

**Voices from the Underground Economy:
The Experiences of Workers and Advocates
Seeking Meal and Rest Breaks
in Low-Wage Industries**

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I. Introduction and Summary

For well over one hundred years, the need for workers to rest during their workday has been exhaustively studied and documented. The deleterious effects on worker health and public safety of inadequate opportunities for workers to rest, eat, and use lavatory facilities during the workday are beyond question. Likewise, laws protecting workers' rights to meal and rest breaks have been on the books in California for decades. However, workers still struggle to make these rights a reality in their workplaces. This is nowhere more true than in the "underground economy," a multi-billion dollar sector of the overall California economy where employers flout regulatory requirements and workers are especially vulnerable to abusive labor practices.

Although California labor law (discussed in more detail in Chapter III.C) specifies that an employer may not employ a worker for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, and must provide a second meal period when a workday exceeds ten hours, many workers in the underground economy are rarely or never allowed this respite. Likewise, state regulations mandating a ten minute rest period for each four hours of work, while binding, are almost universally ignored in the underground economy. Some employers flatly prohibit meal or rest breaks or punish workers who request or take them, others intimidate workers into foregoing breaks, and still others never inform workers of their rights. The structure of some jobs makes the taking of breaks difficult or impossible without employer cooperation. The result is exploitation and avoidable health problems for workers, violations of law, and threats to public safety.

Advocates for low-wage workers in California hear on a daily basis of employers denying workers their right to take legally mandated meal and rest breaks. Likewise, state and federal agencies have occasionally published summaries of the abuses their investigations have documented and have noted the prevalence of all types of labor violations in the underground economy. Nonetheless, accurate statistics regarding the extent of meal and rest break compliance or violation anywhere in the economy are strikingly elusive. Research on these violations in low-wage and underground industries is particularly sparse.

This report seeks to help demonstrate the widespread abuse of meal and rest break rights in California's underground economy. Under the supervision and guidance of Professor Clare Pastore, two students from the USC Gould School of Law's Access to Justice Practicum canvassed numerous legal and workers' rights groups in California for estimates on the extent of meal and rest break violations in low-wage industries, based on observations from their caseloads. Collectively, the organizations we surveyed assist thousands of low-wage workers annually. The students distributed survey questionnaires, carried out telephone interviews, and conducted independent research and a literature review, compiling the information they

uncovered into this report. The report provides an overview of the underground economy (Chapter II), a summary of the history of meal and rest breaks and the current legal structure governing them in California (Chapter III), descriptions and analysis of meal and rest break violations in the contemporary workplace (Chapter IV), a discussion of challenges in enforcing workers' rights to meal and rest breaks (Chapter V), a brief Conclusion (Chapter VI), and a bibliography of sources for further information (Chapter VII).

II. DEMOGRAPHICS: What is the Underground Economy and How Many Employees Work in It?

A. What is the Underground Economy?

“Underground economy” is a term that government agencies, advocates, and scholars use to describe the sector of the workforce that avoids labor, tax and licensing laws by dealing in cash and/or by employing other methods that allow concealment of activity from licensing and regulatory agencies.¹ While many businesses in the underground economy pay their employees “under the table” in cash, this sector also includes businesses that use traditional payroll methods, but that nonetheless chronically violate minimum labor standards, such as meal and rest break protections, safety rules, or overtime pay requirements.²

The underground economy has long been a target of governmental attention, because of the cost to state coffers in unpaid taxes, to workers in injuries, lost wages and benefits, to legitimate businesses from unfair competition, and to consumers from public safety risks and poor quality work. California began systematically attempting to combat the underground economy in 1993, with the creation by gubernatorial executive order of the Joint Economic Strike Force (JESF). Led by the Employment Development Department, the JESF pooled resources and promoted data

¹ See, e.g., Economic & Employment Enforcement Coalition (EEEC), *Report to the Director of the California Department of Finance & California Joint Legislative Budget Committee 1-2* (2007), available at http://www.labor.ca.gov/pdf/EEEC_Final_Report.pdf (hereinafter “EEEC Report.”). The EEEEC includes the California Labor & Workforce Development Agency, the State Departments of Industrial Relations, Labor Standards Enforcement, Occupational Safety & Health, and Employment Development, as well as the California Contractors State License Board and the federal Department of Labor, who work jointly on enforcement actions. For more information, see the EEEEC Homepage, <http://www.labor.ca.gov/eeec.htm>.

² See, e.g., Lora Jo Foo, *The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 Yale Law Journal 2179, 2180 (1994). It is important to note that not every worker in the underground economy is a low-wage worker. For example, some construction companies pay well above minimum wage, but ignore other legal obligations, by paying in cash or violating tax, labor or health and safety requirements. On average, however, wages in the underground economy are significantly lower than those in the conventional economy. See, e.g., Paul M. Ong & Jordan Rickles, *Analysis of the California Labor and Workforce Development Agency's Enforcement of Wage and Hour Laws*, Paper 17, Ralph and Goldy Lewis Center for Regional Policy Studies, University of California, Los Angeles 21 (2004) (estimating mean hourly earnings for California workers not recorded on payroll at \$9 to \$10 per hour, compared to \$16 to \$19 per hour for those recorded on payroll).

sharing among the state agencies charged with enforcing licensing, labor, and tax laws.³ The JESF has since been codified by statute.⁴ In 2002, when the state's employment-related agencies were reorganized under the umbrella of the Labor and Workforce Development Agency, one of the eleven specific purposes for the reorganization set forth in the statute was to "[m]ore closely coordinate enforcement activities so the Employment Development Department (EDD) can capture lost revenue from the underground economy while the Department of Industrial Relations protects workers exploited in the underground economy."⁵ More recently, California in 2004 created the Economic & Employment Enforcement Coalition (EEEC), a partnership of the state Labor & Workforce Development Agency, five other state agencies, and the U.S. Department of Labor. According to the EEEEC itself, its objective is "to address the underground economy in a unique and dynamic way. It is a coalition of agencies actively combating non-compliant employers while also providing concentrated outreach and education to employers and workers."⁶ Where the Joint Enforcement Strike Force focused on a wide variety of industries, EEEEC specifically targets the underground economy.⁷ The 2005 state budget authorized new 66 positions and \$6.5 million in funding for the initiation of the EEEEC and tasked it with identifying the worst offenders via targeted enforcement actions throughout the state.⁸ In its first two years, the EEEEC identified over \$109 million in unreported wages and assessed over \$17 million in unpaid employment taxes. One hundred and sixty one cases were referred to District Attorney's Offices and fifty-eight resulted in criminal convictions.⁹

According to the EEEEC, industries in the underground economy tend to be characterized by the following exploitative behaviors:

- They avoid licensing requirements, making business owners hard to find and harder to monitor for compliance with labor laws;
- They often pay wages in cash;
- They employ vulnerable workers, especially new and/or undocumented immigrants,

³ EEEEC Report, *supra* note 1, at 7. JESF includes EDD, the Departments of Consumer Affairs, Justice, and Industrial Relations, the Franchise Tax Board, the Board of Equalization, and (since 2002), the Department of Insurance.

⁴ Cal. Unemp. Ins. Code § 329.

⁵ See Cal. Gov. Code § 12813, Historical and Statutory Notes, *quoting* Stats.2002, c. 859 (S.B.1236), §§ 1(f).

⁶ EEEEC Report, first page of unpaginated "Secretary's Message."

⁷ *Id.* at 7.

⁸ *Id.*

⁹ *Id.* at 12.

and the economically disadvantaged;

- They often fail to pay the federally and state mandated minimum wage; and
- They often do not adhere to minimum worker and workplace safety requirements¹⁰

The EEEEC targeted seven industries for its initial enforcement actions based on their history of recurring tax, labor and safety violations, including the failure to pay the minimum wage and the failure to report wages. These industries are

- agriculture
- car wash
- construction
- garment manufacturing
- restaurants
- horseracing
- janitorial services¹¹

With the exception of horseracing, these are all industries in which the advocates we surveyed see frequent violations of labor laws, especially meal and rest break protections, as discussed in Chapter IV. The EEEEC's 2007 report describing why these seven industries were selected specifically noted the prevalence of meal and rest break violations in the agricultural, car wash, garment, and restaurant sectors.¹² In response to our survey, advocates also mentioned experience with meal and rest break claims for workers in medical clinics, homecare/personal attendant companies, meat packing, non-garment light manufacturing, landscaping, bus driving, grocery, and security guard employment.

B. How many workers work in the underground economy?

By definition, the size of the underground economy is difficult to measure. At the state level, some estimates show that California's underground economy generates anywhere from \$60 billion to \$140 billion annually.¹³ The Los Angeles County Economic Development Corporation estimated in 2003 that the statewide underground economy included over 600,000 workers in just

¹⁰ EEEEC homepage, <http://www.labor.ca.gov/eeec.htm>.

¹¹ EEEEC Report at 9-11.

¹² *Id.* at 9-10.

¹³ Ong & Rickles, *supra* note 2, at 21 (citing various sources).

five industries (high-tech, agricultural, construction, trade and apparel).¹⁴ Extrapolating from federal and state data, the Los Angeles-based Economic Roundtable estimated in 2005 that there were 679,000 “informal workers” in Los Angeles County alone¹⁵ and that most net job growth in Los Angeles is occurring in the “informal” sector.¹⁶

Other sources show that in the County of Los Angeles alone there are an estimated 22,000 car wash workers,¹⁷ 25,000 day laborers,¹⁸ and 65,000 gardeners.¹⁹ At the state level, it is estimated that there are over 85,000 gardeners,²⁰ 90,000 housekeepers,²¹ 100,000 garment workers,²² over

¹⁴ *Id.*

¹⁵ Daniel Flaming, Brent Haydamack, & Pascale Joassart, *Hopeful Workers, Marginal Jobs: LA's Off-the-Books Labor Force*, (Economic Roundtable 2005) at 1. The Economic Roundtable’s definition of the “informal economy” is synonymous with that of “underground economy” as used in this report: “jobs that do not show up in formal data sources and that operate outside of established labor laws. They are jobs that would otherwise be considered legal but are not effectively regulated.” *Id.* at 4. The report specifically notes the plethora of labels that have been used to describe this sector of the economy, including (*inter alia*) hidden economy, irregular economy, shadow economy, and underground economy. *Id.* A set of recent papers from the UCLA Institute for Research on Labor & Employment (IRLE) use the term “gloves-off economy” to refer to “a set of employer strategies and practices that either evade or outright violate the core laws and standards that govern job quality in the U.S.” Bernhardt, et al, *An Introduction to the “Gloves-off” Economy*, IRLE Paper Tilly05 (2008) at 2, *reprinted in* Bernhardt, Boushey, Dresser, & Tilly, *The Gloves-Off Economy: Workplace Standards at the Bottom of America’s Labor Market* (Cornell Univ. Press, 2008).

¹⁶ *Hopeful Workers, Marginal Jobs, supra* note 15, at 38.

¹⁷ Carwash Workers Organizing Committee of the United Steelworkers, *Cleaning Up the Carwash Industry: Empowering Workers and Protecting Communities* 3 (2008), available at <http://www.cleancarwashla.org/index.cfm?action=article&articleID=ae9615a4-6be8-47be-b29e-5b78b353dca3..>

¹⁸ Victor Narro, *Impacting Next Wave Organizing: Creative Campaign Strategies of the Los Angeles Worker Centers*, 50 N.Y.L. Sch. L. Rev. 465, 487 (2005-2006).

¹⁹ Christopher David Ruiz Cameron, *The Rakes of Wrath: Urban Agricultural Workers and the Struggle Against Los Angeles’s Ban on Gas-Powered Leaf Blowers*, 33 U.C. Davis L. Rev. 1087, 1090 (2000).

²⁰ See California Employment Development Department, California Occupational Guides, Gardeners and Groundskeepers, available at <http://www.calmis.ca.gov/file/occguide/gardener.htm>.

²¹ California Employment Development Department, California Occupational Guides, Maids and Housekeeping Cleaners, available at <http://www.calmis.ca.gov/file/occguide/maidhouse.htm>.

²² Asian Immigrant Women Workers’ Clinic, *We Spend Our Days Working in Pain: A Report on Workplace Injuries in the Garment Industry* (2002) (unpaginated), Introduction Section, available at <http://www.aiwa.org/workingreport.pdf>. See also California Employment Development Department, California Occupational Guides, Sewing Machine Operators (estimating over 97,000 sewing machine operators in 2005), available at <http://www.calmis.ca.gov/file/occguide/sewingop.htm>.

320,000 waiters and waitresses,²³ and over 220,000 janitorial workers.²⁴ Not all of these workers are part of the underground economy, since not all employers in these sectors ignore their legal obligations. However, because employers in the underground economy often pay employees in cash and do not report the workers or the earnings to the state,²⁵ these official estimates likely understate the actual number of employees working in each industry.

National figures also show a large and by some measures growing underground economy.²⁶ The International Monetary Fund has estimated that the underground economy in the entire United States more than doubled from 4% of GDP in 1970 to 9% in 2000,²⁷ and the National Center for Policy Analysis estimates that as many as 25 million Americans earn a large part of their income from underground economic activities.²⁸

A recent Congressional Budget Office (CBO) report shows that nationally, a majority of the employees in low-wage industries (defined in CBO's report as those in the lower half of the hourly wage distribution) are women (fifty-four percent), and a disproportionate number are immigrants.²⁹ Both documented and undocumented immigrants are disproportionately represented in the low-wage and underground economy.³⁰ The CBO report also shows that in 2005, at least twenty-five percent of low-wage employees were the only earners in their homes; another thirty-four percent accounted for the majority of earnings in the household.³¹

²³ California Employment Development Department, California Occupational Guides, Waiters and Waitresses, available at <http://www.calmis.ca.gov/file/occguides/waiter.htm>.

²⁴ California Employment Development Department, California Occupational Guides, Janitors and Cleaners, available at <http://www.calmis.ca.gov/file/occguides/janitor.htm>; Telephone interview with Lilia Garcia, Executive Director, Maintenance Cooperation Trust Fund (Feb. 26, 2009).

²⁵ See EEEEC Homepage, <http://www.labor.ca.gov/eeec.htm>.

²⁶ See, e.g., *An Introduction to the "Gloves-off" Economy*, *supra* note 15, at 14 ("our assessment is that the erosion and outright rejection of labor standards have become increasingly common. . . .") and 15-16 (citing studies finding increases in labor law violations and erosion of workplace standards).

²⁷ Friedrich Schneider & Dominik Enste, *Hiding in the Shadows: The Growth of the Underground Economy*, (International Monetary Fund 2002), available at <http://www.imf.org/external/pubs/ft/issues/issues30/index.htm>.

²⁸ National Center for Policy Analysis, *The Unmeasured Underground Economy* (2001), available at http://www.ncpa.org/sub/dpd/index.php?Article_ID=12688. See also Ong & Rickles, *supra* note 2, at 21 (citing sources).

²⁹ See Congressional Budget Office, *Changes in Low-Wage Labor Markets Between 1979 and 2005*, 18 (2006).

³⁰ See notes 113-117 and accompanying text in Chapter IV.B.4, *infra*.

³¹ CBO, *supra* note 29, at 20.

C. How frequent are labor law violations in the underground economy?

As with employment figures, precise statistics about the frequency of labor law violations in the underground economy are difficult to find,³² but governmental agency enforcement efforts confirm the conclusion of advocates that violations are widespread in California. For example, the state's Joint Enforcement Strike Force identified \$245 million in unreported wages in 2002.³³ According to EDD, from 2004 to 2006 the JESF conducted 1,731 payroll tax audits; issued payroll tax assessments totaling \$84.6 million; discovered 30,243 workers who had not been reported to the state, and cited employers for various labor code violations totaling \$10.8 million.³⁴ The multi-agency EEEEC reported in 2007 that over 5600 employees had improperly not been reported to the state in just the two previous fiscal years, and over \$109 million in wages had been concealed.³⁵

It is important to note that as large as the EEEEC's violation figures are, they represent only the results of EEEEC's nearly 3000 inspections, only in the seven targeted industries, and do not purport to describe the universe of violations. EEEEC's recent actions confirm that violations continue in the industries at the heart of the underground economy. For example, recent EEEEC and Labor Commissioner press releases announce a \$13 million judgment in April 2009 against two janitorial companies who evaded payroll taxes and failed to pay minimum wage and overtime for approximately 300 California janitorial workers,³⁶ citations totaling over \$130,000 in May 2009 against a Los Angeles restaurant owner for multiple labor law violations over a ten year period,³⁷ and the filing of a civil suit in August 2009 against a Sonoma restaurant for stealing workers' tips.³⁸ In January 2009, 245 restaurant inspections in 26 counties across the

³² A recent report from the UCLA Institute for Research on Labor & Employment noted that "research on workplace violations is still very much an underdeveloped field, and there are currently few comprehensive estimates of the prevalence of violations. However, the evidence available points to a significant level of violations in some industries." *An Introduction to the "Gloves-off Economy," supra* note 15 at 9-10 (citing, *inter alia*, U.S. Department of Labor Findings in the late 1990s showing only 43% of Los Angeles grocery stores were in compliance with minimum wage and overtime laws, and a 2005 independent analysis of Department of Labor administrative compliance data concluding that over half of Los Angeles garment contractors were out of compliance with minimum wage requirements and had serious OSHA violations in 2000.)

³³ Daniel S. Levine, '*Underground*' Squeezes Honest Firms, San Francisco Business Times (August 22, 2003), reported in Ong & Rickles, *supra* note 2, at 22.

³⁴ Employment Development Department, *Annual Report: Fraud Detection and Deterrence Activities* 17 (2007), available at http://www.edd.ca.gov/pdf_pub_ctr/report2007.pdf.

³⁵ EEEEC Report, *supra* note 1 at 12 (unreported wages); Appendices 2 & 3 (# of employees).

³⁶ IR 2009-09, available at <http://www.dir.ca.gov/DIRNews/2009/IR2009-09.html>.

³⁷ IR 2009-14, available at <http://www.dir.ca.gov/DIRNews/2009/IR2009-14.html>.

³⁸ IR 2009-27, available at <http://www.dir.ca.gov/DIRNews/2009/IR2009-27.html>.

state revealed that 129 of the 143 employers cited failed to carry workers' compensation insurance.³⁹ Likewise, the Labor Commissioner and the Los Angeles City Attorney have recently sued numerous Los Angeles carwashes for pervasive labor violations, including of meal and rest break rights.⁴⁰

No data is apparently available on the prevalence of meal and rest break violations alone, but as discussed in Chapter IV, it is all but unheard of for an employer to violate minimum wage, overtime, or reporting requirements, yet provide meal and rest breaks. Research and enforcement agency findings of widespread violations of workers' rights in the low-wage and underground economy are completely consistent with the experience of advocates who counsel and represent low-wage workers in these sectors.

III. MEAL AND REST BREAK LAWS

A. What are the origins of national meal and rest break laws?

Professors Marc Linder & Ingrid Nygaard provide a comprehensive history of the development of national meal and rest break laws in their 1998 book, Void Where Prohibited: Rest Breaks and the Right to Urinate on Company Time. Void Where Prohibited compellingly illustrates the struggles that workers have faced for over 100 years to secure and protect their rights to rest, health and safe working conditions. This section of our report owes an enormous debt to Professors Linder and Nygaard.

As far back as the dawn of the Industrial Age in the mid to late nineteenth century, pioneering scientists, efficiency experts, industrial psychologists, and motion study experts in the United States, Germany, and Britain began to study the need for rest during the workday. Early research, confirmed anew by each generation, established that rest breaks during the day benefit not only workers but also employers, for productivity was conclusively shown to increase as a result of taking strategic rest pauses.⁴¹ Governments also took an interest in these rest break studies, recognizing the benefits to the health of their citizens. With the advent of World War I,

³⁹ IR 2009-02, available at <http://www.dir.ca.gov/DIRNews/2009/IR2009-02.html>.

⁴⁰ See, e.g., Office of the City Attorney Press Release, *City Attorney Files 176-Count Criminal Case Against Car Wash Owners and Manager Who Mistreated Workers and Violated Labor Laws*, Feb. 10, 2009, available at <http://www.cleancarwashla.org/index.cfm?action=article&articleID=1f354246-692f-4327-bbea-fdb30cad80ea>; *Cal Labor Commissioner Files Suit to Close Down Nine Carwash Businesses* (June 9, 2009), available at <http://www.dir.ca.gov/DIRNews/2009/IR2009-19.html>.

⁴¹ See Marc Linder & Ingrid Nygaard, Void Where Prohibited: Rest Breaks and The Right To Urinate on Company Time (Cornell Univ. Press 1998) at 13.

governments also came to view increased worker productivity as an important element of national security.⁴²

In automated workplaces in the early twentieth century, workers endured long hours and prison-like conditions. Employers often viewed low-wage labor as a cheap commodity, replaceable with other workers readily available in the workforce.⁴³ Even outside of factories, many workers, in industries ranging from medical personnel to department store clerks, experienced workdays as long as thirteen hours as the norm.⁴⁴ Development of assembly line mass production further exacerbated harsh working conditions, as workers' hours became more productive and efficient, while their tasks became more repetitive and intense.⁴⁵ These working conditions foreclosed the possibility of working different muscle groups, caused repetitive stress injuries and worsened performance.⁴⁶

Likewise, the need for breaks so that workers may use toilet facilities has long been obvious. For over a century, it has been observed that workers unable to use a restroom often experience health complications or resort to inhumane and humiliating measures. For example, in 1882 the journal *The Sanitary Engineer* noted that decent toilet accommodations were “too often lacking in our manufacturing establishments.”⁴⁷ German scientists in the 1920s noted that workers' health could be injured and their work performance reduced if workers were not allowed enough time to relieve themselves. For this reason, German medical counselors of that era recommended that workers be given ten-minute rest periods every two hours, specifically for use of restrooms.⁴⁸

⁴² *Id.* at 26-27. Linder and Nygaard note that a major study conducted in 1917-18 in two large war-related plants by the U.S. Public Health Service, the Council of National Defense's Committee on Industrial Fatigue, and the National Research Council's Committee on Fatigue in Industrial Pursuits provided the first substantial compilation of information on the effectiveness of rest periods in U.S. industry. The results ““prove[d] more conclusively than ha[d] been proved before that with the long workday the interruption of work is on average more than compensated by the recuperation afforded by the recess.”” *Id.* at 27 (citation omitted).

⁴³ *Id.* at 10.

⁴⁴ *Id.* at 70.

⁴⁵ *Id.* at 24.

⁴⁶ See, e.g., David Gartman, *Auto Slavery: The Labor Process in the American Automobile Industry, 1897-1950* at 98 (Rutgers Univ. Press, 1986). See also Linder & Nygaard, *supra* note 41 at 15.

⁴⁷ See, e.g., “Sanitary Closets for Shops,” 6 *Sanitary Engineer* 560 (1882), *cited in* Linder & Nygaard, *supra* note 41 at 53.

⁴⁸ Linder & Nygaard, *supra* note 41, at 64.

Some states began enacting modest rest break laws as early as the 1890s, declaring that employers must provide bathroom facilities for their workers.⁴⁹ Other states began mandating 10 minute rest breaks- often only for female workers - in the early twentieth century, while labor unions worked to secure rest breaks through collective bargaining agreements.⁵⁰ By 1937, twenty-one states mandated a meal or rest period, though in many states the protection extended to women only.⁵¹ A few states, including California, passed rest break statutes for women as well as meal break laws.⁵² These rights were generally not extended to male workers until after the 1972 enactment of Title VII of the Civil Rights Act, prohibiting employment discrimination based on sex.⁵³

Although the passage of Title VII at the federal level spurred a reexamination of gendered state protective laws, neither Congress nor the federal enforcement agencies have been heavily involved in the evolution of meal and rest break protections. Beginning in 1970, the federal Occupational Safety and Health Act (OSHA)⁵⁴ regulated certain workplace conditions, including the number of restrooms needed and the amount of time required to use them.⁵⁵ The federal Fair Labor Standards Act of 1938 (FLSA),⁵⁶ has long regulated minimum wage and overtime requirements. However, neither OSHA nor FLSA mandates meal or rest breaks for workers. Where rights to meal or rest breaks exist, they are a matter of employment contract or state law.

⁴⁹ *Id.* at 53.

⁵⁰ *Id.* at 80.

⁵¹ *Id.* at 77.

⁵² *Id.* (noting 1932 passage of mandatory rest breaks in California). *See also* *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal.4th 1094, 1105 (2007) (noting that state Industrial Wage Commission wage orders have required meal and rest breaks “since 1916 and 1932, respectively.”)

⁵³ 42 U.S.C. § 2000e *et seq.*; *see also* *California Hotel & Motel Ass’n v. Indus. Welfare Comm’n*, 25 Cal.3d 200, 207 (1979) (“Prior to 1972, the [Industrial Welfare Commission] had authority to determine the wages, hours, and working conditions of women and minors, but not of men. The Legislature extended the authority of the commission to determine the minimum wage for men in 1972 and the hours and working conditions for men in 1973.”) (citations omitted); *Linder & Nygaard*, *supra* note 41, at 81-109 (discussing the struggle over gender-specific protective statutes before and after the passage of Title VII).

⁵⁴ 29 U.S.C. §§ 651-678. *See also* 29 CFR § 1910 (2009).

⁵⁵ 29 U.S.C. §§ 653, 655, 657. *See also* 29 CFR § 1910.141(c) (2009).

⁵⁶ 29 U.S.C. § 201 *et seq.*

B. What are the benefits of meal and rest breaks for workers and the public?

Meal and rest breaks can directly alleviate numerous adverse health conditions and public safety hazards.

Fatigue and accidents: Rest breaks are an effective solution to combating fatigue in the workplace, as well as reducing the risk of accidents.⁵⁷ Fatigue on the job can be very dangerous, not only for the individual employee but for other workers and the public as well.⁵⁸ For example, fatigue has been identified as a "principal factor in accident causation" among bus drivers in San Francisco,⁵⁹ and lack of rest breaks may have contributed to the fatal Metrolink crash in Los Angeles in September 2008.⁶⁰ Fatigue affects work performance and increases the rate of accidents in many other work sites, including agricultural fields, hospitals, construction sites, and restaurants.⁶¹

Heat exhaustion: Workers in high-temperature work environments such as warehouses, bakeries, laundries, and agricultural fields risk heat illness and even death when they do not receive sufficient and timely breaks. For example, between 2005 and 2008, at least 13 farm workers perished in California due to heat-related illness.⁶² Three of the six confirmed heat-

⁵⁷ See, e.g., Tucker et al., *Rest Break and Accident Risk*, 361 *The Lancet* 680 (2003); Hamed et al., *Analysis of Commercial Mini-Bus Accidents*, 30 *Accident Prevention* 555-67 (1998); Dababneh et. al., *Impact of Added Rest Breaks on the Productivity and Well Being of Workers*, 2 *Ergonomics* 164-74 (2001); Jeff Kenner, *Working Time, Jaeger and the Seven-Year Itch*, 11 *Colum. J. Eur. L.* 53 (2004/2005). These and other sources are cited in Suzanne Murphy et. al, Amicus Letter of Worksafe, Inc., to California Supreme Court in Support of Petition for Review in *Brinker Restaurants Corp. v. Superior Court* (Case No. S166350) at 8-10 (September 29, 2008).

⁵⁸ See e.g., *Gentry v. Superior Court*, 42 Cal. 4th 443, 456 (2007) (noting that the risk of accidents falls not only on employees who miss breaks, but on other workers and members of the public); *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal. 4th 1094, 1113 (2007) ("Employees denied their rest and meal periods face greater risk of work-related accidents and increased stress, especially low-wage workers who often perform manual labor . . .").

⁵⁹ Greiner et. al., *Objective Measurement of Occupational Stress Factors—An example with San Francisco Urban Transit Operators*, 2 *Journal of Occupational Health and Psychology* 325 (1997).

⁶⁰ Editorial, *Who Regulates Rail Workers' Shifts?*, Los Angeles Times, September 20, 2008.

⁶¹ The websites of state and federal agencies, including OSHA (www.osha.gov) and Cal-OSHA (www.dir.ca.gov/dosh/) contain many links to reports on fatigue and work performance. Advocacy groups such as Worksafe (a California coalition for worker occupational safety and health protection) likewise collect and link to useful data and independent research. See, e.g., www.worksafe.org.

⁶² See Anna Gorman, *California Steps Up Efforts to Prevent Heat-Related Deaths Among Farmworkers*, Los Angeles Times, Aug. 3, 2009. See also State of California Memorandum to Len Welsh, DOSH Acting Director from Janis Prudomne, Public Health Medical Officer, DHS-OHB and Amalia Neidhardt, RE: Cal-OSHA Investigation of (2005) Heat Related Illnesses, Feb. 17, 2006; DOSH Memorandum to Len Walsh, DOSH Director from Janis Prudomne, Public Health Medical Officer, DHS-OHB and Amalia Neidhardt, RE: Cal-OSHA Investigations of 2006 Heat-Related Illnesses, October 18, 2007; Presentation by Len Walsh on 2008 Heat Fatalities and Illnesses at Cal-

related deaths in 2005 occurred under working conditions where all required meal and rest periods were not taken.⁶³ The Sacramento Bee reported in an August 21, 2008 article that between 1992 and 2006, heat exhaustion killed US farm workers at a rate 20 times higher than all other workers.⁶⁴

Repetitive stress injuries: Increasing numbers of repetitive motion injuries have prompted ergonomists to warn that periodic rests during the workday are necessary to counteract the onset of carpal tunnel syndrome and other trauma from repetitive cycles.⁶⁵ Studies of particular industries, especially garment factories, show very high rates of repetitive stress injuries among low-wage workers.⁶⁶

Incontinence/urinary problems: Workers who are unable to relieve themselves in the workplace can suffer incontinence and dangerous health problems including infection, kidney damage, and in extreme cases, death.⁶⁷

California's courts and regulatory agencies have long recognized the health and safety benefits from meal and rest breaks and the dangers to workers and the public from the absence of these protections.⁶⁸ As discussed below, however, there is a wide gulf in practice between the requirements of the law and the reality of the low-wage workplace.

OSHA Advisory Committee meeting, September 11, 2008, Oakland, CA, *cited in* Cynthia Rice, California Rural Legal Assistance, Amicus Letter to California Supreme Court in Support of Petition for Review in *Brinker Restaurants Corp. v. Superior Court* (Case No. S166350) (September 26, 2008).

⁶³ See Division of Occupational Safety and Health, *2005 Investigation Reports for David Castillo, FLC, R and R Labor Services, and Zepeda's Farm Labor Service*; *cited in* Rice, *supra* note 62 at 2.

⁶⁴ Susan Ferriss, *In California's fields, risks rise with the temperature*, The Sacramento Bee, A1 (August 21, 2008). A recent lawsuit alleges that Cal-OSHA's failure to investigate, monitor, and take remedial measures to enforce worker protections in conditions of extreme heat violates California state law. The complaint, available at <https://www.aclu-sc.org/documents/view/199>, includes citation to numerous reports and investigative findings regarding the prevalence of heat-related deaths among California farmworkers.

⁶⁵ See, e.g., Marc Linder, *I Gave My Employer a Chicken That Had No Bone: Joint Firm-State Responsibility for Line-Speed-Related Occupational Injuries*, 46 Case W. Res. L. Rev. 33, 35 (1995); see also National Institute for Occupational Safety and Health, *Health Hazard Evaluation Report: Perdue Farms, Inc.: Lewiston, North Carolina, Robersonville, North Carolina* 19 (HETA 89-307-2009, 1990); *22 Percent Report Hand/Wrist Disorder in NIOSH Evaluation of L.A. Times Workers*, 77 Daily Lab. Rep. A-6 (Apr. 22, 1991).

⁶⁶ See, e.g., *We Spend Our Days Working in Pain*, *supra* note 22, citing Bureau of Labor Standards, *Annual Survey of Occupational Injuries and Illnesses* (1994) and other sources.

⁶⁷ Linder & Nygaard, *supra* note 41, at 47 (citing studies).

⁶⁸ See, e.g., *Kerr's Catering Service v. Dept. of Indus. Rels.*, 57 Cal.2d 319, 330 (1962); *IWC v. Superior Ct*, 27 Cal.3d 670, 724 (1980), *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal.4th 1094, 1105 (2007), *Gentry v. Superior Court*, 42 Cal.4th 443, 456 (2007) (all acknowledging that wage and hour laws foster health and welfare of workers and the public).

C. What Meal and Rest Breaks are Legally Required for California Workers Today?

California Labor Code section 512 governs meal periods. It states:

An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee.

For a workday of more than ten hours, Section 512 specifies a second meal period:

An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.⁶⁹

Rest breaks are mandated by Labor Code section 226.7, which does not specify their length or frequency, but rather delegates the authority to make those determinations to the Industrial Welfare Commission. Section 226.7 states, “No employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission.”⁷⁰

The Industrial Welfare Commission (IWC) is the state agency empowered to formulate regulations known as wage orders governing employment in California.⁷¹ Wage orders governing labor standards are adopted after public hearings and after the IWC issues a “Statement of Basis” reflecting the factual, legal and policy foundations for the action taken.⁷²

⁶⁹ There are limited exceptions to the meal requirement for employees in the baking, motion picture, and broadcasting industries, as well as a provision allowing the Industrial Welfare Commission to adopt an order “permitting a meal period to commence after six hours of work if the commission determines that the order is consistent with the health and welfare of the affected employees.” Cal. Lab. Code § 512(c) and (d).

⁷⁰ Section 226.7(b) also requires one additional hour of pay at the employee’s regular rate for each day that a meal or rest period is not provided.

⁷¹ *See also* Cal. Labor Code §§ 1173, 1178.5, 1182. The IWC “investigate[s] the health, safety, and welfare” of California employees and “ascertains the hours and conditions of [their] labor and employment” in order to draft wage orders. Cal. Labor Code § 1173.

⁷² Cal. Labor Code §§ 1177(b), 1178.5. Under Labor Code § 516, the IWC may also adopt or amend working condition orders with respect to break periods, meal periods, and days of rest for any workers in California “consistent with the health and welfare of those workers.”

Rather than a single wage order governing rest breaks for all industries, the IWC has regulated rest breaks by including the same language in multiple wage orders governing specific industries. That language specifies:

Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 1/2) hours. Authorized rest period time shall be counted, as hours worked, for which there shall be no deduction from wages.⁷³

As with meal breaks, any employer failing to permit rest breaks is required to pay the employee “one additional hour of pay at the employee’s regular rate of compensation for each work day that the meal or rest period [was] not provided.”⁷⁴ State regulations also require that suitable resting facilities shall be provided in an area separate from the toilet rooms and shall be available to employees during work hours.⁷⁵ Finally, all wage orders require employers to maintain time records of when employees begin and end meal breaks. Employers are not required to record rest breaks.⁷⁶

IV. MEAL AND REST BREAK VIOLATIONS IN THE CONTEMPORARY WORKPLACE

A. How frequently do California’s low-wage workers experience meal and rest break violations?

We canvassed advocates for low-wage workers in ten California nonprofit agencies to learn about the frequency of meal and rest break violations in low-wage industries. All of the agencies provide information and training about employment rights to workers, and most provide legal assistance or representation in filing wage claims and pursuing other remedies. We distributed survey questionnaires asking advocates for data regarding the number of workers’

⁷³ See, e.g., Wage Order 5 (Public Housekeeping), 8 Cal. Code. Regs. § 11050(12). The same language appears in wage orders governing numerous individual industries. Wage orders can be found on the IWC’s website at <http://www.dir.ca.gov/IWC/wageorderindustries.htm>.

⁷⁴ Cal. Labor Code § 226.7(b).

⁷⁵ As with rest break regulations generally, the identical language requiring suitable rest facilities is set forth in a series of wage orders applicable to individual industries. See Cal. Code Regs. § 11010 (13)(B) through 11150(13)(B).

⁷⁶ See para. 7 of all wage orders except Wage Order 16, where the timekeeping provisions are in para. 6, found in Cal.Code Regs. § 11010 through 11150.

rights cases the agencies handled within the last three years and the percentage of these cases that included meal or rest break issues. Except where otherwise indicated, the information and anecdotes discussed below are drawn from these questionnaires.

While our survey is by no means an exhaustive or scientific inquiry into the frequency of meal and rest break violations in the low-wage economy, an obvious pattern did emerge: meal and rest break claims occur in the vast majority of cases where workers have other labor claims. That is, when workers seek legal or advocacy help because they are not being paid overtime, are not being paid for all of the hours they worked, or are in some other way subjected to illegal labor conditions, it is also likely that they are not provided with meal and/or rest breaks in accordance with the law. Moreover, our survey doubtless underestimates the frequency of meal and rest break violations, because many worker advocate groups report that they do not represent workers who have claims based *only* on meal or rest break violations and therefore do not keep data on any such cases.

Here are the results of our survey:

Bet Tzedek Legal Services, which provides free legal assistance in the Los Angeles area, filed, negotiated, and advised on 570 employment cases between 2006 and 2009. Of these, an estimated 93% involved meal or rest break violations.

Centro Legal de La Raza, located in the East Bay region of Northern California, reports that it helps workers file approximately 50 wage and hour or workers' rights administrative claims with the Department of Labor Standards Enforcement (DLSE) per year, of which 90-95% typically involve meal and/or rest break violations.

Garment Worker Center in Los Angeles, California filed, negotiated, and advised on 300 cases from 2006 to 2009. Fifty of the cases were negotiated and settled and 250 were filed with the DLSE. Of these 300 total cases, 95% involved meal or rest break violations.

Legal Aid Foundation of Los Angeles (LAFLA) helped workers bring 143 claims with the DLSE in 2006. Ninety-nine of these cases included rest break issues; eighty-five included meal break issues.

Legal Aid Society – Employment Law Center in San Francisco resolved 55 cases between 2006 and 2008; 17 through DLSE hearings and 36 through settlements. Over 50% of these cases involved meal or rest break violations. In these cases ELC recovered over \$720,000 in settlements, back pay, and penalties for workers.

Maintenance Cooperation Trust Fund, a California statewide watchdog organization for the janitorial services industry, processed 400 employment claims between 2006-2009. Of these, 95% involved meal or rest break violations.

Neighborhood Legal Services of Los Angeles County (NLS) helped workers bring 150 cases with the DLSE from 2006 to 2009. Seventy percent of these cases involved meal or rest break claims. In the same period of time, NLS provided brief assistance rather than full representation on 1600 additional cases through its workers' rights clinics. Of these 1600 cases, 60% involved meal or rest break claims.

Young Workers United in San Francisco, California, filed and negotiated over 100 cases through the DLSE from 2006-2009; approximately 50% of these involved meal or rest break issues.

The **Wage Justice Center** in Los Angeles obtained settlements for 203 workers and provided brief services for an additional 90 workers from 2006 to 2009. Of these cases, approximately 95% involved meal or rest break issues.

The meal and rest break violations these advocates observed were concentrated in the car wash, garment, janitorial services, restaurant, manufacturing, catering, construction, domestic work, day labor/short-term construction, and retail industries—but meal and rest break violations are by no means limited to these areas. For example, the state Economic & Employment Enforcement Coalition has identified the agricultural and horse race track industries as among the industries most likely to violate minimum labor standards.⁷⁷ Advocates also reported that meal and rest break violations are prevalent in the gardening and motel industries. Compounding the problem, the industries in which advocates and regulators identify pervasive violations are disproportionately those in which workers engage in manual labor or work in physically stressful positions such as while sewing or washing cars, making the need for breaks even greater than in (for example) many office settings or other less physically demanding workplaces.

B. Why are strong meal and rest break protections needed in the law? Can't we just rely on workers to take breaks when they need them?

Several key factors prevent workers, especially those in the underground economy, from asserting and enforcing their rights to meal and rest breaks. These include:

- Many low-wage workers don't know they are entitled to meal and rest breaks.
- The pay and profit structures in some industries discourage or punish workers for taking breaks without explicit employer cooperation.
 - Punishment, termination, or retaliation for requesting or taking breaks is common in the underground economy.
 - Many low-wage workers are vulnerable to exploitation because of language barriers or immigration status.

⁷⁷ EEEEC Report, *supra* note 1, at 9-11 (identifying the agricultural, car wash, construction, garment, restaurant, janitorial services, and horse race track industries as seven industries as "target industries" for the EEEEC's investigations of labor law violations due to these industries' high likelihood of violating minimum labor standards).

As discussed below, some of these barriers are created by employers who actively discourage or punish workers who take or ask for permission to take breaks. Other, more subtle factors that contribute to widespread violations of meal and rest break laws involve structural aspects of the low-wage economy that, as a practical matter, make it difficult or impossible for workers to assert their rights to meal and rest breaks. In combination, these factors create an environment where, without strong enforcement of labor laws, employers lack an incentive to make sure their employees are taking breaks regularly, and employees are reluctant to ask for breaks for fear of being fired or disciplined.

1. Many low-wage workers don't know they are entitled to meal and rest breaks.

Many employees in the underground economy are unaware of the meal and rest break protections the law provides.⁷⁸ For example, the **Maintenance Cooperation Trust Fund (MCTF)** reports that most of the janitorial workers it serves are not aware they are entitled to meal and rest breaks under the law.⁷⁹ The **Asian-Pacific American Legal Center (APALC)** reports the same problem among garment workers: “Meal and rest breaks are unheard of in the garment industry. Workers don't know they have these rights.”⁸⁰

Although state law requires the posting of information about meal and rest breaks (and minimum wage),⁸¹ many employers simply ignore this requirement. For example, in the non-union janitorial industry, **MCTF** reports that “it is rare that we see a worksite or employer where workers are instructed of their right to take rest periods.”⁸² **Centro Legal de la Raza** reports that mandatory posters specifying meal and rest break requirements are often only in English, and that some low-wage workers can't read in any language.⁸³ In addition, even where information is posted, employers sometimes refuse the breaks. For example, **Centro Legal** reports that one car wash worker client read the sign, requested his break, and was told “not to worry about what the sign said and that things were too busy to take a break anyway.”⁸⁴

⁷⁸ See, e.g., Daisy Ha, *An Analysis and Critique of KIWA's Reform Efforts in the Los Angeles Korean American Restaurant Industry*, 8 Asian L. J. 111, 122-23 (2001); see also Ong & Rickles, *supra* note 2, at 26.

⁷⁹ Telephone interview with Lilia Garcia, Executive Director, Maintenance Cooperation Trust Fund (Feb. 26, 2009).

⁸⁰ Telephone interview with Julie Su, Litigation Director, APALC (Mar. 13, 2009).

⁸¹ See Cal. Lab.Code § 1183(d) (requiring employers to post wage orders to which they are subject).

⁸² MCTF Questionnaire.

⁸³ Email from Centro Legal (July 22, 2009).

⁸⁴ *Id.*

2. The pay and profit structure in some industries discourages or punishes workers for taking breaks without explicit employer cooperation.

Even where workers are aware of their right to meal and rest periods, many are reluctant to assert those rights because industries in the underground economy are often structured in ways that discourage workers from taking breaks. These structures include payment of piece-rate wages and contracts that require work to be performed within specific time frames. Combined with economic incentives for employers to understaff many low-wage workplaces, these conditions make it impossible, as a practical matter, for many workers to assert their rights to meal and rest breaks.

For example, in the garment industry, many workers are paid a “piece-rate” for each garment produced, rather than a fixed hourly rate.⁸⁵ Garment factory owners face fierce competition for subcontracts from clothing manufacturers and the industry is characterized by small orders, frequent changes in assembly lines, and a dependence on a quick turnaround.⁸⁶ This employment structure creates an incentive for employees to work through the day without taking breaks, as the more garments produced, the more the employee earns, and there are often deadlines for the production of a specific order of garments. As a result, garment workers can work sitting in a steel chair at a sewing machine for ten or more hours a day, conditions which are known to cause musculoskeletal pain and other health problems.⁸⁷ **Garment Worker Center** notes, “Many workers now suffer chronic carpal-tunnel syndrome and other have suffer kidney problems, anxiety and emotional stress.”⁸⁸ “Very often, workers do not take breaks because they are paid for what they make in piece work. Employers yell at workers if they are seen up from their work station and remind them that they get paid based on the amount of product they make. With miserable pay rates, workers express feeling pressured to not take breaks because that will mean less pay.”⁸⁹

In the janitorial services industry, companies are often contracted to do a job (for example, clean a supermarket) based on a certain rate for a certain amount of time (e.g., six hours), even though it is clear at the outset that the job will take longer (e.g., eight hours) to do.⁹⁰ This creates pressure for the janitors to continue working through their breaks because they are only paid for the amount of time in the contract: any extra time it takes workers to finish the job is time for

⁸⁵ Garment Worker Center Questionnaire; Telephone interview with Julie Su, Litigation Director, APALC (Mar. 13, 2009).

⁸⁶ *We Spend Our Days Working in Pain*, *supra* note 22, Background Section.

⁸⁷ *Id.*, Clinical Findings Section.

⁸⁸ Garment Worker Center Questionnaire.

⁸⁹ *Id.*

⁹⁰ MCTF Questionnaire and email from MCTF (March 25, 2009).

which they will not be paid.⁹¹ “In the janitorial industry, workers are regularly paid a set number of hours per shift, regardless of the actual time that they work,” reports MCTF. “There is normally so much work that the entire shift is spent working frantically, and often past the scheduled work hours. In this situation, if the worker takes two ten-minute breaks, it means getting out of work even later. And, as lunch periods are usually not scheduled into the shift, to take thirty minutes would lead to finishing work still later. This situation is further complicated when workers are required to complete their work by a certain time, because, for example, the store opens at 7:00 a.m. and customers begin to arrive.”⁹²

In the car wash industry, many worksites resemble traditional assembly lines in which workers rinse, wash, and dry cars that are put onto an automated conveyer, and then drive cars off of the conveyer as new cars move down the line. Workers on these chains generally do not control the pace at which cars are placed on the line, and cannot take breaks unless their employers stop the automated conveyer.⁹³ When business is at its peak, successful car washes can wash over 1000 cars in one day, and employees often work ten or more hours per day, often without the chance to take a full meal or rest break.⁹⁴

The advocates we surveyed uniformly reported that one of the most common reasons low-wage workers don’t take their legally mandated meal and rest breaks is that there is no realistic way workers can take their breaks and still complete the work they have been assigned in the amount of time allotted, unless the employer manages the workload and the workplace so as to make breaks possible. Yet employers have strong economic incentives to require or permit their employees to keep working through legally mandated meal and rest breaks. **Asian Pacific American Legal Center** commented on the pressure faced by workers to complete all assigned tasks, “If workers have to assert their rights to receive breaks, they will never get them; it’s impossible.”⁹⁵ **Legal Aid Society of San Francisco—Employment Law Center** likewise reports that most of the meal and rest claims that LAS has assisted workers in bringing involved

⁹¹ MCTF Questionnaire. Of course, under the law, workers are entitled to be paid for every hour they work, so underpaying workers in this fashion is an additional violation entirely separate from meal and rest breaks.

⁹² MCTF Questionnaire. MCTF reports that “workloads are so heavy that people do not have time to rest. In the majority of cases, if someone does take time to rest during their shift, it is for a maximum of ten or fifteen minutes, but almost never the full thirty minute lunch period plus two ten-minute rest periods. We normally ask people how they go for more than eight hours of manual labor without eating, and are told that they eat a snack while working—eat an apple while pushing the vacuum cleaner or drink a soda while waiting for the wax to dry, but always vigilant about completing their work.” *Id.*

⁹³ *Cleaning Up the Carwash Industry*, *supra* note 17, at 5.

⁹⁴ *Id.* at 7.

⁹⁵ Telephone interview with Julie Su, Litigation Director, APALC (Mar. 13, 2009).

workers who felt that they could not take the breaks or who were in a situation where the conditions precluded them from doing so.⁹⁶

Specific examples from the practice of other advocates provide further illustration:

Neighborhood Legal Services represented three Los Angeles County motel workers who worked ten to twelve hours per day, six to seven days per week, maintaining seventy motel rooms. Because only two workers were scheduled to clean the rooms on any given day, the workers had no time to take breaks.⁹⁷

Centro Legal represented a caterer/food preparation employee in the Bay Area who was never given meal or rest breaks in the fourteen years he worked for his employer.⁹⁸ While he was never told explicitly that he could not take a break, the company gave him so much work that he was never able to take breaks and still complete his work.

Laura G. was a janitorial worker for office buildings.⁹⁹ Laura recounts working for a company that was contracted to clean an office building. She and her co-workers were told that they had to clean the entire building in six hours and that they would only be paid for six hours worth of work, even though the building always took over seven hours to clean. They would work during these seven hours without taking a lunch break. Laura reports that she would spend the seven hours working non-stop, cleaning restrooms, emptying trash cans, and vacuuming three floors.

Chi L., is a garment worker who recounts working for a factory six days a week for eight hours a day without ever being given lunch breaks.¹⁰⁰ Chi understood the importance of taking regular rest breaks: “Rest breaks are very important to workers because if we do not get rest breaks we are more likely to make mistakes and get into accidents. We work so closely with equipment like sewing machines and steam irons that mistakes can lead to bad injuries.” But she explains why she was never able to take advantage of these important protections: “Unless an employer makes sure that the workers stop for at least 30 minutes, we are never able to stop and take our lunch breaks because there is always work to do.”

Kang C. was a cook in a small restaurant who reports working six days a week, twelve hours a day, being given only twenty minutes a day for a meal break, during which he was still required

⁹⁶ Legal Aid Society-Employment Law Center Questionnaire.

⁹⁷ NLS Questionnaire.

⁹⁸ Centro Legal Questionnaire.

⁹⁹ Testimony of Laura G., submitted in conjunction with Public Hearing on DLSE Proposed Regulations (Feb. 9, 2005).

¹⁰⁰ Testimony of Chi L., submitted in conjunction with DLSE Public Forum on Rest and Meal Breaks (Aug. 9, 2007).

to cook.¹⁰¹ “Ironically, we are surrounded by food,” explains Kang, “but unless an employer makes sure that the cooks and wait staff can stop for 30 minutes, we are never able to stop and take our lunch breaks because there is always work to do.”

Jin Lian F., a cook at a restaurant, describes a similar experience.¹⁰² He worked in the restaurant six days a week, ten hours a day, and was never able to take meal breaks. “The restaurant was busy and I had to work constantly. Sometimes we’d sit down to eat together, but never for more than 15 minutes or so and then we’d have to jump up and return to our duties. It was exhausting and we were on our feet constantly in the kitchen.”

3. Punishment, termination, or retaliation for requesting or taking breaks is common in the underground economy.

Workers in the underground economy commonly risk losing their jobs or other adverse consequences if they complain about not receiving adequate breaks. Advocates report that when workers attempt to take breaks or complain about the inability to do so, employers in many cases retaliate by firing or threatening to fire the complaining employee, reducing the number of hours the employee is scheduled to work, assigning less desirable work to the employee; or sending the employee home for a day or longer.

Young Workers United notes, “The threat of being fired is used in almost every single case we have dealt with to force workers not to complain about the violations to every single one of their labor rights including overtime, minimum wage, and meal and rest breaks.”¹⁰³ **Maintenance Cooperation Trust Fund** adds, “We have seen many cases where workers are disciplined or fired simply for asserting or demanding their rights, including that to take rest and meal periods. They come to be seen as trouble-makers by the employer and are forced out of the company (fired).”¹⁰⁴ Similarly, **Bet Tzedek Legal Services** reports that in several car wash cases it has handled, employees who asked for breaks were sent home, assigned to positions that do not result in tips, or told they should look for work elsewhere if they didn’t like the working conditions.¹⁰⁵

Bet Tzedek also reports retaliation in the garment industry, in the form of employers assigning a worker who complains about the lack of meal and rest breaks to more difficult garments, which

¹⁰¹ Testimony of Kang C., submitted in conjunction with DLSE Public Forum on Rest and Meal Breaks (Aug. 9, 2007).

¹⁰² Declaration of Jin Lian F., submitted in conjunction with Public Hearing on DLSE Proposed Regulations (Feb. 9, 2005).

¹⁰³ Young Workers United Questionnaire.

¹⁰⁴ MCTF Questionnaire; MCTF email (March 25, 2009).

¹⁰⁵ Bet Tzedek Questionnaire.

means the worker will work more slowly and therefore earn less money when working for piece-rate wages. **Garment Worker Center** also reports from a garment factory: “Workers were denied the right to take their full thirty minute lunch period. They were only allowed a twenty minute break for their lunch and rest period in the course of their ten hour work day. During these twenty minutes, workers were rushed back to work, and were yelled at and verbally abused if they left their workstation aside from these twenty minutes. Workers were expected to produce large amounts of production and were paid by piece; if they did not produce enough they were threatened with being fired.”¹⁰⁶

Other advocates and workers themselves provide further examples:

Arturo G. was a janitorial worker at a large retail store where workers were scheduled to work at night.¹⁰⁷ Arturo worked seven days a week for nine hours a day, hardly ever receiving lunch breaks. If his boss found out that he and the other workers were taking a break to eat lunch, the boss would suspend them from work for two or three days, or even threaten to fire them.

Patricia Y., a client of **Young Workers United**, worked seven years in a *taqueria* in San Francisco, working for eleven hours a day, six days a week, almost never taking a meal or rest break.¹⁰⁸ If she took a break and the *taqueria* manager saw that a customer was unattended, he would yell at her and threaten to fire her. Patricia reports that she was always hungry and would drink water to overcome the hunger. Even when she was pregnant, her boss still refused to give her adequate breaks.

Mike C. was a desk clerk at a small hotel where, during his shifts, he was the only person covering the desk and checking guests in.¹⁰⁹ Since he was alone at the desk, he was not allowed to take any type of break, even though it was not uncommon for him to work twelve-hour shifts. “I recall one time when I had to go across the street to a local market in order to get something to drink,” recounts Mike. “My boss happened to show up at the same time and reprimanded me by stating, ‘If you don’t stay at your desk, who is going to check the guests in? And how am I going to pay you? My boss always made me feel guilty for leaving my post for any reason. She used to make me feel like if I left my desk, I would not get paid. I was afraid to ask for breaks of any kind because she made me feel that my schedule was only work with no breaks.’”

¹⁰⁶ Garment Worker Center Questionnaire.

¹⁰⁷ Testimony of Arturo G., submitted in conjunction with Public Hearings on DLSE Proposed Regulations (Feb. 9, 2005).

¹⁰⁸ Young Workers United Questionnaire.

¹⁰⁹ Declaration of Mike C., submitted in conjunction with Public Hearings on DLSE Proposed Regulations (Feb. 9, 2005).

Javier A. is a gardener in San Luis Obispo County, California.¹¹⁰ Javier worked six days a week for eight to nine hours a day with only a break for lunch. Javier reports that workers were allowed to take thirty minute lunch breaks, but were not allowed to take any rest breaks throughout the day, even though they worked in temperatures that were often higher than ninety degrees. “I often became extremely tired, weak and sometimes dizzy before the meal break and toward the end of the day, but I was afraid that if I took a break I would be disciplined or even fired.”

Telma M. worked in a garment factory for ten hours a day, six days a week, for three years.¹¹¹ Telma reports, “I’m a trimmer and the machine I work on gets very hot and I’m bent over the whole time. I didn’t get any breaks, only lunch but the employer decided when and for how long. From being in the same position for so long with the hot machine I started getting intense pain in my feet, legs, arm, neck, and back. I had to go to the hospital but the day I had a doctor’s appointment the employer told me, ‘postpone your doctor’s visit because there is too much work.’ I told her I couldn’t, I needed medicine for the pain. Two days later she fired me.”

Maria M., a Mexican immigrant and client of Young Workers United, worked 12 hours a day, 6 days a week, for a *taqueria* in Northern California.¹¹² During this time she received no breaks, overtime pay, or sick leave, even while undergoing chemotherapy for the treatment of cancer. After ten years, her employers fired her for speaking up against management stealing workers’ tips and not providing adequate breaks and overtime pay.

4. Many low-wage workers are vulnerable to exploitation because of language barriers or immigration status.

Undocumented immigrants in California provide a labor market for low-paying, labor-intensive jobs that often involve dangerous working conditions.¹¹³ “The undocumented immigrant population is a significant sector of the informal economy, and many of the industries where

¹¹⁰ Declaration of Javier A., submitted in conjunction with Public Hearing on DLSE Proposed Regulations (Feb. 9, 2005).

¹¹¹ Testimony of Telma M., submitted in conjunction with Public Hearing on DLSE Proposed Regulations (Feb. 9, 2005).

¹¹² Young Workers United Questionnaire.

¹¹³ See, e.g., Foo, *supra* note 2, at 1282. Using U.S. Census data, the Urban Institute concluded that immigrants comprised 21% of low-wage workers (defined as those earning less than twice the federal minimum wage) in 2005, and that undocumented workers comprised nearly 10% of low-wage workers in the nation as a whole. Undocumented workers made up 23% of lower-skilled workers (those without a high school education) in the U.S. See Capps et.al, *Trends in the Low Wage Immigrant Labor Force 2000-2005* (Urban Institute 2007) at 2, 3. The Economic Roundtable noted that nearly all of the industries with substantial numbers of undocumented workers have been recognized as industries in the informal or underground economy, and that the four industries with the highest concentrations of estimated undocumented workers (over 24% of the workforce) are related to clothing production. *Hopeful Workers, Marginal Jobs*, *supra* note 15, at 30-31.

these residents find work are flagships of the informal labor market.”¹¹⁴ Undocumented workers are entitled to the protection of California’s labor laws.¹¹⁵ However, the fear of deportation or other immigration consequences can have a chilling effect on workers’ willingness to assert their legal rights, and can embolden unscrupulous employers to make express or implied threats to report employees to immigration authorities if they complain about illegal working conditions.¹¹⁶ **APALC** reports that workers in the garment industry, who are often Latina or Asian immigrants, do not question even the worst of the working conditions in garment factories because they feel vulnerable and fear losing their jobs.¹¹⁷

Furthermore, many workers in low-wage industries speak no or very limited English, regardless of their immigration status.¹¹⁸ Workers who don’t speak English face great obstacles in accessing legal resources and are less likely to be aware of their rights and employers’ obligations under the law.¹¹⁹ For example, the **Garment Worker Center** reports representing several garment workers who were coerced into signing documents in English, even though they didn’t understand the documents.¹²⁰ The workers were told that if they wanted to continue working, they would sign the documents. If not, they could not return to work. Likewise, the **Wage Justice Center** reports that many clients are coerced into signing blanket waivers of wage claims or timesheets understating their hours.¹²¹

¹¹⁴ *Hopeful Workers, Marginal Jobs*, *supra* note 15, at 25.

¹¹⁵ Cal. Labor Code § 1171.5.

¹¹⁶ See, e.g., Noah D. Zatz, *Working Beyond the Reach or Grasp of Employment Law*, UCLA School of Law Public Law & Legal Theory Research Paper No. 07-36 (2008) at 48-49; Iryll Sue Umel, *Cultivating Strength: The Role of the Pilipino Worker’s Center Courage Campaign in Addressing Labor Violations Committed Against Filipinos in the Los Angeles Private Home Care Industry*, 12 *Asian Pac. Am. L.J.* 35, 43 (2007); Mujeres Unidas et al., *Behind Closed Doors: Working Conditions of California Household Workers* at 2 (2007), available at <http://www.datacenter.org/reports/behindcloseddoors.pdf>.

¹¹⁷ Telephone interview with Julie Su, Litigation Director, APALC (Mar. 13, 2009).

¹¹⁸ See e.g., *We Spend Our Days Working in Pain*, *supra* note 22, Background Section (reporting that the vast majority of the state’s 100,000 garment workers are Latina or Asian immigrants with limited English language skills); *Cleaning Up the Carwash Industry*, *supra* note 17, at 5 (majority of carwash workers in California are monolingual Spanish-speaking immigrants from Latin America). The Urban Institute’s 2007 report found that immigrants make up substantial fractions of the workforce in industries regularly identified as frequent violators of labor laws: 40% all employees in construction and building and grounds maintenance, a third in manufacturing, and more than a fifth in food preparation and transportation. Capps, et.al., *supra* note 113, at 8.

¹¹⁹ See, e.g., *Cleaning Up the Carwash Industry*, *supra* note 17; *We Spend Our Days Working in Pain*, *supra* note 22.

¹²⁰ Garment Worker Center Questionnaire.

¹²¹ Wage Justice Center Questionnaire.

V. CHALLENGES IN VINDICATING WORKERS' MEAL AND REST BREAK RIGHTS

A. What avenues are available to workers seeking to vindicate their rights?

Employees whose rights to meal and rest breaks are violated can file suit in court or pursue an administrative claim. The Department of Labor Standards Enforcement (DLSE) is the state agency within the Department of Industrial Relations empowered to enforce California's minimum labor standards, including meal and rest breaks.¹²² The DLSE adjudicates wage claims, investigates complaints of labor standards violations, and enforces licensing and registration requirements.¹²³ The DLSE is headed by the Labor Commissioner, who is appointed by the governor and has authority to investigate employee complaints and prosecute actions to enforce labor laws.¹²⁴

An employee who believes her rights to meal or rest breaks have been violated can file an individual wage claim with the Labor Commissioner by filling out a form available online and submitting it to DLSE.¹²⁵ After the filing, a deputy Labor Commissioner will determine whether a hearing will be held to test the allegations, whether the DLSE will prosecute the employer in civil court based on the alleged labor violations (under the procedures provided in Labor Code § 98.3), or whether the complaint will be dismissed with no further action.¹²⁶ Either party has the right to appeal the Labor Commissioner's decision to a civil court.¹²⁷

When a particular case is complex and involves a large number of employees and records, the claim may be investigated by the DLSE's Bureau of Field Enforcement (BOFE), rather than through the individual wage claim procedures described above.¹²⁸ Unlike an individual wage claim, a BOFE claim is generally filed against an employer for violations that are applicable to all or a group of employees.¹²⁹ BOFE claims usually require investigators to conduct an on-site

¹²² DLSE Homepage, <http://www.dir.ca.gov/DLSE>; *see also* Cal. Labor Code § 98.

¹²³ DLSE Homepage, <http://www.dir.ca.gov/DLSE>.

¹²⁴ Cal. Labor Code §§ 98, 98.3.

¹²⁵ Cal. Labor Code § 98; *see also* DLSE, "How To File A Wage Claim" <http://www.dir.ca.gov/dlse/HowToFileWageClaim.htm> for the claim form.

¹²⁶ Cal. Labor Code §§ 98, 98.3; DLSE Policies and Procedures for Wage Claim Processing, <http://www.dir.ca.gov/dlse/Policies.htm>.

¹²⁷ Cal. Labor Code § 98.2; *see also* DLSE Policies and Procedures for Wage Claim Processing, <http://www.dir.ca.gov/dlse/Policies.htm>.

¹²⁸ DLSE Policies and Procedures for Wage Claim Processing, <http://www.dir.ca.gov/dlse/Policies.htm>.

¹²⁹ DLSE How to File a Claim with the Bureau of Field Enforcement, <http://www.dir.ca.gov/dlse/HowToFileBOFEClaim.htm>.

investigation before a hearing can be held to determine whether labor law violations exist,¹³⁰ and thus the investigations can lead to changes in the employers' practices that benefit all employees in the workplace rather than simply leading to the imposition of fines for labor violations committed against one employee. However, an employee does not have the right to compel a BOFE investigation. Moreover, as noted below, state and federal enforcement agency resources have not kept up with the increases in the size of the workforce, and are even more limited in this time of state fiscal austerity, budget cuts, and furloughs.

B. What obstacles do workers face when seeking to vindicate their rights?

The advocates we surveyed have observed that workers face a number of often insurmountable challenges when trying to enforce their rights to meal and rest breaks, including lack of legal resources and problems of false evidence.

1. Scarce resources

First, workers cannot always rely on being able to obtain legal assistance to help them vindicate their rights. All the worker advocate groups we surveyed confirmed that they lack the financial resources to provide full legal representation to workers in every potentially meritorious labor violation claim. Moreover, of course, low-wage workers by definition cannot afford to hire private attorneys. Nor is there a functioning contingency fee market for attorneys in these cases, because in many instances workers seek to recover sums that, while vital to the workers themselves, are far too small to provide a recovery from which a private contingency lawyer could earn reasonable compensation.¹³¹ Thus, for many workers, the only avenue practically available to vindicate their rights is by appearing before the Labor Commissioner without legal representation. However, navigating this complaint process is very difficult for workers who lack a sophisticated knowledge about their rights and employers' obligations under the law and may not speak or read English.

Moreover, staffing and budget cuts, in combination with a large increase in the size of the state's workforce, have made it more difficult for these agencies to enforce labor standards.¹³² Similarly, studies show that federal enforcement efforts have declined dramatically, even while the number of workers covered by labor laws has grown.¹³³

¹³⁰ *Id.*

¹³¹ See, e.g., *Working Beyond the Reach or Grasp of Employment Law*, *supra* note 116 at 46 (discussing barriers to private enforcement of labor laws, including expense of attorneys, small recoveries for low-wage workers, and unavailability of class actions under federal Fair Labor Standards Act).

¹³² Limor Bar Cohen & Deana Milam Carillo, *Labor Law Enforcement in California, 1979-2000* at 137 (2002).

¹³³ Bernhardt et al, *An Introduction to the "Gloves-Off" Economy*, *supra* note 15, at 17 (citing studies showing 14% decline in number of federal Department of Labor workplace investigators and 36% decline in DOL compliance actions between 1975 and 2004, along with 55% increase in number of covered workers and 112% increase in

2. Problems of Proof and False Evidence

The second challenge workers face is persuading the decision maker (generally a Deputy Labor Commissioner) that they were denied their required meal or rest breaks. Section 7 of the Wage Orders requires most employers to keep accurate time records of their employees' meal periods.¹³⁴ In the underground economy, however, employers frequently fail to keep such records or fabricate them to skirt state wage reporting and tax requirements as well as wage and hour laws.¹³⁵ Where an employer fails to keep such records, a worker will meet his or her initial burden through testimony. The burden then shifts to the employer to introduce specific and compelling rebuttal evidence. Absent such evidence, the Labor Commissioner should find in the worker's favor.¹³⁶

In contrast to this relatively clear standard applicable when employers keep no records at all, workers face a more difficult challenge when employers maintain inaccurate or false records. The practice is all too common. For example, in the garment industry, advocates report that employers tamper with time cards to make it appear that employees took breaks, even when they did not.¹³⁷ **Garment Worker Center** observes that employers have been known to give workers blank sheets of paper and tell them to sign at the bottom in order to receive their weekly pay.¹³⁸ These blank pieces of paper have later been used to create printed time cards with false start and off hours and false rest and meal breaks taken. Likewise, **Maintenance Cooperation Trust Fund** reports that employers creating false time records is a pervasive problem in the janitorial services industry.¹³⁹

Wage Justice Center reports similar experiences with carwash employees. At one carwash

number of covered businesses; as well as budget cuts and shift of resources away from enforcement at federal Occupational Safety and Health Administration. *See also* Zatz 2008 at 46 (citing studies showing how "enforcement agencies staffing and budgets have stagnated or shrunk over the past several decades").

¹³⁴ For example, Wage Order 9-2001, section 7(A) provides: "Every employer shall keep accurate information with respect to each employee including the following: . . . (3) Time records showing when the employee begins and ends each work period. Meal periods, split shift intervals, and total daily hours worked shall also be recorded. Meal periods during which operations cease and authorized rest periods need not be recorded."

¹³⁵ *Working Beyond the Reach or Grasp of Employment Law*, *supra* note 116 at 44-45 (discussing problem of falsified records).

¹³⁶ DLSE Hearing Officer Procedure No. 94-28 (1995) provides in pertinent part: ". . . iv) If the employer fails to maintain the time and payroll records required by the Labor Code and/or the IWC Orders, the imprecise testimony of the employee as to hours worked (including estimates) is entitled to great weight, imposes a heavy burden of rebuttal on the employer, and is sufficient to support a finding of wages owed, if not rebutted by precise and compelling evidence. (*Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721)."

¹³⁷ Telephone interview with Julie Su, APALC Litigation Director (Mar. 13, 2009).

¹³⁸ Garment Worker Center Questionnaire.

¹³⁹ Telephone interview with Lilia Garcia, MCTF Executive Director (Feb. 26, 2009).

where WJC’s clients work, “the timekeeping system automatically punches workers out for 1 hour lunch breaks, even though on busy days they often only take a half hour lunch break.” Across a variety of industries, WJC reports that “many of our clients are coerced into signing timesheets that understate the number of hours that they actually work—typically they are presented with copies of the sheets at the same time that they are paid and told that they are required to sign the sheet to receive their pay.”¹⁴⁰

Workers face a difficult time challenging the veracity of written records, particularly when those records bear the workers’ signature. Generally, no documentary evidence exists to contradict these false records. Nevertheless, and perhaps due to the pervasiveness of the problem, advocates report that Deputy Labor Commissioners hearing cases do occasionally find sworn worker testimony credible and disregard these false time records. The fact that false time records are sometimes disregarded, however, does not diminish the difficulty in proving these claims. Moreover, the uncertainty as to how a Deputy Labor Commissioner will view the records and testimony decreases the value of the claim.

VI. CONCLUSION

The lack of meal and rest breaks is a significant problem for California’s lowest-paid workers. Violations of these and other labor laws are rampant in the vast underground economy where hundreds of thousands of Californians labor. These violations have severe detrimental effects on worker health and performance, public safety, and the market. To date, public and private resources to combat these violations have been inadequate, indeed shrinking. Policymakers must address the need for stronger legal protection and greater enforcement resources to protect these most vulnerable workers and the public.

¹⁴⁰ Wage Justice Center Questionnaire.

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