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Keywords

Employment rights, Day laborers, Undocumented immigrants, Undocumented workers

ALL IN A DAY'S WORK: ADVOCATING THE EMPLOYMENT RIGHTS OF DAY LABORERS

By Liza Zamd*

SPECIAL INSERT COMMEMORATING THE TENTH ANNUAL HISPANIC LAW CONFERENCE

In December 2005, House Bill H.R. 4437 brought the immigration debate to the forefront of national politics.¹ In homes and in public forums across the country, people debated the advisability of allowing an estimated 12 million undocumented immigrants the right to obtain legal status. Further complicating the issue, advocates highlighted human rights and homeland security problems resulting from millions of people living outside health, educational, and law enforcement systems.²

In the spring and summer of 2007, Congress came its closest in years to passing legislation to address a system that all sides agree is currently non-functional. In late June, however, the Senate could not foreclose a filibuster threat, and the immigration bill died without a vote. With focus now on the impending presidential elections, immigration reform has been put on the proverbial back burner – but the issue continues to smolder. Outside the immigration controversy, there are myriad legal and arguably moral problems surrounding immigrants that are unrelated to documentation status.

This article deviates from the common focus on how a person arrives in the United States by concentrating on what happens to these newcomers as workers who have critical roles in our daily lives.⁴ By taking jobs in construction, restaurants, and agricultural work,³ immigrant Latinos make up a significant percentage of the American workforce. Yet, in immigrant communities in Maryland, and across the nation, wage theft occurs with alarming frequency.⁵ Furthermore, the need for legal advocacy in this area goes largely unmet because Legal Aid and other government-funded organizations are not allowed to represent undocumented workers in most circumstances.⁶

This article focuses on a piece of the immigration issue from the perspective of a practitioner at a non-profit that assists the most controversial figures in the heart of the debate – undocumented workers. First, I will discuss the demographic realities of my clients and the nature of the cases I litigate. Then, I will explain the legal employment issues my clients face and how I deal with challenges from employers who refuse to pay their workers. Finally, I will detail some possible solutions to worker exploitation.

My experience with day laborers stems from my work as a staff attorney at CASA of Maryland (“CASA”).⁷ CASA is a non-profit organization that provides health, education, employment, community organizing, and legal services to predominantly low-income immigrants. I am the sole attorney in CASA's Baltimore office, though there are other attorneys in CASA's Silver Spring location. In Baltimore, the Latino

population has increased significantly in the last ten years, reflecting the overall growth in the state.⁸ Although I strive to provide basic legal advice to whomever walks through the door, I prioritize wage and hour cases, almost to the exclusion of any other issue. The general advice I give often pertains to the many poverty problems that confront citizens and immigrants alike: landlord-tenant disputes, low-level criminal issues, access to health care, and access to education. Depending on other commitments within my job, I have between 75 to 100 (or more) open cases at any given time. Outside of client contact, I have continuous and frequent interaction with immigrants – speaking to between ten and fifty Latino (and sometimes African) immigrants per day.

My clients run the gamut of low-wage temporary workers, and although I sometimes encounter restaurant employees, the bulk of my cases involve construction and house rehabilitation. My clients are drywall hangers, painters, framers, carpenters, and demolitionists. Not surprisingly, they are predominately male; only about five percent of my clients are women.⁹ Most are in their twenties or thirties, though their ages range from eighteen to fifty-five. The majority of my clients are Mexican, Salvadoran, and Honduran. In addition, some are from other Latin-American countries, and even a few are native-born, non-Latino Americans.

Day laborers' wage and hour cases have a common structure. A worker usually comes into CASA after not having been paid by the employer for weeks, months, or sometimes even years,¹⁰ and our conversation usually begins after they have uttered the same six words: “Mi patron no me quiere pagar.”¹¹ For whatever reason, whether it is miscommunication, resentment, or downright malicious thievery, an employer has not paid the day laborer after work was completed. During client intake, which lasts about an hour, I try to elicit the basic factual points that will help inform the case against the employer. What days did you work? What was your wage? Where did you work? These may seem rudimentary, almost banal questions, but often my clients respond with a sheepish look and tell me they don't know. It is often challenging to piece together basic facts from a worker who, for any number of reasons, waited some months before coming to see me. With few exceptions, however, each client is resolute in his idea of how much he is owed even if he does not recall how many hours of wages went into that dollar amount.

The calculation of the wages problem is complicated by the fact that employers often give their workers random sums of money at various times during the term of service. For example, one client, Pablo,¹² did intermittent construction over the course of a few months for a prominent Latino business

owner in the area. Pablo was absolutely certain he was owed \$700 and had even kept track of his hours in a notebook — a lawyer’s dream. Pablo and I met with the employer, a man I was already frustrated with because he had failed to pay an additional six people in the previous weeks. During the meeting, it became clear that while Pablo had meticulously recorded his work schedule, he had neglected to note when he had received small partial payments that occurred at random times. In a rare turn of events, the employer had actually kept written receipts of the wages he paid — an often-neglected requirement under federal law.¹³ Upon review, it appeared that Pablo was probably owed about \$100, although there was some possible ambiguity concerning an \$80 payment. At most, Pablo should have received another \$180 for work he performed. The employer was annoyed with my initial position that Pablo was owed \$700, but I was frustrated with the employer because his irregular payments caused the confusion.¹⁴

Unfortunately, the great majority of day laborers do not write down their hours, nor do they gather other necessary information about their employer due to their fear that if they ask too many questions, the employer will just hire someone else. This often puts me in a position of weakness when I call an employer, because it may be obvious that I am missing crucial information.¹⁵ For this reason, it is helpful to make the initial employer phone call with my client sitting next to me, enabling me to ask my client for clarifications depending on how the employer responds to the unpaid wage allegations. Most clients have at least a cell phone number and first name of an employer, and calling is usually my best means to recover wages.¹⁶ If phone calls are not fruitful, however, I then write a demand letter to the employer detailing the laws that have been violated and my client’s potential recourses.¹⁷ If the demand letter fails to resolve the issue, I take the case to court if my client performs and provides the requisite requirements.¹⁸

II

Of the three-step process by which I interact with employers — the phone calls, the demand letter, and litigation — most of the amusement, frustration, and shock I experience comes from my phone interactions. Sometimes, perhaps 5% of the time, the wage non-payment arises from a true misunderstanding, and the employer wants to settle the matter as quickly as possible. Usually, however, my client is not that fortunate, and the employer proffers several reasons as to why the worker should not be paid. These excuses often make me almost laugh out loud,¹⁹ pull at my hair in frustration,²⁰ or lay down the phone, stunned.²¹

Although there are employers who give outlandish responses, some of the most popular non-payment excuses I encounter are the following:

“The worker did a bad job.”

“The worker is ‘illegal’” (i.e. is undocumented and not permitted to work in the United States).

“I’ve never heard of this worker. How do you know he even worked for me?”

“I haven’t been paid for the job.”

“The worker did a bad job” is the most common complaint among employers, and usually they are livid that I am requesting wages for work that was allegedly poorly performed. There are, of course, instances when a day laborer has done sub-par work, and even lied about his level of skill or training for a particular job. The law is quite clear on the matter; unless there is a bona fide disagreement about wages, an employer must pay employees for work performed within two weeks.²² If an employee is doing a poor job, then the employee should be fired. All workers should be supervised, and just as it would be unfair for a receptionist who cannot handle phone calls to be fired without having been paid for the work already performed, it is similarly unfair for a painter who leaves unsightly streaks on the walls to leave a 12-hour day with no money in hand.

Recently, I had an unsatisfied subcontractor case where three of his employees came to CASA after waiting four months for their wages. Juan, Mario, and Alex were good-humored, respectful men. They felt bad for resorting to legal devices because they honestly believed the subcontractor would pay them their \$6,500 wage debt, even though he had strung them along, week after week, promising money at future dates that passed without payment. The men finally grew suspicious when the subcontractor stopped answering their calls, so they came to me almost apologetically but also desperately needing the wages they were owed.

The men showed up on a Thursday, having come from work with plaster and paint splattered on their clothing. Their stories were similar to most of my other clients. Mario is 33 and has a wife and a few young children waiting for him in Honduras. He moved to the States last year so that he could finance his own children’s books and uniforms. Alex is 34 and one of the savvier workers I have met. He demanded that his employer sign an itemization of the work that would be performed and the agreed-upon wages. Unfortunately, Alex never received or kept a copy of the contract, so his foresight did not pay off. Finally, Juan is 32 and hailed from Mexico. Juan is supporting all his siblings — and their children — with his \$300 per week average salary. With the exception of that first day, he dressed up when he came to see me, even though it probably meant having to bring a change of clothing with him to work. He had a very developed sense of formality and took pride in doing things properly. I believe that it was also this sense of propriety that made him and the other men wait so long to try to claim their wages through legal means.

The employer, who turned out to be a very reasonable man, suggested my clients and I do a walk-through of the house so we could see how the work was performed. I was mindful of the fact that it made no difference whether the men had painted a giant “X” on a wall and called it a day — they were to be paid for whatever work they did. I thought, however, that if I could

meet the employer face-to-face, I would have better success at convincing him of the legal realities. After walking through the house with the men and hearing from them the different work that was accomplished, I could tell the employer was having a change of heart. He ended up offering a settlement of 75% of the debt. After some deliberation, the men agreed to the settlement, provided that I promise to go out to lunch with them.

While the unsatisfied employer situation is probably the most frequent, it is often coupled with the “worker is illegal” excuse. This argument is a little more complicated because it is sometimes accompanied with threats of calling immigration, but it is not all that difficult to rebut. Each employer has three days from the date of hire to check an employee’s work eligibility.²³ Absent any mitigating fraud on the employee’s behalf, an employer has violated federal law by not obtaining verification of any employee’s ability to work.²⁴ The significant fines for violating the law make it all the more remarkable that employers protest workers’ undocumented status, since they are basically admitting that they knowingly hired a person without work authorization.

Given that legal status does not pertain to wage and hour law, I inform employers that bringing it up is pointless and that I do not even collect that information from my clients. If the employer continues to argue, I phrase my rebuttal in these terms: “You violated federal law when you did not collect my client’s information regarding his ability to work, and you violated Maryland Wage Payment and Collection Law when you refused to give him his wages. There is nothing you can do about the first legal violation, but you are now in a position to ameliorate the second. You should also know that the Departments of Labor and Homeland Security have an agreement whereby Immigration and Customs Enforcement²⁵ will not involve itself in labor disputes.”²⁶ Usually, employers have no counter to that argument and, depending on the employer’s original inclination to pay, I am often able to collect the due wages or at least settle for a portion of them.

The third excuse is one of my favorites and can be disposed of rather quickly. Amazingly, each employer provides such a similar argument that I wonder if there is a common script handed out for subcontractors to read whenever they are called with unpaid wage claims. This is usually the gist of what I hear: “I don’t know [insert client’s name]. How do you know he even worked for me? Hell, why don’t I just come into your office and tell you that I worked for *him* and he owed me for [insert number of days owed]! Any guy can just walk into your office, claim that he has worked for me, and you’ll go representing him? That’s ridiculous.” In response to this argument, I usually have ready specific details about the worksite, the employer, the type of work performed, or other factual information that would be known only by someone who had performed the labor.²⁷ The employer usually grumbles

and may move on to the first or second excuses for not having paid, but sometimes the details are enough to induce a settlement agreement.

Although I have never had such a case, I have often thought about the possibility in which a worker comes in, pretends to have worked at a site where his friend or family member has been employed, and tries to get payment by giving me a completely falsified story. While it is theoretically possible for that to occur, CASA requires workers to perform thirty hours of community service for me to take their case to court – a strong disincentive for people who would otherwise just be fishing for easy money. Further, there is a safety net of sorts in that employers often do not pay people they have *actually* employed, much less some worker they legitimately never hired. Additionally, in the thirteen months that I have been at CASA, I have done intakes with hundreds of clients and can usually tell quite easily when people are lying.²⁸

The fourth employer excuse, “I haven’t been paid for the job,” is the most difficult one I deal with, even though there is no legal ambiguity. Under Maryland law, every worker must be paid within fifteen days of performing work.²⁹ It is therefore immaterial whether or not the employer received, or was denied, expected income. This excuse is also the most challenging because the employer, usually a contractor or a subcontractor, literally has no money to pay workers. His revenue sources are so tenuous that if one job does not pay, the employer does not have enough capital to cover other costs, such as labor.

There are no perfect solutions for this problem, although I have found that requesting a payment plan is a good way to determine whether the employer, in good faith, wants to pay off the wage debt. With my client’s permission I often settle for a

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lower amount of wages contingent on the employer providing between \$100 and \$300 per week, depending on the amount of money owed, in order to make the wage repayment less onerous. This is often a successful way to avoid court, save time, and prevent us from trying to obtain a judgment against an employer who may be judg-

ment-proof.

Ultimately, irrespective of what reasons an employer gives for not paying a worker, I am convinced that the only relevant factors in whether a day laborer will be paid are the employer’s integrity, and the employer’s aversion to being sued.³⁰ The most financially compromised employer will try hard to settle a wage claim if he or she fears the moral or legal consequences of an unpaid wage. In contrast, the most financially solvent employer will hang up on me without compunction if he or she cares little about the difficult life of a day laborer or is indifferent to landing in court.

III

Regardless of how many employers I call, write, or sue,

there will always be some who will try different ways to take advantage of their workers. At CASA, we try to implement three strategies to prevent or mitigate the likelihood that workers will be exploited. First, we provide a brief but comprehensive “Know Your Rights” talk, or *charla*, to educate workers. Second, we have created worker centers where employers and employees meet in an organized fashion. Third, we try to employ legislative fixes to common problems that plague the day laborer community.

I believe that one of the more important elements of my job is to give “Know Your Rights” talks to the community. I have a five minute workers’ rights *charla* and an accompanying booklet simply written and illustrated so that uneducated or illiterate workers can understand the bulk of the material. The *charla* involves wage and hour, employment discrimination, and workman’s compensation laws. Although CASA takes only wage cases, workman’s compensation is a huge issue among day laborers: Latinos are hurt and killed on the job at an alarming rate.³¹ Additionally, there is a limited window in which an employee can submit a discrimination claim with the Equal Employment Opportunity Commission, so I feel it is important for workers to understand that issue as well.

The education component of my job is also critical because one way to assist exploited workers is to ensure they have sufficient level of proof to win a civil wage judgment or a criminal theft of services claim. One of the best forms of proof is business records, which for an employee are contemporaneous notes that include one or more of the following: the days and hours worked, the address of the work-site, and the type of work performed. This information is powerful evidence in court since employers often do not have any rebuttal records of their own, even though they are required by law to keep them.

I give my worker’s right *charla* to every client after intake, in the hopes that if my clients are ever owed wages again, they will have a notebook of proof the next time they walk through the door. The *charla* is an imperfect solution to a much larger problem. Workers understand why the information is important but are often too discouraged by their plight in life to bother noting the information every day. After experiencing exploitation at work for months and years at a time, many day laborers have a fatalistic viewpoint and believe that even the best records in the world will not force employers to pay and therefore do not bother keeping them.

As a practitioner interested in motivating day laborers to play a role in the advocacy of their rights, I am torn as to whether I should require information-keeping as a condition for taking a case to court. Many good claims would fall by the wayside if CASA were to initiate that policy, but I also believe that some workers know they can go to CASA with little or no written proof of their hours. Because of this, some workers may feel no incentive to keep those records. I ultimately want workers to feel a sense of agency and power over their lives, which can be partially accomplished by keeping records. There

is one reason, however, that keeps me from suggesting that CASA implement a written-record policy: lack of basic education. Many day laborers are barely able to write or are completely illiterate, so it would be a huge burden – if not impossibility – for them to keep track of their hours. These people already feel deep shame about their illiteracy,³² and I would hate to create yet another barrier in their already difficult lives.

The second method CASA uses to prevent exploitation of workers is to organize day laborers and create worker centers. A worker center is a place where day laborers congregate in an orderly fashion so that employers can pick up employees who are qualified in the needed areas without the chaotic clustering occurring on street corners and in Home Depot parking lots around the country. Currently, CASA has four centers around Maryland. These centers provide workers with a safe environment, restrooms, and a barrier from the elements, which is critical during the hot summer and cold winter months. Additionally, employers must give their identification to CASA staff and list their names, addresses, and telephone numbers. The employers write a description of the work to be done, the proffered wage, and a rough approximation of the length of the job. This ensures that unpaid workers are already one step ahead of their unorganized counterparts since CASA has employer contact information in addition to proof that the employer hired the worker.

Worker centers are also useful tools to organize day laborers; CASA’s community organizers have a captive audience in the mornings when workers are waiting for employers to come. During these times workers are also given *charlas* about health and labor issues, so the centers provide an opportunity to protect workers, organize them, and educate them as well. It is also important to note that worker centers have set wage rates, so there is no race to the bottom. This also empowers workers to decide for themselves important employment priorities. Unfortunately, there is currently no worker center in Baltimore, although we are working hard to open one by the end of 2007.

Arguably, the broadest yet most difficult method for protecting workers is to create legislative fixes. Currently, CASA is determining which laws need to be strengthened or created to ensure that workers will be paid their owed wages. Two of our top legislative goals are creating laws that allow for joint employer liability and strengthening the criminal penalties for non-payment of wages.

At present, workers are often hampered in an unpaid wage claim by low-level subcontractors who, as explained above, may not have sufficient capital to cover expenses whenever a single client fails to pay for services rendered. If, however, the law were to impose joint liability to contractors for non-payment of wages, workers would be able to collect from their direct employer, the subcontractor, or from the larger, often more solvent contractors. Currently, contractors can avoid wage payment claims if they did not directly supervise the work of the unpaid day laborer. This creates an incentive for contractors to

shield themselves from being sued by keeping a distance between themselves and the work performed by sub-contractors. If there was broader joint employer liability, contractors would take a greater interest in the work performed and would have incentive to ensure that all workers are paid, even those hired by subcontractors.

Enhancing criminal penalties for wage theft would also be a useful weapon in combating the problem.³³ Currently, under Maryland's Theft of Services law, non-payment of wages is a felony, but the law is relatively weak and narrow compared to other state statutes. The Maryland Theft of Services statute reads:

- (e) A person may not obtain the services of another that are available only for compensation:
- (1) by deception; or
 - (2) with knowledge that the services are provided without the consent of the person providing them.³⁴

Given that the burden of proof is higher in criminal cases, and that Maryland's statute does not shift the burden of proof to employers, many workers are unable to overcome evidentiary hurdles.³⁵ If the burden of proof shifted to employers in the absence of federally-required record keeping, criminal prosecution of wage and hour cases would undoubtedly be more attractive to state attorneys.

Ultimately, all legislative fixes take a great deal of time, money, and effort, especially when some state legislators are hostile to the idea that all workers, regardless of legal status, should be protected by the law. CASA's legal and organizing departments are joining with other groups to help pass statutory

improvements, but the road may be a long one.

IV

I am often asked why I, a seemingly white, middle-class American, have dedicated my career to low-wage worker issues. Clients also often ask where I learned my Spanish because I have a clear accent that gives away no hint of my American background. The answer is surprising for both groups, for I, despite my pale skin, am a first-generation American of immigrant Mexican parents. My older sisters were born in Mexico and my family moved to California a few weeks before I was born. There I was educated about the finer points of stereotypes and racism – not by my parents, but by my classmates and fellow citizens. Although there are many Latinos in San Diego, I witnessed significant bigotry, yet I never experienced any of it. In school, people bad-mouthed Latinos but would turn to me and say that I was exempt from their diatribe because I was “different,” but they could not explain how. I learned Spanish before I learned English, but that made me cute and exotic, while darker-skinned schoolmates were weird and regarded with contempt for speaking another language in public. These experiences convinced me of the necessity of my work, and each eyebrow raised in surprise when I disclose that I am Latina feels like a small victory. Now...if only I could convince all the day laborers to write down their hours.

ENDNOTES

* Liza Zamd, Esq. is an attorney at CASA of Maryland. In 2001, she received her B.A. in History from Yale University, and graduated from the University of Michigan Law School, 2004.

¹ Border Protection, Anti-Terrorism, & Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005).

² Low-income undocumented immigrants do not have much access to preventative health care because they do not qualify for most government benefits. Also, although they are allowed to receive a primary education, in most states undocumented students are required to pay out of state tuition if they wish to attend college, and they are not eligible for financial aid. In November 2007, Congress will vote upon a bill, the Development, Relief, and Education for Alien Minors (DREAM) Act, which will allow a pathway to legalization for undocumented youngsters who were: 1) brought to the United States as children, 2) have been accepted into college or the U.S. armed forces, and 3) have no criminal record. Additionally, almost all states require proof of legal status in order to obtain driver's license (although Maryland is one of the few exceptions). This means that there is no government database that contains the contact information for millions of undocumented immigrants.

³ Craig J. Regelbrugge, Senior Director of Government Relations, American Nursery & Landscape Association, National Co-chair, Agriculture Coalition for Immigration Reform, American Agriculture and Immigration Reform: An American Perspective, Address at the USDA Agricultural Outlook Conference (Mar. 1, 2007).

⁴ According to a report issued by the President's Counsel of Economic Advisors, “Our review of economic research finds immigrants not only help fuel the Nation's economic growth, but also have an overall positive effect on the income of native-born workers...In 2006, foreign-born workers accounted for 15% of the U.S. labor force, and over the last decade they have accounted for about half

of the growth in the labor force... Immigrants increase the economy's total output, and natives share in part of that increase because of complementarities in production. Different approaches to estimating natives' total income gains from immigration yield figures over \$30 billion per year. Sharply reducing immigration would be a poorly-targeted and inefficient way to assist low-wage Americans.” Executive Office of the President, Counsel of Economic Advisors, Immigration's Economic Impact, 1, 4 (June 20, 2007).

⁵ A 2004 survey conducted in the suburbs of Washington, D.C. found that 58% of workers had been denied their wages at least once, while another 57% reported being paid less than the agreed upon wage. Abel Valenzuela Jr., Ana Luz Gonzalez, Nik Theodore & Edwin Melendez, *In Pursuit of the American Dream: Day Labor in the Greater Washington DC Region*, 1, 14 (UCLA Center for the Study of Urban Poverty, 2005). See Jennifer Gordon, *Campaign for the Unpaid Wages Prohibition Act: Latino Immigrants Change New York Wage Law*, 2-3 (Carnegie Endowment Working Papers No. 4, 1999) for an account detailing the passage of a strong wage and hour law in New York, the author notes that the exploitation of immigrant workers occurs not only in New York, where her campaign was launched but also in “the outskirts of Los Angeles, Dallas, Chicago, Washington, D.C., and elsewhere around the country...”

⁶ Although Legal Aid usually cannot take undocumented clients, they are able to make an exception for certain narrow issues, such as domestic violence.

⁷ CASA of Maryland was founded in 1985 as Central American Solidarity Association but has since expanded its mission to reach all immigrant communities, as well as low-wage workers.

⁸ According to the Migration Policy Institute “Between 2000 and 2005, the foreign-born population in Maryland changed from 512,040 to 641,373, representing a change of 25.3 percent [...] contrasting the national immigrant population, which...] grew from 30,760,065 to 35,689,842 (16.0 percent) between 2000 and 2005. [...] Of the total foreign-born population in Maryland in