeding related to wage theft crimes.

(4) ... to intentionally make a written or oral statement known to be false, including providing documents that are forged, wrongfully altered, or contain a knowingly false statement or knowingly false representation of a material fact, in connection with an investigation of wage theft crimes.

If enacted, the New Orleans Ordinance will impose criminal penalties on wage theft violators. The statute makes wage theft a misdemeanor punishable by a fine of up to \$500 or by imprisonment not exceeding six months, or both. Punishments worsen with multiple violations. In addition to fines and imprisonment, violators must pay restitution in the amount of the wages stolen, plus interest at a rate of 4%. If restitution is not paid within 30 days, the person shall be subject to a mandatory 15-day imprisonment.

One unique aspect of the New Orleans law is that Section 54-534 outlines specific duties of law enforcement officers, including the filing of incident reports, required forms for witnesses and victims, and interpreting services. The section also contains a built-in protection for undocumented immigrants, providing that officers shall not inquire, investigate, or otherwise record the immigration status or country of birth of any individual in relation to a report or investigation of wage theft.

### **RECOMMENDATION: INCREASE FEDERAL AND STATE ENFORCEMENT**

State and local governments can take several small steps to increase their effectiveness to enforce wage and hour violations in El Paso. First, the Texas Workforce Commission should increase its investigative capacity, allow for field investigations, and increase the period of time within which an employee may make a complaint.

Second, the United States Department of Labor should take the following steps:

- (1) **Ensure** the right of employee complainants to have a representative or attorney to represent their interests in the investigation process, if they want, particularly where the employer is represented by an attorney
- (2) **Ensure** the fast and efficient assignment of investigators and resolution of cases, particularly when the employee has a statute of limitations problem;
- (3) **Ensure** employee participation in the negotiation process;
- (4) **Ensure** continued collaboration, communication, and transparency with local community-based organizations to increase outreach and capacity among employees.

### **RECOMMENDATION: PASS AND ENFORCE AN EL PASO CITY WAGE THEFT ORDINANCE**

### ***Wage Theft Ordinance: Why a Local Ordinance?***

Counties and municipalities throughout the country are using local tools to deal with the issue of wage theft in their communities. Here in Texas, quick action in the state legislature to better protect workers or increase resources for enforcement is unlikely in the next several years. The United States DOL is slowly improving the effectiveness of the Wage and Hour Division, but those changes will only reach a narrow portion of workers in El Paso. Therefore, El Paso should take the lead in this matter.

Local leaders continue to face tough decisions regarding the fiscal health of our region. Fortunately, the best practices of other localities show there are solutions to strengthen enforcement of wage theft violations, using methods that not only allow more workers to recover their wages, but also bring more revenue into the city's coffers. The authors have put together language that complies with state law, will increase penalties for wage theft violations by unscrupulous employers, and improve protections for thousands of workers in the El Paso region.

### ***Wage Theft Ordinance: Recommended Language***

#### **-- Introduction --**

An El Paso Wage Theft Ordinance should set the tone of the debate and make explicit the consequences of wage theft outlined in this report that the ordinance would address. It should demonstrate the City's commitment to protect the least vulnerable in the region.

#### ***Proposed Language***

It is hereby declared to be the policy of the City of El Paso to prevent and eliminate wage theft. Eliminating the underpayment or nonpayment of wages earned by persons working in the City serves the public purpose:

- (1) by promoting financial security and dignity for workers and their families;
- (2) by promoting ethical business and economic development through the elimination of unfair economic competition by unscrupulous businesses that underpay or refuse to pay their employees;
- (3) by relieving the burden on the public that has to subsidize unscrupulous employers whose employees are forced to rely on public assistance because of unpaid wages; and
- (4) by ensuring due revenue for the public by rightly requiring employers to pay workers' compensation and payroll taxes.

-- Violations --

The El Paso Wage Theft Ordinance should specifically enumerate the following violations:

- (1) failure to pay overtime at time and a half the regular rate of pay for all hours worked in excess of forty hours per week constitutes a failure to pay wages;
- (2) failure to pay the wages agreed upon by an employer;
- (3) employer retaliation against an employee for filing a complaint. In recognition of the unique vulnerabilities of undocumented workers, the anti-retaliation provision should explicitly prohibit employers from threatening to use immigration enforcement to intimidate or coerce employees for complaining about wages.

***Proposed Language***

It shall be unlawful—

- (1) for an employer to fail to pay any portion of wages due to an employee, according to the wage rate applicable to that employee and at the time required by law, in the City of El Paso for employment in, or contracted in, the City of El Paso.
- (2) for an employer to fail to pay any portion of overtime wages due to an employee, according to the overtime rate applicable to that employee and at the time required by law, in the City of El Paso for employment in, or contracted in, the City of El Paso.
- (3) for an employer to terminate or take other adverse action against an individual or report or threaten to report an individual to law or immigration enforcement with intent to influence the individual in his or her report, testimony in any form, or appearance at a legal proceeding related to wage theft.
- (4) for an employer to intimidate or to attempt to intimidate the individual with the intent to influence him in his or her report, testimony in any form, or appearance at a judicial proceeding related to wage theft.
- (5) for an employer to intentionally make a written or oral statement known to be false, including providing documents that are forged, wrongfully altered, or contain a knowingly false statement or false representation of a material fact, in connection with an investigation of wage theft.

-- Investigation and Reporting Requirements --

Finally, a Wage Theft Ordinance must have a procedure for reporting and pursuing a complaint that is efficient for the employee, employer, and the city *and* that does not drastically increase already limited budgetary resources. The type of procedure will ultimately depend on whether the city chooses to enact a criminal ordinance—where the parties involved are the city and the violator—or a civil ordinance—where the parties involved are the aggrieved employee and the violator.

Because city code inspectors would likely enforce a criminal version of the ordinance, criminalization has the added benefit of economic efficiency in that it would utilize the existing enforcement structure already in place in El Paso. Nonetheless, a criminal ordinance can be restrictive in that the cost of prosecution could not be shared with private civil attorneys, but rather is placed solely on city attorneys.<sup>57</sup>

Regardless of whether the ordinance is civil or criminal, it should contain a provision requiring the creation of a wage bond. A wage bond would require employers to put up money to cover potential claims and help ensure payment for workers who find that their employer has disappeared or does not have adequate funds to cover their wages.

### *Proposed Language*

#### **Civil**

An aggrieved person may file a report within one year of the last incidence of alleged wage theft. The complaint must set out the facts of the alleged violation with sufficient specificity. After receiving a complaint and determining that it alleges wage theft, the city shall send the complaint and a written notice to the person charged with commission of wage theft. The respondent must file an answer no later than twenty days after receipt. A Wage Theft Grievance Examiner will be appointed by the city to hold hearings, during which parties can submit evidence, cross-examine witnesses, obtain subpoenas, testify under oath, and be heard. The complainant has the burden of proof to establish wage theft by a preponderance of evidence. Upon the conclusion of the hearing, an adjudicative final order shall be issued and served upon the parties, setting forth written findings of fact and conclusions of law.

#### **Criminal**

An aggrieved person may file a complaint with the City Code Compliance Division. The complaint must be filed within 30 days of the alleged unlawful activity under this chapter. The Code Compliance Division will investigate the complaint, and, if there is probable cause that the Code has been violated, issue a citation. The violator may plead guilty and pay the fine or contest the citation in Municipal Court and request a jury or bench trial. If the violator fails to pay the citation penalties, outlined in this chapter, and fails to request a trial in Municipal Court within 30 days of the issuance, the Code Compliance Division will refer the case to the city attorney's office. The city attorney will provide legal representation to the city in Municipal Court and prosecute wage theft violations.

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<sup>57</sup> *Id.*

### **Wage Bond**

If, after receiving a wage complaint from an employee, it appears to the Wage Theft Grievance Examiner or Municipal Court Judge, as appropriate, that the employer is representing to its employees that it is able to pay wages for their services and that the employees are not being paid for their services, the Wage Theft Grievance Examiner or Municipal Court Judge may require the employer to file a bond in such sum as the Wage Theft Grievance Examiner or Municipal Court Judge deems reasonable and adequate in the circumstances, with sufficient surety, conditioned that the employer will for a definite future period not exceeding six months conduct its business and pay its employees in accordance with this ordinance.

### **-- Penalties --**

The monetary penalties imposed by the wage theft ordinance –should be high enough to make it worth the trouble to make a complaint and to deter violations in the future.”<sup>58</sup> Like the procedures already discussed, the type of penalties imposed will depend on whether the city pursues a criminal or civil wage theft ordinance.

Under a civil ordinance, the penalties should include liquidated damages to compensate workers according to the time value of money or, in other words, to compensate them for the time they had to wait to receive the wages they had earned. The increased possible damages also enhance the possibility of being able to retain an attorney, thereby increasing the likelihood of a private remedy. Encouraging the local bar to become involved in wage theft claims would reduce enforcement costs for the city. High monetary penalties, such as treble damages, also would make wage theft more expensive for employers who violate the ordinance and less expensive for the city to enforce. In addition, an offending employer should be required to pay the city an assessment to cover administrative processing costs and hearing costs. The civil penalties proposed below are modeled after the Miami-Dade Ordinance.

Under a criminal ordinance, the penalties charged to the violator would be paid to the city. Note that penalties from code violations in El Paso are prohibited by law from being placed into a wage fund for victims. Because money from the penalties cannot go into such a fund, a criminal ordinance would need to contain a separate provision ordering the payment of restitution. The criminal penalties suggested below are modeled after the proposed New Orleans Ordinance.

### ***Proposed Language***

#### **Civil**

If the preponderance of the evidence demonstrates a wage theft violation, the employer shall be ordered to pay wage restitution to the employee in an amount equal to three times the amount of back wages. This amount shall include the back wages in addition to liquidated damages as compensation for the economic losses suffered by reason of an employee not receiving the wage at the time it was due. In addition, the Wage Theft Grievance Examiner may order the violating

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<sup>58</sup> *Id.* at 19.

employer to pay to the city a sum of not more than \$50 for each day or portion thereof and for each employee or person as to whom the violation occurred. Those funds are then allocated to the City, to be used to offset the costs of implementing and enforcing this ordinance. This assessment shall not exceed actual administrative processing costs and costs of the hearing.

**Criminal**

Any person who commits wage theft in violation of this chapter shall be guilty of a Class C Misdemeanor, and, upon conviction thereof, shall be punished by a fine of up to \$500. Each occurrence of wage theft shall constitute a separate offense for each individual and every day, or part thereof, during which a violation of this chapter, or of any law or regulation referenced herein, is allowed, committed, continued, permitted or retained by such person, and shall be punishable accordingly. In addition to any other fine or penalty imposed under this section, the court shall order, as part of the sentence, restitution in the amount of the stolen wages, plus interest at a rate of 4%.

As with the San Francisco and Seattle ordinances, the El Paso ordinance should tie noncompliance with wage theft judgments to the suspension or revocation of city licenses and permits. Suspending building permits would be an effective means of curbing wage theft in the construction industry. Withdrawing health permits could be an obvious way to curb wage theft in the restaurant industry.

***Proposed Language***

Where prompt compliance is not forthcoming, the City may take any appropriate enforcement action to secure compliance, including, except where prohibited by state or federal law, requesting that City agencies or departments revoke or suspend any registration certificates, permits, or licenses held or requested by the violator until such time as the violation is remedied.

**-- Controlling Cost --**

The civil version of the local wage theft ordinance should encourage conciliation between the parties. Encouraging parties to independently settle their disputes can cut administrative and enforcement costs to the city.

The civil version of the local wage theft ordinance should also accommodate a private right of action for individuals, which, upon commencing, would automatically terminate any local administrative enforcement mechanism in progress.

### *Proposed Language*

#### **Conciliation**

The city encourages conciliation of charges and will work with the parties in an attempt to mediate an agreement. If possible, a written conciliation agreement resolving the dispute between the complainant and the respondent shall be executed prior to referral of the matter to a Wage Theft Grievance Examiner. Whenever a party believes the other party has breached a conciliation agreement, the aggrieved party may file a civil action in a court of competent jurisdiction for enforcement of such agreement. Nothing said or done in the course of attempting conciliation under this chapter may be used as evidence in any subsequent proceeding under this chapter or otherwise without written consent of the parties to the underlying charge of violation.

#### **Private Action**

Any employee may also bring a private action under this Section in any court of competent jurisdiction. Civil remedies include the payment of back wages, the payment of liquidated damages in the amount of \$50, and reasonable attorneys' fees and costs.

If, during the pendency of a wage theft violation complaint and prior to the issuance of a final decision by the Wage Theft Grievance Examiner, a complainant employee brings a private action, whether under state law, federal law, or both, in any state or federal court to seek unpaid wages based upon the same facts and allegations as the employee's complaint to the city, or affirmatively or by consent opts to participate in any such private litigation, that employee's complaint of wage theft shall be deemed withdrawn with respect to any respondent employer named as a defendant in such court action. The city, upon becoming aware of any private action described herein, shall advise the complainant and any respondent subject to the private action in writing within fifteen (15) days of this provision and its effect on the complaint. Within thirty (30) days of the issuance of such notice, the city will dismiss, with prejudice, the complaint with respect to a respondent named as a defendant in the private action.

## **CONCLUSION**

This Report shows a crime epidemic that is sweeping El Paso's labor force. Low-income workers have helped El Paso survive through the most recent recession and other earlier economic downturns. Yet, these workers are vulnerable to the practices of unscrupulous employers who seek to increase their profit margin by withholding and denying workers their lawful wage.

Though any solution to deterring wage theft requires increased federal and state enforcement of wage and hour laws, this Report points to change that is possible at the city level. Indeed, there are ways that locally we can make important inroads to ensure an honest and fair working environment for thousands of the most vulnerable members of our community. It is the authors' hope that our local leaders will implement these recommendations and begin to put a stop to a crime wave that negatively affects hard-working El Pasoans, our local government coffers, and the profits of law-abiding businesses throughout the region.

## APPENDIX

### Data and Methodology

The objectives of this study were to assess the degree of wage theft in the El Paso region. As such, the target population was the low-wage workers in this region of Texas. Low-wage workers are those who earn below the livable wage. According to Pennsylvania State University livable wage calculator, the livable wage in El Paso is \$7.49 for an adult and \$15.26 for an adult with one child (<http://www.livingwage.geog.psu.edu/>). These calculations were replicated and confirmed in Dr. Maria Cristina Morales' social inequality course.

To reach this population, we conducted purposeful sampling at central bus terminals, downtown public areas, and communities in the periphery regions of El Paso from June 2010 to April 2011. Purposeful sampling seeks respondents with the characteristics of interest in the study; in this case, low-wage workers. Data collection was conducted by members of the Labor Justice Committee and volunteers at Paso del Norte Civil Rights Project at central bus terminals: Cinco Puntos (N= 17), Eastside Terminal (N= 1), and Santa Fe (N= 44) and in the Sacred Heart area (N= 96) (Table 1). This sampling technique was intended to target low-wage workers, who rely on public transportation. A limitation of this technique is that it does not capture low-wage workers who have their own transportation or who car pool. Surveyors randomly selected respondents on site. To establish rapport with respondents surveyors also randomly selected individuals and discussed the goals of this project and passed out fliers, outlining the services available through the authors' organizations.

Organizers from the Border Network for Human Rights (BNHR) collected data through convenience sampling techniques with their constituents in the communities of Borderland, El Caminante, Montana Vista, Salazar apartments, and Westway, resulting in an N= 95.

Convenience sampling is a nonprobability technique where respondents are selected at the convenience of the researcher. This sample collected through the convenience model will differ from a random sample in that it over-represents: immigrants and low-wage workers, communities in the periphery of El Paso, and individuals involved in community organizing. Yet, these characteristics are in line with the purposeful sampling techniques conducted by the Labor Justice Committee and the volunteers at Paso del Norte Civil Rights Project. BNHR already had established rapport with these communities through its community organizing efforts with low-wage immigrant workers.

Although this methodology constricts generalizability to all low-wage workers in the El Paso region, this limitation is lessened when considering that the purpose of the study is to explore wage theft rather than conduct a comparative analysis between low- and high-wage workers or to generalize wage distribution to the entire El Paso area. While these sampling techniques are not ideal, it is difficult to survey all El Pasoans, which would allow for generalizability to the entire El Paso population. As such, convenience sampling is among the most common sampling techniques.

As a whole, these two sampling methods resulted in 253 total respondents.

Table 1: Data Collection Location, Dates, and Sample Sizes

Location	Dates	Sample Size
Border Network for Human Rights (Borderland, El Caminante, Montana Vista, Salazar apartments, and Westway) Cinco Puntos (bus terminal)	August 2010-April 2011	95
	August 2010	17
Eastside (bus terminal)	September 2010	1
Santa Fe (bus terminal)	June-July 2010	44
Sacred Heart area	June 2010-April 2011	96
<b>Total Sample</b>		253

Although low-wage workers were the target population, no respondents were turned away because of the industry in which they were employed, their occupation, or wages. Excluded from the data collection are self-employed individuals. Most interviews were conducted in Spanish and lasted approximately 5 minutes. All respondents were over 18 years old. This sampling design resulted in a convenience sample that is not representative of the target population.

#### *Operationalization of Key Concept*

The operationalization of wage theft is based on three concepts: getting paid below minimum wage, not getting paid the promised wages, and not receiving over-time pay compensation. In this study, workers' wages are based on the question, how many dollars do you get paid per hour? (*¿Cuántos dólares gana usted por hora?*). If this question was left blank we estimated an hourly wage based on the following questions: (1) how many hours did you work per week (*¿Cuántas horas por semana trabaja?*), and (2) how much did you earn per week (before taxes) (*¿Cuánto gana por semana (antes de impuestos)?*). Not getting paid the promised wage is captured through the question, ~~–In~~ the last couple of months has your employer(s) paid you the promised wage? (*¿Su patrón o patrones siempre le ha(n) pagado el sueldo prometido de los últimos dos meses?*). Individuals who indicated ~~–yes~~ are coded as not getting paid the promised wage. Lastly, to capture whether workers who worked over 40 hours a week received overtime compensation, we used a series of questions. First, we examined the question, ~~–Have~~ you worked more than 40 hours per week in the last two months? (*¿Usted ha trabajado más que 40 horas por semana en los últimos dos meses?*). If respondents answered yes, then we assessed the question, ~~–How~~ much did your employer pay you for hours worked beyond the 40 hours per week? (*¿Cuánto le pagó el patrón por horas trabajados más que 40 horas por semana?*). Responses to this question were then compared to the hourly wage (discussed above) to determine whether the worker got paid time and half for overtime.

## Additional Survey Information

### Figure 6: Wages by Time In The U.S.



### Figure 7: Wages by English Speaking Ability



### Figure 8: Wages by Gender

