

Lost Wages

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Jesenia Rodriguez couldn't pay her phone bill or muster the cash to complete her high school correspondence course, but it wasn't because she didn't have a job.

Ms. Rodriguez, 20, of Hanover Park, earned \$10.22 an hour as a machine operator and packer at Duraco Products Inc., a manufacturer of plastic lawn and garden accessories in Streamwood. Duraco began skipping paychecks in March 2008, workers allege in a lawsuit against company President Kevin Lynch and his brother Michael. In November 2008, Duraco filed for Chapter 11 bankruptcy protection; it has since converted to Chapter 7.

Some 34 Duraco employees claim in court that they are owed almost \$400,000 in unpaid wages. The U.S. Department of Labor also is suing Kevin Lynch, alleging Duraco allowed employees' health coverage to lapse while continuing to deduct more than \$44,000 in premiums from their paychecks.

Ms. Rodriguez says she missed \$1,200 in paychecks, resulting in \$300 in overdraft fees, calls from collections agencies and a missed graduation.

"Thanks to them, I couldn't finish high school," she says. "I wouldn't be in collections. Now my credit is totally ruined."

The Lynches didn't respond to requests for comment through their attorney, Gregory Jordan, of Jordan Kowal & Apostol LLC in Chicago. Mr. Jordan calls the allegations in both cases "suspect."

In a court filing, Kevin Lynch denies failing to pay workers the wages they earned and states that he testified in a deposition that "Duraco couldn't pay its payroll due to its lender's refusal to authorize the payment of payroll."

Michael Lynch, in court pleadings, denies failing to pay workers and denies that he was a manager of Duraco.

On Dec. 1, the bankruptcy judge ruled that the workers are entitled to \$394,000 from the Duraco estate.

Duraco's workers have plenty of company in their struggle over wages. Researchers at the University of Illinois at Chicago released in April the results of a landmark survey of 1,140 low-wage workers in Cook County. Based on the survey, UIC estimates that almost half the county's approximately 310,000 low-wage workers had experienced a pay-related violation in

the previous week. Worker advocates call these violations “wage theft,” a broad term encompassing practices like skirting minimum wage or overtime, forcing employees to work off the clock or not paying workers at all.

Lawsuits filed in federal court in Chicago alleging some violation of the Fair Labor Standards Act, the law that mandates minimum wage and overtime payments, are up 49% since 2005 and 134% since 2000. The local increase mirrors a national rise in wage-and-hour lawsuits. In 2009, the country's top 10 largest wage-and-hour settlements jumped 44% to about \$364 million, according to a report published by Chicago-based employer-side law firm Seyfarth Shaw LLP.

Each side characterizes the issue differently: Employer attorneys say the plaintiffs' bar has discovered wage-and-hour violations and has cashed in; employee attorneys say workers are discovering that their rights have been violated all along.

“As there are more large judgments and settlements, more and more lawyers get interested in these claims,” says Noah Finkel, a partner in the wage-and-hour litigation group in Seyfarth Shaw's Chicago office.

The UIC report shows alleged violations range across industries from construction to retail to domestic work in private households. In some industries, as many as 70% of workers surveyed reported a violation the previous week.

The problem goes beyond fly-by-night companies that cheat their workers and then shut down, although plenty of those exist. Many cases involve well-known businesses that outsource labor to staffing agencies accused of cheating workers. Victims are not only undocumented workers, although they are at greater risk. Many cases involve warehouses, factories and construction sites, but office workers also say they have been shorted pay.

Employee advocates blame fractured employment relationships and weak law enforcement. While wage theft predates the recession, the nation's economic slump has only deepened the problem.

The ramifications for employees are clear: The UIC study estimates that wage theft costs low-wage workers in Cook County \$379.6 million per year. On average, each of those workers lost \$50 out of weekly earnings of \$322. The impact spreads beyond employees to affect law-abiding employers placed at a competitive disadvantage to lawbreakers, local governments that lose out on tax revenue, and local economies deprived of spending by workers who don't get paid.

BOUNCED PAYCHECKS

Gaytan Construction Inc., with offices in Chicago and Berwyn, is facing a lawsuit by 27 workers seeking almost \$75,000 in unpaid wages. They allege in the lawsuit that Gaytan failed to pay them for work on residential construction projects in the city and suburbs.

The experience of Manuel Hernandez, 49, of Blue Island, is typical of the plaintiffs' claims, some of which go back to 2006. Mr. Hernandez says owner Javier Gaytan paid him for completing two previous construction jobs, so he believed he could trust him. According to court records, Mr. Hernandez, his son and nephew worked on a condo on the Northwest Side of Chicago in February 2008, but Gaytan Construction never paid the \$5,500 they earned. Instead, Mr. Hernandez received a check that bounced.

"I had to get help from my friends and ask them for money," he says through a translator. "I was behind on light bills and gas bills."

The company admitted in court filings that "a check was returned for insufficient funds," but it says Mr. Hernandez cashed "the sign of good faith" check sooner than requested. Moreover, it asserts the client didn't pay for the work performed, and "Manuel Hernandez was specifically told that he would only be paid if Gaytan Construction was paid for its work at the site."

Louis Bernstein, Chicago-based attorney for Gaytan, says the workers in the lawsuit weren't his client's employees and aren't entitled to wages. He acknowledged that some plaintiffs received checks that bounced but said it was because his client wasn't paid either.

Worker advocates and plaintiff-side lawyers say employers who shortchange workers rarely face consequences. David Weil, an economics professor at the Boston University School of Management who has studied wage-and-hour enforcement, found that between 1998 and 2008, U.S. Department of Labor investigators fined repeat violators in only 43% of cases. When they did impose penalties, 32% of companies had their fines reduced. Worker advocates say the courts seldom impose fines either; even when employees sue and win, they often receive only the wages owed, or some percentage of them. Employers essentially receive an interest-free loan from their employees, says Adam Kader, director of Arise Chicago, a non-profit that assists workers in addressing pay issues.

"The worst thing that happens is you have to pay (the workers) back," he says.

In certain industries, like restaurants and hotels, wage-and-hour violations have become standard business practice, says Nik Theodore, lead author of the UIC study and director of the university's Center for Urban Economic Development. Workers fear employers will cut their hours or fire them outright if they complain. Friends tell them it's no better anywhere else. They feel vulnerable, so they stay put and keep their mouths shut.

"Substandard conditions become business as usual in those industries," Mr. Theodore says. "It becomes the expectation on both sides of the employment relationship. . . . You have employers who think they can get away with breaking the law, and they are doing so."

OUTSOURCING TROUBLE

Other factors, such as declining union membership, are driving the rise in wage theft. Boston University's Mr. Weil wrote in a report for the U.S. Department of Labor published in May that the disappearance of unions in workplaces has decreased their "ability to play crucial roles in

assisting workers to exercise statutory rights.”

Mr. Theodore also blames outsourcing, which shifts the burden of compliance to third-party contractors. Since 2006, Chicago-area staffing agencies have settled lawsuits brought by employees hired to clean the stands at Soldier Field, to prepare food trays served by Gate Gourmet Inc. to airline passengers, and to handle cargo for United, Alitalia and Singapore airlines.

United, Alitalia, Gate Gourmet and Singapore Airlines Cargo were dismissed from lawsuits against third-party ground handlers and staffing agencies. A spokeswoman for Chicago-based United Continental Holdings Inc. says it uses outside vendors when “it makes good business sense” and requires them to “fully comply with all applicable laws.” Singapore uses contractors because it has no ground-handling unit of its own, a spokeswoman says, adding that the company “is not involved in any labor outsourcing arrangement between the ground handler and the contract labor supplier.”

A spokeswoman for Gate Group, the Swiss owner of Gate Gourmet, says company employees fulfill “more than 98% of our staffing needs in Chicago,” and the company uses staffing agencies only for short-term and temporary assignments. She adds that a violation of wage or labor laws by a staffing agency would violate its contract with Gate Gourmet.

A spokesman for SMG Corp. of Philadelphia, which manages Soldier Field for the city of Chicago, says, “It’s less expensive” to hire temporary workers because its business is seasonal and driven by events.

The less formal the relationship between a company and its workforce, the greater the risk of wage theft, UIC’s Mr. Theodore says. Workers employed by the staffing industry are particularly vulnerable.

Staffing agencies are hired by name-brand companies that generally award contracts to the lowest bidder. The agency makes its money on the margin between the contract price and the wages it pays workers. The name-brand company gets a rock-bottom labor cost without directly employing anyone.

“The company knows the billing rate, and presumably they know the minimum-wage rate,” Mr. Theodore says. “There are definitely cases where employers know it’s too good to be true.”

Eight workers have brought a class-action lawsuit against Santa Barbara, Calif.-based staffing agency SelectRemedy Inc., which supplies labor to warehouses near Joliet. The workers, many of whom were employed in Wal-Mart Stores Inc.’s warehouse in Joliet, allege a host of wage and hour violations, including failure to pay minimum wage and overtime.

SelectRemedy’s attorney, James McKenna, a Chicago-based partner at Jackson Lewis LLP, says the company denies workers were “not fully compensated for their time worked.”

When asked why Wal-Mart does not directly employ the people who handle its goods, a company spokesman says the Bentonville, Ark.-based retailer “evaluate(s) every situation from a business perspective,” and “in this particular situation, a third-party partnership is best.”

While Wal-Mart does not operate the facility, it does have a representative on site each day to be the company's “eyes and ears.”

“We do look at how people are treated, and we won't continue to do business with those who don't treat people appropriately,” he says.

Tory Moore, 37, of Kankakee, worked in a Kankakee warehouse that stores the produce of Coral Gables, Fla.-based Fresh Del Monte Produce Inc., most recently under the auspices of SelectRemedy, from 2003 until he was fired in 2009. He says he worked 40 hours a week, but his checks frequently were shorted by an hour or two. Supervisors resisted his efforts to see his time sheets, Mr. Moore says.

Fresh Del Monte Produce declines to comment. Attorney Mr. McKenna says Select-Remedy can't comment on Mr. Moore's statement that he didn't receive full pay but says that Mr. Moore was fired because a representative of Fresh Del Monte Produce saw him smoking marijuana on the job.

Mr. Moore denies the allegation and says no police report was filed at the time. He also says the Illinois Department of Employment Security approved his claim for unemployment benefits because the company did not have drug test results to prove its claim.

SelectRemedy fired him, he says, because of his complaints about his own checks and his encouragement of other workers to complain. He is now an organizer for Chicago-based worker advocacy group Warehouse Workers for Justice.

John Plunkett has seen in action what one worker attorney calls “the plausible deniability business model.” Mr. Plunkett heads Harborquest Inc., a Chicago-based non-profit that operates a for-profit staffing agency with a mission to prepare people for jobs. Harborquest regularly competes with other staffing companies for business, just as it would if it were a for-profit company.

The company briefly supplied workers to StyleMaster Inc., a Chicago-based plastic container manufacturer that filed for bankruptcy protection in 2002, according to court records.

StyleMaster, now defunct, wanted two teams of workers on 12-hour shifts, alternating between three and four days a week.

When Harborquest billed for overtime for the people who worked 48 hours over four days, the company balked, Mr. Plunkett says. Even when the staffing agency explained overtime was legally required, Mr. Plunkett says the attitude at StyleMaster was “if you're crazy enough to pay overtime, that's your problem.” Ultimately, the companies parted ways without StyleMaster ever paying its \$50,000 bill, Mr. Plunkett says.

“The only reason that customer would be making demands like that, or would even think of it, is because they know in the temporary staffing industry there are players out there who are just more than willing to accommodate them,” he says.

Many people envision wage theft as a problem limited to low-wage or undocumented workers, and the UIC report found that certain workers are more likely to experience certain types of violations.

For example, 31% of survey respondents born outside the United States said they had been paid less than minimum wage, compared with 20% of those born here. Undocumented workers were particularly at risk. The study also shows that among U.S.-born workers, blacks had the highest violation rates at 35%, compared with 17% of Asians, 12% of Latinos and 1% of whites.

In sharp contrast to minimum-wage complaints, reported violations of overtime laws varied far less across demographic groups.

Of employees in the personal-services industry who had worked more than 40 hours in the previous week, more than three-quarters reported not receiving overtime. Joseph Gallimore, 26, of Andersonville, recently settled a class-action lawsuit he brought against his former employer, Urban Out Sitters Inc., a dog walking and day care business with locations in Lakeview and the West Loop. The pooches live in the city's affluent neighborhoods, including Wicker Park, the Gold Coast and the Loop.

Mr. Gallimore began working for Urban Out Sitters in October 2007. He picked up dogs at their homes in the morning, walked them during the day and brought them home at night. He regularly worked 12-hour days, but the paychecks he submitted to court show Urban Out Sitters paid those overtime hours at the \$9- or \$10-per-hour rate that he received for his first 40 hours.

He knew the law entitled him to more, but “I had no reason to raise my voice when it seemed like 30 other people were OK with it. . . .It seemed like no one wanted to dissent.”

The company admitted in court filings that “some of the named plaintiffs and class members . . . are owed unpaid overtime wages.” It denied that failure to pay overtime was company policy and that either of the owners, Joseph Giannini or Tommy Spinosa, knew of the underpayment.

The case was settled in October for approximately \$31,500 to be paid to 52 employees, according to Jac Cotiguala, a Chicago-based attorney for the workers. Settling costs less than litigating, Mr. Giannini says, adding that he has now “turned the page.”

Mr. Gallimore, whose share of the settlement is about \$1,300, says he finds it hard to believe a lawsuit was necessary.

“It's pretty surreal,” he says. “I never thought it would come to something like this.”

'TRICKLE-UP EFFECT'

Working in an office doesn't immunize employees from wage theft. John Billhorn, a Chicago-based lawyer who represents employees in wage-and-hour cases, says he sees many cases where employees are required to work off the clock or where the employer has classified workers as ineligible for overtime when they should receive it.

“There's a trickle-up effect,” says Jacob Lesniewski, an Arise Chicago organizer. “The protections that are not afforded to low-wage workers are not afforded to professional workers.”

But standards designed for the U.S. economy of 60 years ago don't fit the modern workplace, says Mr. Finkel, the lawyer at employer-side Seyfarth Shaw. He points to overtime exemptions as an example. The so-called “white-collar exemptions” say employers do not need to pay overtime to salaried employees whose workload primarily involves one of three activities: managing others, administrative work that requires independent judgment, or intellectual or creative output. Computer employees, outside sales people and certain highly compensated employees also are exempt.

Mr. Finkel argues the standard should be changed to exclude highly skilled “knowledge workers” from overtime even if their jobs don't require them to exercise independent judgment. Many of them prefer to be exempt because a salary confers greater flexibility and prestige, he says.

Not everyone agrees with that line of reasoning. Angela Piersanti, a former client services specialist at Chicago-based insurance giant Aon Risk Services Inc., filed a class-action lawsuit against the company in April 2008. The suit alleges that Aon misclassified her when it made her salaried position ineligible for overtime based on the administrative exemption. It seeks an undetermined amount of back wages for the more than 450 people in the class.

Ms. Piersanti worked in Aon's downtown office, handling account renewals and updating policy information in the company's system. She worked between five and 20 hours of overtime per week, depending on the business cycle, but did not receive time-and-a-half, says Mr. Billhorn, her attorney.

Mr. Billhorn calls Ms. Piersanti's job title “nebulous” and points out that it's an employee's day-to-day duties that determine whether a job is eligible for overtime.

“No job title is determinative of an exemption,” he says in an e-mail. “A judge once commented that, ‘Yes, well, the employer could have called the employee the Queen of England if they wanted, but she's not, is she?’ “

Aon denied in court filings that it violated the law, and a spokesman says the company looks forward to defending itself in court.

Disputes over who is entitled to overtime often turn on complex and subtle legal distinctions, such as those in a federal lawsuit involving workers who wash the windows of Chicago high-rises.

Some 25 former and current employees are suing Chicago-based Corporate Cleaning Services Inc., its owner and chief operating officer, in federal court for overtime pay.

For seven years, Ramon Alvarado, 26, says he received \$900 to \$1,000 a week for washing windows in the Loop and along Michigan Avenue. Though he worked six or seven days a week, he says, he never received overtime pay. When he raised the issue, Mr. Alvarado says the response was, “You guys get plenty of money, so what are you complaining about?”

The employees say they were paid per job, or “piece,” which would entitle them to overtime pay. The company says they were paid by commission, which would render them ineligible for overtime. While the window washers don't sell anything, the law defines a “commission” as compensation that represents a proportion of the price paid by the customer for the goods or services provided by the worker.

In court records, the workers argue their collective bargaining agreement—they are represented by Service Employees International Union Local 1—requires overtime. They also point to internal company documents that refer to “piece rate” compensation.

Corporate Cleaning Services argues the workers' pay relates to the price the company charges customers for window washing, making it a commission. In June, Judge Robert Dow Jr. wrote that “from a macro level, the evidence appears to demonstrate a relationship between the compensation and the price of labor to customers.”

However, Judge Dow denied the company's motion for summary judgment on the question of whether Corporate Cleaning services actually paid workers on that basis, noting that the workers' attorneys had alleged too many instances where that relationship broke down, where, “simply put, the deviations between the methodology that defendants aver they use to charge for plaintiffs' labor and the actual charges billed to customers are too great, too frequent and not sufficiently explained.”

Both sides expect the case to go to trial in March.

Corporate Cleaning Services is owned by Neal Zucker, known for his civic engagement and philanthropy. He sits on numerous boards, including the Museum of Science and Industry, the Goodman Theatre, After School Matters and the Chicago Botanic Garden. He's also friends with President Barack Obama's senior adviser Valerie Jarrett and former White House social secretary Desiree Rogers. “The allegations are really baseless,” Mr. Zucker says. “I'm 100% union. A lot of my window washers make upwards of \$60,000 a year.”

EMPLOYERS SUFFER, TOO

It's not only workers who suffer when employers don't pay what they owe. Wage theft gives law-breaking companies an unfair cost advantage over law-abiding employers. Todd DeFranco, vice-president of Palatine-based DeFranco Plumbing Inc., uses union labor for the commercial and industrial projects his company handles. He says customers often are

unaware of the potential for wage theft, particularly on private construction projects where, unlike state projects, there's no certified payroll. But there is a tip-off: When a bid comes in 20% to 30% lower than other estimates, "there's a reason for that."

"They're able to undercut us in the bid process if they're not forthright or legitimate with their payroll," Mr. DeFranco says. "The frustration level in our office is very high when that happens."

Lori Abbott, owner of Abbott Industries Inc., says her Bensenville company has chased commercial plumbing jobs only to see the work go to competitors submitting suspiciously low bids. In one case, the work needed to be performed in a lobby, which meant it couldn't be done during regular business hours. The difference between her company's bid and the winner's appeared to be the cost of overtime and shift pay.

"When the playing field is level," she says, "the (low-bid) company may be getting those contracts on their individual efficiencies. But when someone in the marketplace is getting (contracts) not because of their efficiencies, but instead because of their compliance with the rules, that's a problem. That's an upset to our market."

Businesses that speak out against wage theft are the exception. Many don't realize the extent of the problem, says Patricia Werhane, managing director of DePaul University's Institute for Business and Professional Ethics. The institute is producing a documentary aimed at educating the business community about the issue.

Other employers are reluctant to criticize their colleagues in public.

"Everybody thinks it's wrong, but are they going to step up and put their name on something? That's what I see less of," Ms. Werhane says.

LOSING OUT

The effects of wage theft bleed out further, robbing the local economy of consumer spending, says Mr. Theodore, the author of the UIC study. Low-income families are more likely to spend their paychecks quickly on goods and services. When they don't receive their wages, retailers and other merchants lose out.

Lost sales also mean lost sales tax revenues for state and local governments. Those same governments are called on to fill the gap when underpaid workers can't make ends meet.

A UIC study released in August found that a quarter of warehouse workers employed in Will County relied on government assistance to cover basic needs. The report concludes that paying low wages to temporary workers—if they're paid at all—"effectively shifts the burden of supporting families to the public."

This holiday season, like every year, religious organizations across the country will distribute turkeys and other food to needy families, says Kim Bobo, executive director of Interfaith Worker Justice, a national workers rights group based in Chicago. But if those workers

received all their pay, many could buy their own turkeys.

People argue that in a time of economic crisis, workers should just be grateful to have a job and that society should do nothing that might burden employers during a recession, Ms. Bobo says. But it's exactly because times are hard that workers need all the wages they are owed.

“This is the law,” she says. “This is not an option, whether or not you pay people.”