NELP
Immigrant & Nonstandard Worker Project
Fact Sheet for Organizers
Advocating for the Working Poor and the Unemployed

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CRIMINAL PENALTIES FOR EMPLOYERS' FAILURE TO PAY WAGES

Lately some organizers and advocates have been considering use of the criminal provisions of many state laws that provide penalties for employers who do not pay workers.

A number of states already have laws on their books providing that it is a crime to not pay a worker. Many states have a provision in their criminal code prohibiting "theft of services" or "theft of labor." In general, these laws make it a crime to intentionally obtain services or labor from a person and to refuse or fail to pay for those services or labor. Many states also have provisions in their labor codes that create criminal penalties for failure to pay wages in certain cases. A 50-state chart of these laws is available at, http://www.nelp.org/docUploads/criminal%20penalties%20for%20unpaid%20wages%2Epdf.

Criminal Laws Compared To Civil Wage And Hour Laws

Criminal "theft of services" laws do not provide the same level of remedies to workers as state and federal civil wage and hour laws. Civil wage and hour laws generally establish a minimum wage and provide, in addition to recovery of unpaid wages and overtime pay, for additional damages and protection against retaliation. Criminal "theft of services" laws may have large criminal penalties, but they do not go to the worker. Additionally, the standard for proving that an employer has violated a criminal law is much higher than the standard under civil wage and hour laws.

While an individual can bring an action in court to enforce her rights under civil wage and hour laws, only law enforcement agents – for example, the police and prosecutors – can enforce criminal laws.

Criminal Laws And Campaigns

While criminal laws may not be a perfect solution to the widespread problem of employers' failure to pay workers the wages they are due, organizers and advocates may want to consider whether they might be useful in campaigns to highlight the problem and to demonstrate to employers the consequences of breaking the law. A toolkit for advocates on using these laws in campaigns is available at: http://www.nelp.org/docUploads/theft%20of%20services%20toolkit%2Epdf.

In deciding whether to engage in a campaign to enforce criminal laws for employers' failure to pay wages, it is important to carefully weigh the pros and cons of the various approaches. Ultimately, law enforcement agents alone have the power to enforce these laws, and organizing groups may not be able to control the direction a campaign takes. If the choice is made to pursue this type of campaign, it is important to develop good relationships with the law enforcement agencies, seek guarantees that the agencies will not be enforcing immigration laws and ensure that workers are aware of the costs and benefits of taking this approach.

Possible Campaign: Partnering With Police To Enforce "Theft Of Services" Laws

One approach that advocates have taken is to develop a partnership with the police to enforce theft of services provisions. Experience has shown that it is important to develop a relationship with the police department and to engage in education about how the laws will be enforced rather than to rely on individual officers to enforce them.

Low wage workers are very likely to have legitimate concerns about partnering with the police. As community members, they may have had previous bad experiences with the police. Moreover, they may be concerned that the police will ask them questions about their or their co-workers' immigration status.

It is extremely important, if partnering with the police to have a guarantee that they will not engage in immigration enforcement. The National Immigration Law Center (NILC) has gathered a list of state and local non-cooperation ordinances and policies which is available at http://www.nilc.org/immlawpolicy/LocalLaw/. If your city does not already have one, getting one adopted should be the first step in your campaign. If your city does have one, you should ensure that it is being followed.

Similarly, it is essential that there is a clear police procedure for dealing with theft of services complaints and that workers and organizers know what to expect from the police.

Possible Campaign: Enacting A Theft Of Services Law At The Local Level

In states that do not have such criminal laws, advocates may consider the possibility of a municipal ordinance criminalizing failure to pay wages. This can have the effect of drawing attention to the problem of non payment of wages and stigmatizing bad employers. Advocates in Kansas City, Mo took this approach and in 2004, the city passed Ordinance No. 040964.

Possible Campaign: Partnering With State Attorney General To Enforce Criminal Violations Of Labor Code

In some states, the Attorney General (AG) is empowered to enforce criminal provisions of the state labor code. This may also be within their inherent authority. NELP has developed a 50-state chart of the powers of AGs which is available at: http://www.nelp.org/docUploads/State%20Jurisdiction%20Chart%2Epdf.

Groups organizing to combat severe employer violations of wage and hour laws may consider developing a relationship with their state AG to ensure that bad employers are prosecuted under the criminal provisions of the state labor code.

As when partnering with the police, it is important to get a clear commitment from the Attorney General's office that it will not be enquiring into immigration status or enforcing immigration law. The New York State Attorney General has issued a formal opinion that immigration status is not relevant to enforcement of state

wage and hour laws. This opinion is available at: http://www.oag.state.ny.us/lawyers/opinions/2003/formal/2003_f3.html. It may be useful to see if your state Attorney General would be interested in issuing a similar opinion.