

Combatting Rampant Wage Theft on Long Island: A Conversation with Its Chief Labor Law Enforcer

by Gregory DeFreitas

This year is the 75th anniversary of the Fair Labor Standards Act, the landmark New Deal legislation that established federal minimum wage and overtime standards, as well as regulating most forms of child labor. For the past 18 years, Irv Miljoner has directed the U.S. Department of Labor's Wage and Hour Division for all of Long Island. He also serves as National VP for the Federal Managers Association/Labor Department Chapter. The son of immigrant parents, he was raised in Brooklyn by a father who worked in a Manhattan garment factory and a mother employed in a knitwear factory. He is a graduate of Brooklyn College, City University of New York. In late September He spoke with Gregory DeFreitas at the district office of the U.S. Department of Labor in Westbury, Long Island.

Q: This year is the 75th anniversary of the Fair Labor Standards Act, and also the 36th anniversary of your employment with the DOL, and the 20th anniversary of your employment at the District Office on Long Island. So it's a year of anniversaries. Looking back over the last 20 years on Long Island, what stands out for you in terms of the major changes you've observed?

Irv Miljoner: Well, there certainly are changes to have observed, by anyone who's worked here. In a nutshell, I can say that the violations that we find are more severe and more frequent than ever before. I say that objectively. It's reflected in the casework that we do, the nature of the complaints that we receive, and the results of the investigations we do.

We are a civil law enforcement agency, or a regulatory agency, or however you want to categorize it. We enforce most of the federal labor laws – actually, some 60 laws – the most prominent of which, and the one that presents the most work, is the Fair Labor Standards Act. It provides the minimum wage, overtime, child labor, recordkeeping provisions. And that's really what I'm speaking of when I say the violations are more severe and more frequent than ever before.

Q: Do you see much in terms of child labor? Do you get violations very frequently these days?

IM: No. Unequivocally, no. It's not that the violations aren't out there. We find them occasionally. We're very attuned to it. Any case that we look into has a child labor component. Our investigators

are directed to specifically look for and verify child labor compliance. So that entails looking at the ages of everyone who works there and the types of jobs that they perform, that minors perform, if minors perform at the establishment. But the answer to your question is no. We do not find many violations of child labor laws. In fact, I would say historically we don't, but it's probably less now than ever before in my time here. And there are reasons for that.

Q: Is part of it the decline in farming on Long Island?

IM: That's a reason, but not a large part of the reason. There's still a pretty active agricultural industry on Long Island – not as much as it was 20 years ago, or certainly 40 years ago – but it's shifted. The type of work is different. The type of crops that are raised are different. The largest agriculture-related industry on Long Island today is wine growing. There are about 60 or 70 wineries on Long Island. There is an agricultural component to that. There's also a nonagricultural component to that. But those have replaced the potato farms, although there are still a good number of crop farms, which people on the West End here don't realize.

And, yes, child labor in agriculture is a quite important aspect of what we do, because there's a higher percentage of injuries and deaths with minors in agriculture than there are in other industries. But the rules are also different. You can operate machinery on a farm or do certain things at a younger age in agriculture than you can at a restaurant or a deli. But there also, we do not find many violations of child labor law. The main reasons lie in the demographics of Long Island, the demographics of the workforce and the economy itself.

And that's really part of the reason that our violations in general are worse and more severe than ever before. It's very simply, the burgeoning immigrant population these last ten or 20 years provide a ready, willing, able and available low-wage workforce, and they populate the low-wage industries, including agriculture, but most prominently restaurants, car washes, gas stations, hotels, motels and the like. But many recent immigrants are also working the jobs that minors used to when we had more child labor concerns or violations.

The other aspect of it is older workers, displaced workers, unemployed workers, underemployed workers. All of those folks

are in the kinds of jobs, or taking the kinds of jobs that minors used to. Increasingly, you'll see those workers in fast food establishments and the like, retail, et cetera.

Q: Have you seen increases in those or other kinds of violations in particular with the recession? Did things tend to get worse in 2008, '09, as the recession really hit?

IM: Yes. The trend had already been in place where violations were worse and getting worse already because, of course, the wave of immigrants had started before then. But there's no doubt about it. The recession's employment problems have resulted in workers who were already vulnerable in low-wage industries becoming more vulnerable. In a nutshell, people are more willing to work and be paid in violation of the law, whether it's minimum wage or overtime, when they don't have other options or where they believe they don't have other options more readily than if the employment was better.

Q: Do you sense that the complaints to your office fell as a result, whereas maybe before the recession, immigrants might have been a bit more willing to come to you over violations. Did that kind of dry up during the recession?

IM: No, no. The complaints increased, as a matter of fact. It might seem counterintuitive with the recession. But the low-wage industries are also industries with relatively low profit margins, and they're highly competitive. And really, the best example to give is the restaurant industry. It is the industry that we have the most problems with, with the highest violation rate and the most severe violations. And it would not be unusual for us to get complaints. It isn't unusual for us to get complaints from folks who say they haven't been paid for weeks at a time, sometimes even months! And largely these people are recent immigrants. Many of them, it must be said, are undocumented – not all of them, but many of them are.

But the labor law applies to everyone, and increasingly they're becoming aware of that. Everyone who works must be paid regardless of their immigration status. That's what the labor law says. We get a lot of pushback on that concept from all sides, actually: from the business world and from communities and others who don't think we should be enforcing the law on behalf of undocumented workers. But we enforce it on behalf of everyone because, as I say, it is the law. But there's even a philosophical reason behind it. If we didn't enforce the law for everyone, including undocumented workers, it would be an additional incentive for more employers to hire more undocumented workers and pay them even less, or not at all for stretches at a time.

So because of the visibility of our cases, because of the volume of our cases, and because of our outreach work, where we have community partners, we'll speak at community events, we'll partner with worker advocates, faith-based organizations like Catholic Charities and others, more and more people are becoming aware of their rights. And very simply, we conduct about 400 investigations a year. Most of those involve low-wage workers.

Most of those low-wage workers are recent immigrants. Most of those are Spanish-speaking. And word gets around. We investigate well over 100 restaurants a year. We had a diner initiative. We scheduled many diners for investigation, based on historical evidence indicating a widespread industry problem, and the results were startling: over 95% were in violation of minimum wage or overtime pay standards.

So the dishwasher that gets paid \$2 an hour has brothers and sisters and cousins who work at other restaurants being paid the same, or maybe a gas station, or maybe a car wash. And there's quite a geometric increase in the number of complaints we get, to the extent that it would surprise many to learn that these workers actually come to our office. They not only call, but they come to our office. They walk in! For an undocumented worker to walk into a federal office voluntarily, he's got to be at the end of his rope, you know, where he hasn't been paid for long stretches at a time. Consider how alarming this is: It's not unusual for dishwashers to be paid \$2 an hour! And this goes on for years.

We get many people who doubt what we're saying and what we're finding. "How in the world can you possibly contend that anyone who's being paid \$2 an hour can exist or survive in the year 2013 on Long Island, where it's so expensive to live?" Well, they are. We establish the facts through our investigative work. A possible answer is they may live in a boarding house with 25 others. I don't know, I don't look into their finances or the means by which they live. We just know what they're being paid and how they're being paid.

Q: I saw you quoted somewhere saying that you estimated that three-fourths of the restaurants in the area are probably violating some aspect of the FLSA at a given time? Would you stand by that today? Is that a reasonable estimate?

IM: Yes. Our goal is to have an impact on the industry and compel compliance. We'd like to reach a point where we are changing industry behaviors for the majority. We haven't reached that point. But we have had an impact. It might have been this feature article in Newsday. There was a cover story in the business section about our work with restaurants. But, there are over 5,000 restaurants on Long Island. We have 19 investigators, okay? If you do the math, obviously, we're not going to intervene with a large percentage.

But for the ones where we do intervene, we will seek a resolution, typically in the form of a consent judgment which is filed in federal district court. And we'll issue a press release and get articles published about it. Our aim is to impact the rest of the industry. And we think we are. But still, if I looked at our cases this year alone, the violation rate is still well above 75% for the restaurant sectors.

Q: How do you make that tough decision who to investigate, with just 19 investigators, on a daily, weekly, monthly basis? Is checking past violators a top priority, or is it random?

IM: That is a key question, and it’s at the core of not only what we need to do, but what we’re mandated to do. Because of the numbers, we have to be strategic in our use of resources and our planning, so we are. And the short answer is, we target industries, or even industry sectors, based on history, experience. You know, I could say anecdotal information, but it’s really much more than that. And data. So, yes, we do investigate prior violators. Absolutely. But that’s just a small portion.

There are so many problems in the restaurant industry that we had to focus more precisely. So we focused on sectors. Two years ago we focused on the pizza/pasta sector – and there are literally hundreds of pizza/pasta restaurants – because in looking at our data, we saw that the violation rate was about 90% for pizza/pasta restaurants. We had an initiative where we directed resources with or without complaints. In other words, regardless of whether we had complaints, we will target those establishments for investigation. It sounds like a harsh word, but it’s a precise word. It’s what we do.

And we continued to find a high violation rate. We filed actions in federal district court against a good number of those, about 40 or 50 of them in that year. We didn’t go to trial. They admitted the violations. They agreed to correct their practices. They signed a consent judgment, which became an order by a federal judge. So they’re going to be in compliance, or else they’ll be in contempt of a federal judge’s order when we go back a couple years down the road. But in addition, we hope that that influences the rest of the industry.

The interesting trends now are that the employers, and even their attorneys and accountants, will admit the violations with an explanation, and the explanation is, “I’m sorry, Labor Department, but this is the way the industry operates.” I actually had an attorney sitting right at this table tell me not long ago: “Yeah, you found that we employed people off the books, and they weren’t paid overtime. But nobody pays overtime in this industry, so why are you picking on us?” That was the defense!

He represented an Italian restaurant. He went on to say, “If my client has to pay overtime, then he’ll have to charge \$22 for a chicken parmesan meal, and the competitor right across the street is still charging \$18, so we can’t compete, and we’re out of business.”

Q: About one-fourth of Long Island employees, by our estimates, are union members. Having the most unionized state in the country, does that help more,

given that the unions want to make sure they keep prevailing-wage jobs, for example? Do some help you in terms of reporting violators or alleged violators?

IM: Under the Fair Labor Standards Act, not often. Because we know where the violations are; we know where to find them. We know how to resolve them. And the truth is, if an industry or an employer is unionized, there are less likely to be wage violations there. So we don’t frequently hear from the union on FLSA scenarios.

Where we do hear from them are under some of the other laws, like the prevailing wage laws, because union wage rates are largely set as the prevailing wages for government contracts. So when nonunion companies get these contracts, there are frequently violations. I’m not disparaging nonunion companies per se. Some are in compliance, some not. But it’s just stating a fact. We have a very, very high rate of violations on government contract cases. So, yes, the unions coordinate with us pretty actively on government contracts, but more limited scenarios under FLSA.



Irv Miljoner

Q: Do you sometimes get complaints about one business from a competitor who feels they’re obeying the law, and so they’re being undercut by the violators. Do you get businesses complaining about other businesses?

IM: Absolutely. It’s one of the fastest-growing categories of complaints that we get, from other employers. And they complain for that reason. They can’t compete. It is a low profit margin industry, and so it is a common dynamic, that they

will complain about each other. And we take those complaints. We take them seriously. Now, we don’t take complaints on face value. We investigate the facts, and that’s what we find.

Q: Without revealing any secret tactics, when you say you investigate, do you go in with badges out to the restaurant and say, “Give us your pay stubs,” and so on? Or do you talk to workers first? Is there any pattern there that you follow?

IM: First of all, let me say that we don’t go in with badges flashing. We’re respectful of the employer, and their business operations. There is a pattern. Part of it depends upon the nature of the case, for example if we are going in as a complaint, or as part of an initiative, etc. But in general, actually, you touched on some of the tactics in your question. We expect that a review of payroll records won’t give us all the information. Payroll records are frequently missing, unavailable or inaccurate, so we can’t rely on them. We

have to look at whatever’s available. There may be time records. What’s consistent for every case is we talk to the workers. Now, we don’t take their statements at face value either. We corroborate what they say. We talk to them in confidence. The names of people who we talk to are held confidential. Complainant information is confidential. We investigate for everyone who works for an establishment, not just the complainant, and not just those we talk to. But we talk to as many workers as we can.

Q: Again, just in terms of how on the ground that would happen: Do you say to the employer, “We need to talk to your workers?” and then you go somewhere with the workers? Or do you meet them after work? Or how is that done?

IM: All of the above. Often, we’ll go in unannounced, because the other big dynamic is that most establishments in the low-wage industries that we audit, including restaurants, employ people off the books. It’s a terrible problem for the workers, who aren’t covered by Social Security and other benefits. And our nation, our state, our county, our communities are all losing tax revenue when workers are hidden, and it’s a detriment to the workers themselves. But this is the way it is, and we’re trying to attack that as well.

When I previously used the term undocumented workers, it’s really a term that encompasses a few things – their immigration status perhaps, but also the fact that they’re literally not documented on payroll records. So we need to go in unannounced, because if we did our work the way we did it 20 years ago, we would call the establishment and we’d say: “Mr. Business Owner, you are being scheduled for an audit under the Fair Labor Standards Act. Please have your payroll records, your time records, your employee information, your business information and certain other things available to us.” We would set an appointment date, and we would go and talk to them first, and then proceed from there. We don’t do that typically today because we would not find the workers.

Pizza/pasta is on my mind, because I just mentioned it. We went into a pizza/pasta restaurant, a pretty large establishment, not the small mom-and-pop pizza places that we think of, not long ago. We found ten workers on the payroll records, and we had already spoken to some of the workers, and we knew that there were at least 25 workers. We eventually found 40. So only a quarter of their workforce was on the books. That’s an extreme example, but we find workers off the books all the time. And it makes investigating difficult.

Q: Did you find the other 30 workers basically just by talking to the current workers, and keeping at it?

IM: There’s a combination of tactics, and most of them are not secret. We do surveillance. We count heads. We count people walking into the back of the establishment, into the kitchen. We know when they report to work and leave at the end of the day, or at the end of the shifts.

Following our pizza/pasta initiative, last year we had a diner initiative. There are about 150 diners on Long Island. The violation rate is historically high. Diners have a special dynamic. Many of them are open 24 hours a day, and most at least 20 hours a day. So the typical dynamic is, there’s two shifts of workers, either ten or 12 hours a day. And they also typically work six days a week. So we know they’re working 60 or 72 hours a week. So, yes, we speak to as many workers as we can.

Q: As customers? Do you show up as customers and watch? Or is that less efficient than just surveillance?

IM: Sometimes as customers, but not often. And yes, we sometimes do surveillance.

Q: But investigators typically show up unannounced at an establishment and start asking these kinds of questions. Is that quite tense, and sometimes potentially violent?

IM: Potentially it is. But our investigators are quite professional, and I would say diplomatic, and they’re federal officials, and we train them to act as such, even when they don’t get equal or considerate treatment in return. We’re here to do a job. We have authority to be here. We have regulations that establish our authority. The employers are required to give us access to the workers – that’s by law – and their records.

Sometimes they don’t. Sometimes we get kicked out of the establishment. We’ll turn around and walk out, and if we need records that we’re not being given, we also have subpoena authority. On Long Island, we issue a great many subpoenas, by necessity. I’m not saying the violations are worse here than anywhere else, but we believe in taking the extra step and the enforcement actions that we need to get the information we need.

So we have the authority to be there. We have the access to the records. We’re not always given the access to the records, the workers or the establishment. And we’re sensitive. We won’t go at dinnertime when they’re busy, or at lunchtime. We’ll go between lunch and dinner, or between breakfast and lunch, you know, in consideration of the business practices.

I believe in engaging the business community, as well. They have an interest in our work, not just if they’re violating the law, but more precisely if they’re trying to do the right thing and comply. They have an interest in what we do. And that’s how we appeal to them. I’ve been told by too many businesses and attorneys and accountants, “My client really wants to comply. He just can’t and stay in business. Not when that guy across the street is not paying minimum wage, or not paying taxes, or not paying overtime. How can we?” Well, my answer is, “That’s why you need us, to level the competitive playing field.” So we take that very seriously. I try very hard to not come off as the big, bad regulator. It sounds like that bad old joke: “I’m with the government, and I’m here to help you.” But basically that is our approach.

Q: What about in terms of the sectors you mentioned? Pizza/pasta, you mentioned diners.

IM: This year, Asian restaurants.

Q: What about big fast food companies?

IM: We’ve had initiatives in past years with them. We know that there have been violations. But because of past interventions, we’re finding that the corporate entities themselves have an interest in not having their brand associated with labor exploitation, labor violations, and so to an extent it’s self-policing, but it always comes down to the franchisee. But on Long Island, at least, it’s not our biggest problem.

Q: What about retail? Companies like Wal-Mart, of course, have been much criticized around the country, lots of lawsuits alleging off-the-clock work and other abusive practices.

IM: Yes. We do investigate retail establishments, including some of the larger enterprises, but we have nationwide investigations also, and one of the ways we’re able to leverage our resources is by intervening with the headquarters of the corporation. So our office in Arkansas will intervene with Wal-Mart where they’re based. And of course, if there’s a complaint here in Long Island, we’ll investigate it. But we’ll also coordinate with our office in Arkansas to intervene with headquarters and get them to get the local store to comply. So we have a protocol for that.

And for that reason, it’s not as big a problem as the hundreds of restaurants, which are all independent, or maybe there’s a chain of two or three or five. But yes, it’s certainly a segment that we’ve looked into. Fast food in particular. One of the large burger enterprises, for example, was found some years ago to have an extensive systemic child labor violation problem. They regularly had minors under the age of 16 working prohibited hours. If you’re under 16, you’re not allowed to work past 7 p.m. on a school day, for example, nor more than 18 hours a week on a school week.

We had pretty widespread and consistent problems not only on Long Island, but nationwide with this burger enterprise. We use different methods in different situations, all aimed at not only resolving current violations, but our prime mission is bringing employers into compliance going forward. Actually it was a very productive intervention, because on a national level, we reached an agreement with the company not only to police themselves and eliminate those practices, but actually to educate their employees with very prominent posters, and even their customers. We got them to agree to produce a placemat they put on trays with a summation of the child labor laws. That was part of our agreement with them. It was quite unique, and very, very productive.

Q: New York State has just passed an increase in the minimum wage to \$8 at the end of this year, ultimately rising to \$9 in 2016. When that happens, does your office or another office of the Labor Department start a

big education initiative? And secondly, do you anticipate a lot more work for you in violations with the higher minimum wage?

IM: Well, there is a state Department of Labor, of course, and we have a parallel function. There’s a division called the Division of Labor Standards, and they have the responsibility of enforcing the state labor law, if it differs from the federal. And throughout history, there have been different periods of time where the state minimum wage did exceed the federal minimum wage, and even cases where the federal minimum wage was raised above the state. The state has a provision of their law saying that if the federal minimum wage is higher, the state’s minimum wage automatically gets elevated. That happened infrequently, but it happened to occur the last time the federal minimum wage was raised, which was July 2009. It went from \$6.55 to \$7.25. The state minimum wage had been \$7.15. So they got raised to \$7.25.

But to answer your question, we don’t enforce the state minimum wage, except in certain situations. I’ll give you the most common one. In overtime situations, the law says you have to pay time and a half of the employee’s regular rate of pay, but not less than time and a half any legally due wage. So in an overtime workweek, when the state’s minimum wage goes up beyond the federal minimum wage, we will actually enforce the state minimum wage in overtime workweeks. It’s sort of a little technicality in the law.

Q: But in 2014, if you go into a restaurant, and they’re paying \$7.25, below the new state minimum wage, you just tell the state DOL about it?

IM: We may coordinate with the state. We’ll definitely advise the employer, “Look, here are our findings, okay? You haven’t paid the minimum wage. You haven’t paid overtime. And we’re not charging you for that. We’re not collecting back wage restitution for that. But we’re making you aware that you’re additionally in violation of state law.”

There are several differences between state and federal law, not only the monetary minimum wage – right now it’s the same – but there are conditions of state law that differ from federal law. Just for example, state law requires a meal break after any shift of as much as six hours or more, a meal break of at least a half-hour. No such requirement in federal law. But we’ll advise the employer of the requirements.

We won’t advise the state in every single case. We’ll try to get cooperation of the employers and resolve the case as to the federal violations. We may or may not, depending upon whether it’s an isolated incident or systemic, or how severe it is. So it’s a judgment call.

Q: Beyond that, what kind of coordination is there between you and the state? Are they doing their own investigations on Long Island as well?

IM: Yes, they are, but their staff is smaller, and they don’t do all the kind of investigations that we do in the multitude of laws that we enforce. And they have other ways of operating. They have a large case unit based in a couple of places around the state, one of which is New York City, where if it’s a large significant case, they’ll ship it out to their large case unit in New York City, and they may or may not do it, or they make referrals to us. That’s much more common than us making referrals to them. But occasionally we do, because, as I say, there are differences in state law. So if somebody is covered under a provision of state law, not federal law, we may coordinate with the state on that.

Q: In terms of your investigative staff, has that changed over the years? Has it grown or shrunk?

IM: It has definitely grown, as labor law enforcement has grown in importance. We have hired ten investigators on Long Island in the last four years, doubling our staff size. Nationwide, the agency hired about 300 additional Wage and Hour investigators. That growth is a reflection of the importance of labor law enforcement to our communities, our economy and our nation. It reflects an argument I have made in many venues, often to business groups, and continue to make: that we really are a revenue-producing agency, and important to the economy.

For one thing, when we collect back wages – and we’ve secured about \$20 million in back wage restitution the last two years – we collect taxes on those back wages, as well. We also put people “on-the-books” (who were previously “off-the-books”), and money into the hands of low wage workers, so they can better participate in the economy as consumers. And, of course we secure of level competitive playing field for the employers.

So we’re revenue-producing – we put people on the books. We collect taxes. That \$20 million in the hands of these workers goes back into the stream of the economy. I mean, I don’t care what your political persuasion is, I think that’s all good for our communities and the economy and businesses.

Q: And do you also charge businesses for the cost of your investigations?

IM: Not frequently, but yes, occasionally. When we get a refusal to pay or a refusal to comply, and we file an action in federal court and we don’t get an agreement (that’s reduced to a consent judgment), and we actually have to go to trial to prove our case. Yes, part of the resolution is a request for government costs to have litigated. That’s in addition to penalties, and under the law there are civil money penalties and liquidated damages as well. Liquidated damages go to the workers. Civil money penalties go to the U.S. Treasury.

Q: You mentioned that you’re charged with enforcing some 60 specific laws. Could you talk a bit about a few of them that have gotten attention? For example, particularly in New York State, the issue of independent contractors has been in the spotlight.

IM: Well, that’s really an offshoot of the Fair Labor Standards Act. But it’s a huge issue, and it’s a focus of ours, because one of the common schemes, tactics, strategies on the part of businesses to evade requirements of the Fair Labor Standards Act is to categorize employees as independent contractors as opposed to employees. So we definitely look out for that. It is a growing problem, and a serious problem, for the same reasons that those undocumented or off-the-books workers are. Yes. It’s a focus of ours across the industries.

We find certain industries where that’s prevalent, like construction contracting, for example. We find it increasingly in many industries. Janitorial services will frequently say, “Yes, that housecleaner works for our clients, but she is a subcontractor. She is not our employee. We’ll give her the work and tell her where to go.” So there are criteria well-established by case law, including Supreme Court decisions, that establish who’s an employee rather than an independent contractor. And we’re attuned to that.

Q: What are key criteria that you insist on?

IM: Well, the determination as to whether or not someone’s truly in business for themselves. Do they work only for the janitorial contractor, or are they subcontracting for many different entities? That’s telling. The other key one is the degree of control. Is ABC Janitorial telling you, “Go to client ‘A’. Be there at 9 a.m., and report back to our office?” Or are you truly an independent contractor, and you’ll decide when to go to the client? Do you provide your own tools of the trade? Is that given to you by the employer? Things like that – the degree of control and the degree to which the person is really, or not really, in business for themselves.

Q: About immigration, what if any relationship is there between your office and immigration authorities trying to enforce immigration law, like checking employers’ I-9 forms?

IM: We used to inspect I-9 forms as part of our regular inspection process. But, we don’t do that anymore. We may see it in the course of our looking at records. But we don’t have that function. That changed almost ten years ago now.

In fact, we have a very definitive line with the immigration officials. We do not share information with immigration officials, for obvious reasons. If a worker is undocumented, he’d never come to us with a complaint if he knew that we were going to share the information with Immigration and Customs Enforcement officials. It would obviously have a chilling effect.

So we actually have a formal memorandum of understanding with Homeland Security, with ICE, the Immigration and Customs Enforcement, saying, “We will not share information with you.” That’s not to say that regulatory and civil law enforcement agencies, and law enforcement generally, don’t share information. We do, and we get a lot of things done that way. But we have a formal agreement with Immigration that they won’t ask us and we

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won’t tell them who are complainants are, or any of the workers involved in any of our cases. We will not give them information about the workers. It’s a formal agreement called a memorandum of understanding, an MOU, for good and obvious reasons.

Q: So do they contact you for any reason? Would they suggest that you investigate certain firms?

IM: We get referrals from different agencies on occasion. It doesn’t happen that frequently. Because of that MOU, we don’t get too many referrals from ICE in particular. But, immigration generically is a function that’s split among other agencies. ICE is the enforcement agency. There’s another agency called CIS, Citizen and Immigration Services, USCIS. They are there to help people know what they have to know and do what they have to do to get on a path to citizenship. And they talk to us sometimes if something comes to their attention.

But there are immigration provisions that we do enforce. There are a whole set of work visas called the H visas: H-1B, H-2A, H-2B, that cover different occupations. Companies apply for these through a different agency, not us, but there are labor standards and labor conditions that are part of the H visa processes and agreements. So, for example, employers who wish to bring employees in, either they’re sponsoring them or somebody else is, on an H visa will certify and agree that they will not be displacing other workers, for obvious reasons, that once these people are in, they can’t be “benched” with no work. They have to be put to work. You can’t come in on an H visa and not work. That’s the purpose of your being here.

They have to pay these H-Visa workers certain determined wages, sometimes “prevailing” or “commensurate” wages with those being paid other workers in the industry, so as not to undercut the wages of American workers doing similar jobs. So these labor conditions are designed not to adversely impact employment of American workers, both with regard to their actual employment and their wages. And so we enforce the labor conditions including the wage provisions of these H-visas.

Q: And has that been an important source of your work, or have you not been finding many violations there in recent years?

IM: Not a huge source of complaints or work for us yet on Long Island. We’re expecting that to increase, with the economic, workforce and competitive pressures. These people range from farm workers, who are brought in on H2A visas, to computer programmers and engineers and others in scientific fields of study

where an institution or an employer has to document that they can’t get employees with the needed skills here. We know that there are many such H-Visa workers on Long Island, as there are throughout the country. In areas where agriculture is a more predominant industry, it’s been more of an issue.

Q: President Obama just announced that at the federal level they’re going to extend FLSA protections to home care workers.

IM: Yes, that’s a very significant proposal. It will cover home care workers employed by a third party or an agency, and home health care is an exploding industry. So the significance of it is an expansion of labor law coverage for certain home health care workers.

For example, home care workers who provide only nonmedical-related services – for example, companionship, babysitting, that sort of thing – in the home have been exempt until now. With this new rule, they will be covered. They won’t be exempt. They’ll be covered by the minimum wage and overtime protections if employed by a home health care agency or any third party. They still won’t be covered if they’re employed by a private person or a family.

Q: Has the New York DOL been in charge of enforcing this, and now, when Obama’s extension of coverage goes into effect, you will have to start enforcing it?

IM: We will start enforcing it.

Q: But that will expand the demands on your office?

IM: Quite possibly.

Q: I assume that’s a case for more staff, right? Because that would be tricky to investigate, wouldn’t it?

IM: Yes, tricky, sensitive. That provision is going to appear in the federal register within a matter of days. But it will not take effect until January 1st, 2015. The idea being that because it is a significant change, in order for home health care agencies and others to alter their practices and put things in place, it’ll give them an opportunity to adjust.

You’ve asked me about the other laws. I just want to tell you that the topic and the law that is the subject of a great many inquiries, is the Family and Medical Leave Act. The FMLA is still greatly misunderstood – who’s covered, who’s not, the extent of protections, and all of that.

Q: And it’s 20 years old, right? It began the year you came to Long Island: 1993.

IM: Yes. Actually, two presidents take credit for that, because it was proposed under the Bush administration, Bush number one, and enacted under the Clinton administration, so they both take credit for it. But it was quite a change, and some states have their versions of family medical leave protections. New York State does not, although I think that’s been proposed, too. It’s a big issue.

Q: What would you say are the widest misunderstandings?

IM: The biggest problem that we encounter with the Family Medical Leave Act is the provision that ensures that people can be restored to their job, an equivalent job, upon return from leave for a serious health condition. Second to it, a close second, is people not being granted the time off for a serious health condition to begin with, for themselves or an immediate family member, and getting terminated or having some other adverse action for taking the time off.

So, the provisions of the law are pretty clear, if you’re covered – and only employers with at least 50 employees are covered. And if you’re an eligible employee – meaning you’ve worked at least one year and have at least 1,250 hours on the payroll in the past 12 months -- you must be given the time off to attend to your own serious health condition or that of an immediate family member. And sometimes workers are denied the entitlements. So we do get quite a few complaints under family medical leave.

Q: Do people often complain that when they return from a granted leave, they’re not restored to an equivalent job, that they’ve been demoted, effectively?

IM: Right. I’ll give you one that’s fresh in my mind, because I just talked to the person. A nurse in a hospital about to undergo an operation herself, and she was given the time off. But upon return, she was demoted from head nurse to duty nurse, and her shift was changed. She was put on the night shift. That’s a change in “equivalent position” and you can’t do that. The argument of the hospital was, “Well, obviously, she had an important position that we had to fill while she was out for ten weeks. So we now have somebody performing well in that position, so we’re giving Nurse #1 her job back. We just can’t put her back exactly where she was and disrupt operations yet again.” But the law says you must accommodate her and restore her equivalent position, which means terms and conditions of employment, including such things as shift, title and duties.

Q: In a case like that, would she get back wages if your office found a violation?

IM: She could, if in her change of duties she was also demoted and got less pay, absolutely. We pursue back wages for people who were so affected.

Q: We don’t have time to go through all the many laws you enforce. One, though, that jumped out at me was

employee polygraphs. Do you in fact get much of that these days with employers?

IM: Maybe once or twice a year we’ll get an inquiry. Employers are permitted to administer polygraphs only in very limited circumstances involving safety and security, for example. They have to have a reason for doing so, and they have to document the reason. So we don’t get a lot.

Q: Would employers have to come to you first to administer them, or is it only if an employee complains?

IM: They don’t have to come to us first. They just have to adhere to the requirements of the law, to administer the polygraphs in a certain way and for certain reasons.

The other very active enforcement area is in government contracts. “Prevailing wages” apply to contractors for federally-funded projects. A big issue this year, and yet to come, is with regard to the post-hurricane recovery work. Congress allocated some \$51 billion for post-Hurricane Sandy work. Several billions of these dollars are going to Long Island for cleanup work and debris removal, rebuilding and the like. The bulk of the recovery and restoration work, like the beach restoration work and the raising of homes, it’s all federally funded. And so a separate set of laws called prevailing wage laws apply.

The main law is the Davis-Bacon Act, but there’s a whole set of related acts collectively called the Davis-Bacon and Related Acts which apply to any federally funded construction work. So workers on those contracts have to be paid in accordance with a wage schedule that’s attached to the contract specifying what the required minimum wages are for all the trades – electricians, carpenters, painters, plumbers, etc. And the violation rate is very high, historically. We’re already devoting resources to those investigations.

Now, when contractors get awarded these contracts, they bid on them. Typically they’re awarded to the lowest bidders. Actually, the term is “lowest responsible bidders,” and the contracting agencies decide the awardees. Built into the government contract costs are these labor costs. The government is ensuring that the workers on this job will be paid prevailing wages.

The Davis-Bacon Act is actually older than the Fair Labor Standards Act. It dates back to 1931. It was actually a Depression-era protection statute that was meant to protect employers, not just workers, protect the wage rates that they’re paying so that they could bid competitively for these government contracts. So when they’re not paid prevailing wage, it’s not only a violation affecting the workers, it’s really cheating the taxpayers and the government as a whole, because the contract cost takes into account the cost of these prevailing wages. So the administration is very serious about this. They don’t want labor violations occurring in connection with this funded work.

Q: Any thoughts on issues going forward? At the national level, there's a proposal to raise the minimum wage to some \$10 an hour and index it to inflation. How might that affect your work?

IM: Whenever the minimum wage goes up, the violations rise accordingly. Frankly, I see the violation problems continuing. And this is where I must say that I understand the pressures of businesses whose profit margins are tight, and who are increasingly pressured to stay competitive by any means necessary. Unfortunately, sometimes that translates into compulsions to violate the labor laws and not pay overtime or minimum wage, if they construe that their competitors are violating too. However, the law is the law, and we try to enforce it fairly for all.

Decades ago when the minimum wage was \$4.25 an hour, I don't remember seeing dishwashers being paid \$2 an hour. I just don't remember it. It didn't happen. The minimum wage has not kept pace with inflation. In 2007, the minimum wage had not gone up for ten years. That's the last time it was raised, and at the time it was raised from \$5.15 – that's where it stood since 1997 – to \$5.85. The raise was in three steps, 2007, 2008 and 2009, from \$5.85 to \$6.55 to \$7.25. That's where it is currently.

You would think that we'd see less and less minimum wage violations, and instead we're seeing more because of all these dynamics: the economy, the demographics, the nature of the population and the nature of competitive low-wage industries. So at the same time, I truly see a continuation of the trends, such as more employers complaining to us about unfair competition. And so ... we'll be busy forever.

The point is, there's a need, no matter what the state of the economy, there are people who are always being exploited, and there's a need for labor law enforcement. When the economy's good, there's a demand for more workers, and increased productivity, and people are asked to work overtime, and they're often not paid. So there's more work being done. And when there's more work, inevitably, there's potential for wage and hour violations. People are being asked to work more. And obviously, when the economy is bad, we have the pressures on the other end, you know, with the wages being lowered and undercut.

So there's a need for what we do all the time. I strongly believe that labor law enforcement is good and needed not only for the workers, but for employers, the economy, and our nation as a whole. It's one of the things that distinguishes us as a civilized society, and I'll always believe that. It was true 75 years ago when the FLSA was enacted, and 50 years ago when I'd meet my father at the subway station at 7 or 8 pm, after his long day working in the garment industry. And it's still true today. There are a lot of hardworking people who are severely underpaid, and a lot of businesses who are being hurt by those practices, not to mention our local and state and national government.

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LABOR HISTORY

The Decline of American Unions: Irrelevance, Homicide or Suicide?

by June Zaccone

Most Americans believe that they can be downsized, but they can't be fired for no reason.¹ They're wrong. Except for protected categories, like race or sex, employment in the US is "at will," of the employer, that is. Further, once at work, private citizens become employees, and lose their right of free speech, and increasingly, privacy.² CVS staff must report health metrics, like their body fat, blood sugar, blood pressure and cholesterol levels, to the company's insurer or pay a \$600 penalty.³ Workers here have fewer rights and benefits than in any other advanced, industrialized country. Of the 25 richest countries, the US alone lacks universal health insurance, and paid or even unpaid vacations or sick days.⁴ Unions give workers a collective voice and help achieve these benefits. As the rights of sexual and racial minorities, women, and the disabled have all advanced, worker rights are going backwards.

... for more than half a century – the decline in private sector unionism has been inexorable, proceeding relentlessly through good economic times and bad, through Democratic as well as Republican administrations, and through periods of frantic organizing by unions, as well as periods of inactivity.⁵

Let's look at the state of unions. In 2012, 7 percent of private-sector workers were in unions, the lowest fraction since 1900.⁶ A larger fraction – 37% – of public sector workers belong to unions, so for the first time, they form a majority of union members.⁷

The process of decay continues. Overall, 11% of workers were unionized in 2012, a decline from 12 percent in 2008, 20% in 1983⁸ and the lowest since the 11% of 1916.⁹ In 1983, 42 states had at least 10 percent of private-sector workers with union contracts; now it's 8 states.¹⁰ Note that union membership reached its postwar peak in the mid-1950's, and started its precipitous decline in 1980's. Diminishing union power is reflected in diminishing strikes, and more attacks on those with higher union wages.¹¹

Why do we care? Unions have been a major reason for middle class expansion, and their decay a major reason for its decline. Note the slower growth of median family income after 1973 than before. The income lag complements a slowdown in the reduction of work time: our work year now exceeds workaholic Japan's. Median income grew more slowly because corporations used their power to increase their share of the benefits of economic growth at the expense of wages. In the early postwar period, wages tracked productivity growth, that is, output per worker. Since the 1970's, wages have lagged behind. Even college graduates have not escaped. Labor's

share of national income has declined as profit approaches its postwar high.¹² This shift affects us all. Until the 1970's, rising income based on shared output gains fueled the steady expansion of our economy. Rising inequality has replaced this widely shared growth, based on mass spending, with speculative financial booms fueled by assets of the superrich.

Work-place democracy appears to benefit only workers but unquestioned acceptance of authority on the job encourages its acceptance by workers in their roles as citizens.¹³ Unions boost political participation of members and nonunion members alike,¹⁴ providing an effective voice for social welfare spending. So their loss has permitted increasing inequality and an economic policy that focuses on the deficit rather than on problems of greater concern to the majority – unemployment, stagnant incomes, or mortgage and student debt. Despite increasing income shares to the top, their tax rates have fallen. The higher the income level, the greater the fall. For the 99%, the rate has hardly changed. Corporate tax rates have fallen, too, so government policy has made inequality worse.¹⁵

What ever happened to the labor movement? There are three theories of its decline: irrelevance, suicide, and murder.

Irrelevance means that natural forces have undermined unions – they are no longer necessary or are not adapted to the current structure of production. For example, some Conservatives believe that unions are weaker because wage and other problems of workers have been solved by a century of economic progress. Or it may be that changes in the economy, such as globalization, which have shriveled manufacturing and other labor strongholds, have made unionization impossible for a wide swath of workers.

A second explanation is **suicide** – unions are to blame for their plight. There is corruption; excessive compromise with corporations; looking out only for members' interests rather than those of all workers; and failure to organize new groups of workers as industrial structure changed.

Finally, there is **murder** – government and business have combined to destroy unions using anti-labor laws and the courts. This case includes Taft-Hartley, which restricted union rights and drove out labor activists, and a corporate attack, supported by government, on both existing union power and union organizing.

Their devastating problems demand new strategies, so I'll end with what might help union renewal, and what is being done.