

The mission of the NORTHWEST WORKERS' JUSTICE PROJECT is to defend and strengthen the workplace and organizing rights of low-wage contingent and immigrant workers in the Pacific Northwest.

Legal challenge likely to lead to higher wages and open jobs for U.S. workers

As many of you know, NWJP and other advocates have been engaged in an ongoing struggle against widespread abuse of the H-2B temporary foreign worker program as a source of inexpensive, exploitable labor. After almost two years of litigation to challenge destructive changes made to the program by the Bush administration, we are excited to share with you what should prove to be a very significant victory for more than 100 thousand low-wage workers in the U.S.

After being ordered by a federal judge to revise rules illegally adopted by the Bush administration, the U.S. Department of Labor has proposed new rules that would substantially increase wages for workers in jobs where employers want to hire temporary foreign H-2B workers, most common in industries such as reforestation, landscaping, construction, hospitality, and food processing.

Under the H-2B program, employers can bring temporary non-agricultural workers from other countries only if they cannot recruit U.S. workers for the jobs at the "prevailing wage" determined by the federal government.

In 2005, the Bush Department of Labor secretly changed the way it calculated the "prevailing wage" which employers who proposed to use the H-2B program were required first to offer to U.S. workers. The change lowered the required wage from roughly the average wage being paid in the occupation and area to the average of the *lowest paid one-third* of workers. This left U.S. workers with the choice of accepting work at substandard wages, or seeing the jobs go to temporary workers from elsewhere. This new methodology was invalidated by the federal court in August in a case brought by NWJP and allied advocacy organizations.

If adopted, the new rules should open thousands of jobs to U.S. workers at wage rates that the Department of Labor estimates would average \$4.38 per hour higher than wages required by the Bush method. To the extent that foreign workers are needed, employers would be required to pay them a fair wage that wouldn't drive down wages for U.S. workers in the occupation. Annual wages received by workers who are hired by employers seeking to use the H-2B system would increase by \$769.4 million under the proposed rules, according to the same DOL estimates.

The rules proposed by Secretary Solis would largely return to the pre-Bush system of calculating the prevailing wage. Under the court's order, the Secretary has until January 2011 to revise its prevailing wage methodology.

See **WAGE INCREASE**, page 5



Workers who are hired by employers seeking to use the H-2B program would make an average of \$4.38 an hour more under the new proposed rules. On the whole, annual wages for those workers could increase by an estimated \$769.4 million.

Estimated increases in prevailing hourly wage rates in H-2B temporary worker program, using new calculation method proposed by DOL

(Wage rates specific to Portland, OR area)

Occupation (and SOC code)	Prevailing wage:		Wage increase (\$)	Wage increase (%)
	Illegal Bush method	Proposed new method		
Construction Laborers (47-2061)	\$11.49	\$16.88	\$5.39	46.9%
Roofers (47-2181)	\$10.82	\$17.52	\$6.70	61.9%
Landscaping & Groundskeeping Workers (37-3011)	\$9.43	\$13.14	\$3.71	39.3%
Maids & Housekeeping Cleaners (37-2012)	\$9.07	\$10.49	\$1.42	15.7%
Janitors & Cleaners (37-2011)	\$9.43	\$12.19	\$2.76	29.3%

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* The Northwest Employment Education and Defense Fund (NEED Fund), our partner organization, was founded alongside NWJP to support our 501(c)(3)-eligible program work.

** Affiliations listed for identification purposes only.

Special thanks to our summer law clerks

This year, NWJP had the privilege of hosting two summer law clerks, **Caitlin Mitchell** (far right) and **Liberty Straney** (second to right). Both recently started their second year of law school, Caitlin at Yale and Liberty at Lewis and Clark here in Portland. Pictured below with staff attorney Meg Heaton (far left) and paralegal Patricia Laguna (second to left), the two law students got a strong introduction to labor law by participating in a range of activities, from drafting memos and observing depositions to legal research on legislative issues. We are grateful for the talent and enthusiasm that they brought to their work this summer and wish them success in their legal careers!



At NWJP, we welcome law students year-round who are interested in using the law to promote the rights of low-wage workers. Contact us for more information.

Public Welfare Foundation renews its financial support for NWJP's efforts

We would like to thank the **Public Welfare Foundation** for its generous ongoing support of NWJP's statewide and national advocacy to strengthen protections for low-wage workers, including our upcoming policy initiative to combat wage theft, misclassification of employees as independent contractors, and other workplace abuses in Oregon.

NWJP welcomes a new addition to NEED Fund Board

Keith Cunningham-Parmeter became the newest member of the NEED Fund Board in November. Keith specializes in employment and immigration law and has been an assistant professor at the Willamette University College of Law since 2006. Before joining the Willamette faculty, he worked as a Skadden Fellow with the Oregon Law Center Farm Worker Program. His work there focused on the employment rights of migrant and seasonal agricultural workers in Oregon, with an

emphasis on issues related to occupational health and workplace discrimination. At OLC, Keith co-counseled a class action on behalf of contingent workers at Del Monte Fresh. Keith received his law degree from Stanford Law School. While studying, he also worked to provide focused legal services to immigrant communities and low-wage workers.

Department of Labor Regional Representative meets with advocates in Oregon

In October, NWJP convened a meeting of Oregon community organizations and agencies concerned about wage theft for a dialogue with Secretary of Labor Hilda Solis' (now former) Regional Representative, Mark McDermott. The primary topic was how the USDOL, state agencies, and community-based groups can work together more effectively to achieve greater compliance with workplace laws.

Initial discussion was positive, and those represented at the meeting intend to draw others into an ongoing conversation about how to increase collaboration around enforcing state labor law.

NWJP supports worker organizing

At NWJP, we believe that our most important work is in supporting workers, like those in the following story, who are organizing to build worker power.

When an employee at a Portland business got fired for talking to her co-workers about organizing a union and about improper pay practices in their workplace, she took to the street, leading former employees and community members in a picket outside the business. The owners tried to silence the protest by threatening to slap a restraining order against her and the other demonstrators, so she came to NWJP for assistance.

We agreed to provide legal support for the workers after hearing their story. As they explained, workers at the company were told by the owners that they should arrive at work and clock in about 10 to 15 minutes before their scheduled start time, in order to get prepared for their shift. Some of those who didn't get to work early had been punished with written warnings, unpaid days off, and threats of being fired, even though they had clocked in at the official scheduled start time of the shift. What these workers didn't realize until recently was that *they were not getting paid* for the time they spent working before their shift officially started, even though they were required to be there early, had already punched in, and were at work.

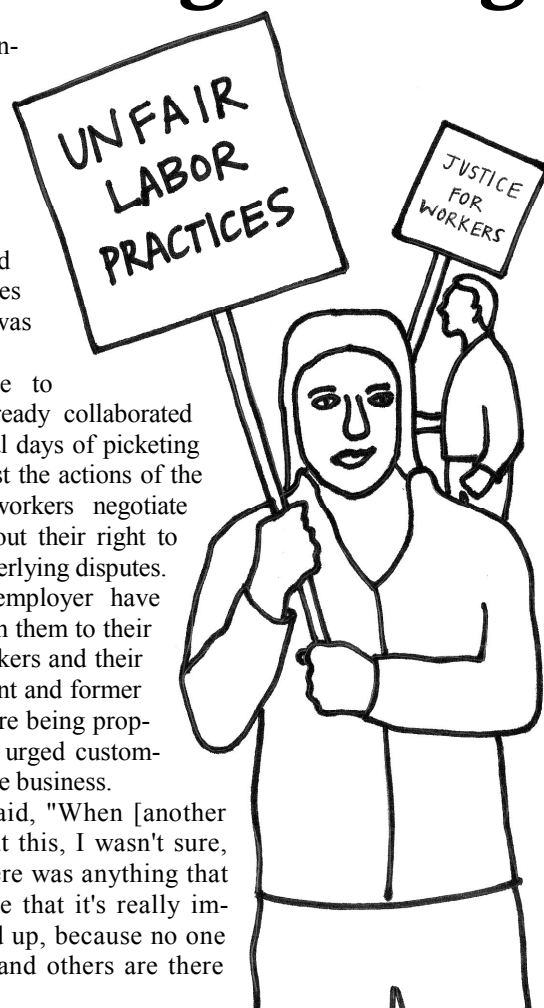
As workers realized what was happening, and an owner eventually admitted that she didn't pay for that time, one of the employees began talking with others about getting help from a union or from law-

yers. Shortly after, her manager told her that she should stop organizing if she wanted to feel secure in her job. She also was disciplined for being late when she clocked in at the beginning of her scheduled shift, rather than ten minutes early. A few days later, she was fired for "insubordination."

By the time she came to NWJP, the workers had already collaborated with the IWW to lead several days of picketing outside the business to protest the actions of the employer. NWJP helped workers negotiate with the employer—first about their right to picket and then about the underlying disputes.

The workers and the employer have resolved the disputes between them to their mutual satisfaction. The workers and their allies feel satisfied that current and former employees of the company are being properly compensated, and have urged customers to resume patronage of the business.

As one of our clients said, "When [another worker] contacted me about this, I wasn't sure, because I didn't know if there was anything that we could do. But now I see that it's really important for workers to stand up, because no one is going to do it for you—and others are there to help."



Another lawyer teams up with NWJP for economic justice



Cathy Highet

We are excited to feature another Portland attorney who is collaborating with us to address the unmet need for representation in wage and hour cases on behalf of low-wage workers.

Cathy Highet has long been a dedicated advocate for workers' rights. She became involved with the labor movement as a volunteer organizer at PCUN, Oregon's farm worker union, during and after attending Reed College in Portland. She later moved south to California where she participated in the AFL-CIO's first Union Summer internship program, spent time as an organizer for the United Farm Workers, and then worked on SEIU's Justice for Janitors campaign.

From there, Cathy headed to law school at U.C. Berkeley's Boalt Hall. Since earning her law degree in 2003, she has practiced labor and employment law. In January 2010, Cathy co-founded the Portland Law Collective, where she continues to represent labor unions, other progressive organizations, and employees with wage and hour complaints.

In conjunction with NWJP, Cathy currently represents two groups of construction workers whose employers violated minimum wage laws. The partnership expands our capacity to provide legal services and allows Cathy to consult with NWJP staff about advocacy strategies for low-wage contingent workers.

We are always looking for lawyers who are willing to take on employment cases on behalf of low-wage workers! To lend your legal expertise to the fight for workers' rights, call Michael Dale or Meg Heaton at the NWJP office (503-525-8454).

Campaign to combat wage theft in Oregon

This month, NWJP and other worker advocacy organizations announced the formation of an organizing committee to convene the Oregon Coalition to Stop Wage Theft. The group will work to prevent abusive employers from stealing wages from Oregon's workers, as such "wage theft" becomes increasingly pervasive in Oregon and around the country.

While the results of the recent election have certainly made our task more difficult, NWJP and our partner organizations remain committed to moving this fight forward in 2011 and beyond. As we rebuild Oregon's economy, we must ensure that tomorrow's jobs are good jobs for which workers receive fair and lawful wages for their labor.

Now, NWJP and our partners are drawing together a strong statewide coalition to combat wage theft in Oregon. We expect to win allies and raise public awareness about the wage theft epidemic, in part through advocacy during the 2011 legislative session to promote bills to provide workers

with adequate tools to enforce their right to be paid and to support adequate resources for state-level enforcement of labor laws. It may take more than one legislative session to win the policy changes Oregonians need, but that also provides us with the opportunity to build and strengthen our campaign for the long haul.

Although the political landscape has changed over the last month, the goals of our initiative haven't. As we develop the Oregon Coalition to Stop Wage Theft, we aim to:

- strengthen protections for Oregon's workers,
- crack down on employers who violate workers' rights,
- level the playing field for honest companies,
- give workers more tools to recover unpaid wages,
- increase state-level public enforcement of labor laws, and
- ensure that state and local governments can collect all employment taxes legally due.

Read below for useful information about wage theft & related workplace abuses that NWJP and the coalition seek to prevent:

Wage theft

Wage theft is the illegal underpayment or non-payment of workers' wages. Wage theft happens when employers pay workers less than the minimum wage, do not pay time and a half for overtime hours, cheat on the hours worked, or don't pay workers at all. Employers also cheat workers out of wages by illegally deducting the cost of tools or fines for safety violations from their paycheck; forcing them to work off the clock; issuing checks that bounce; stealing tips; and denying legally required meal and rest breaks. Employer strategies such as misclassification and subcontracting schemes can facilitate wage theft.

Wage theft has become a common practice in many low-wage industries in Oregon and nationwide—a recent study of low-wage workers in three major U.S. cities found that *one in four* of the workers surveyed had been paid less than minimum wage in the previous work week.

When employers steal wages and benefits it hurts everyone—the workers that don't get paid, other workers whose standards are undermined, ethical employers who have to compete with scofflaws, communities robbed of local spending, and taxpayers who have to make up for the taxes that can't be collected on unpaid wages.

Contingent labor

It is no accident that wage theft has become so widespread. Over the last three

decades, a significant percentage of stable, full-time jobs have disappeared. Instead, employers are relying increasingly on "contingent" labor—labor that is contracted, temporary, or part-time.

Contingent work tends to pay low wages and provide no benefits. Employees who work through a staffing agency and day laborers hired on a temporary basis are examples of contingent workers. It is easier for employers to exploit workers in these less formal employment relationships, in part because it is often unclear who is legally liable for the exploitation.

Subcontracting schemes

One strategy some employers use to shield themselves from accountability is to hire one or more levels of subcontractors. The subcontractor may then hire workers directly, or employ yet another subcontractor. When workers suffer abuses in the workplace, the employer at the top of the subcontracting ladder will argue that it is not the employer and thus not responsible—the subcontractor is. However, these subcontractors are often "fly-by-night" operations that are undercapitalized and unable (or unwilling) to comply with wage and hour laws and other workplace protections. This leaves workers with little recourse when their rights are violated (even though the general contractor is often a joint employer of the workers under federal law).

We see such subcontracting schemes most frequently in low-wage industries

such as construction, janitorial, retail/warehousing, security, and agriculture.

Misclassification

Some employers of low-wage workers cut labor costs by claiming that their employees are self-employed independent contractors. The advantage for the employer is that workers who are misclassified as "independent contractors" are not covered by most of the labor laws that protect "employees." Unlike the employers of employees, users of independent contractors are not required to pay payroll taxes (including unemployment), to provide workers' compensation, to pay minimum wage or overtime, to bargain with unions, or to provide a safe worksite.

Independent contractor misclassification has historically been common in only a few sectors of the economy, such as agriculture and day labor. However, we're now seeing this strategy in many low-wage workplaces, particularly in construction, janitorial, home health care, and delivery services.

Here's an example: a property management company employs a full-time janitor. Rather than assume responsibility for her rights as an employee, the company claims she's an independent contractor. However, she's clearly an employee as she works entirely on the employer's terms: at its hours, at its wages, with its supplies. Consequences for employee: Can't form a union, higher taxes, no unemployment insurance or workers' comp. The state loses taxes.

Wage increase likely in H-2B program

Continued from page 1

Lawsuit leads to discovery of unpublished changes

The court decision that invalidated the Bush method came in response to *C.A.T.A. et al v. Solis*, a lawsuit filed in the U.S. District Court for the Eastern District of Pennsylvania in early 2009 challenging regulations to the H-2B temporary foreign worker program adopted by the Bush administration in its final days.

The case was filed by advocates from the Low Wage Workers' Legal Network (which NWJP helped to organize and now coordinates) on behalf of PCUN (Oregon's farm worker union), the Alliance of Forest Workers and Harvesters (a Northwest organization of reforestation workers), and other organizations around the country.

The original lawsuit did not include claims about the legality of the Bush method for calculating prevailing wages because worker advocates were unaware of the nature of the change that had been made. However, during the course of litigation, attorneys discovered documents detailing the unpublished changes implemented in 2005 by the Bush Department of Labor to the method of calculating the prevailing wages required in the H-2B program. Plaintiffs' counsel amended the lawsuit against the H-2B regulations to include the argument that the Bush administration broke the law when it adopted a new prevailing wage policy without informing the public.

On August 30, 2010, a federal judge in Philadelphia agreed and ordered the Department of Labor to come up with new rules.

Further progress toward stronger H-2B worker protections

The federal court also upheld other challenges made by NWJP and collaborating worker advocates in the lawsuit against the H-2B regulations adopted by the Bush administration.

One change made by the Bush administration excused employers from notifying the appropriate unions that work was available, unless the work was subject to an existing collective bargaining contract. The recent decision invalidated this change and requires that prospective H-

Indentured "guest" workers:

A brief overview of the H-2B temporary foreign worker program

What is the H-2B temporary foreign worker program?

The H-2B program allows U.S. employers to recruit and hire workers from other countries to fill temporary or seasonal non-agricultural jobs, normally for less than one year. H-2B workers are commonly found in the landscaping, forestry, seafood processing, hospitality, and construction industries. In theory, employers must certify that they could not recruit U.S. workers before they can hire foreign workers with H-2B visas.

The annual limit on new H-2B visas is 66,000, although an H-2B worker already in the United States may be recruited by another H-2B-certified employer without counting against the cap for up to a three-year total stay. It is currently estimated by the Department of Labor that there are about 110,000 workers with H-2B visas in the United States at any one time.

Why has the H-2B program been described as "close to slavery"?

The structure and lack of regulation of the H-2B program seems designed to leave H-2B workers extremely vulnerable to exploitation and without access to legal recourse. From the moment they arrive in the United States, H-2B workers are bound to a single U.S. employer. This means that an H-2B worker who gets fired for complaining about labor violations, or leaves to escape such conditions, cannot legally stay in the country to work for a different employer. To make matters worse, H-2B workers fre-

quently arrive deeply in debt (sometimes amounting to thousands of dollars) after being charged exorbitant fees by labor recruiters and paying for travel expenses to the United States.

The end result is a situation similar to indentured servitude in which many H-2B workers endure abuses such as wage violations, discrimination, seizure of identity documents, squalid living conditions, and other health and safety risks for fear of losing their jobs and getting sent back to their home country without an income. Even those who choose to speak out have trouble accessing legal assistance, especially because most H-2B workers are not eligible for federally funded legal services.

How does the H-2B program affect U.S. workers?

The widespread abuse of H-2B workers not only hurts migrant workers, it also leads to the displacement of willing U.S. workers. In theory, the H-2B program only allows U.S. employers to recruit foreign workers if no qualified U.S. workers are available *and* the employment of foreign workers will not negatively affect the wages and working conditions of U.S. workers in the same occupation. In practice, however, H-2B employers have frequently utilized the program to replace U.S. workers with foreign workers whose labor rights are less well protected. In the absence of effective government regulation and oversight, employers can frequently skirt a thorough search for U.S. workers.

2B employers recruit U.S. workers through unions representing the type of workers who are being sought, whether there is an existing contract covering the work or not.

The court also threw out Bush changes that allowed employers to avoid responsibility for ensuring that foreign workers were not displacing willing U.S. workers by hiding behind labor contractors who recruit workers for them. The ruling makes clear that both the contractor and the employer to whom workers are being provided must certify that they are complying

with H-2B rules.

In addition, the judge invalidated the Bush administration's definition of "full-time" work (which must be offered under the H-2B program) as only thirty hours per week.

The Department of Labor indicated that Secretary Solis would propose revisions to the current H-2B regulations in November 2010. We are optimistic that the revisions may address the many concerns brought to light in the lawsuit, even in areas where plaintiffs did not prevail in *C.A.T.A.*

At the **Northwest Workers' Justice Project**, we believe that all workers share the fundamental **human right** to live and labor with **dignity, safety, and hope**. Whether constructing and landscaping the buildings in our communities, harvesting and preparing the food on our tables, or cleaning our offices and hotel rooms, **every worker** deserves **fair and lawful wages and working conditions**.

Proposed prevailing wage rates for the H-2B program could put \$769.4 million more per year in the hands of workers!



Read more inside about how a legal challenge by NWJP and our allies against the abusive H-2B temporary worker program may increase wages & open jobs for U.S. workers.

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Thank you for your support.

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