

WHEN WORKING ISN'T ENOUGH: LOW-WAGE WORKERS STRUGGLE TO SURVIVE

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Low-wage workers are often in the news. Congress passes, or fails to pass, refundable tax credits that would benefit the families of low-wage workers.¹ An immigrant worker is hurt or killed on the job.² When people ask questions about how many former welfare-to-work participants have become unemployed in the recession that began this century, people are (ordinarily) asking about low-wage workers.³

But who are these “low-wage workers?” What are their characteristics? Their stories? Their hopes and dreams? What problems hold them back from attaining more financially secure situations? How are they exploited? How does employment law attempt to protect them from these problems?

This article will answer some of those questions. It begins with a review of the demographics of low-wage workers, including an examination of the particular issues concerning current and former welfare recipients, contingent workers, and immigrants. Second, the problem of low wages – the *sine qua non* of low-wage workers – is considered, along with income supports, which can supplement low wages. Third, the article enumerates other problems and barriers that low-wage workers encounter. Finally, the article discusses the role of employment laws and their enforcement in the context of the protection of low-wage workers.

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1. See, e.g., David Firestone, *Tax Law Omits \$400 Child Credit for Millions*, N.Y. TIMES, May 29, 2003, at A1; ISAAC SHAPIRO & ROBERT GREENSTEIN, CENTER ON BUDGET AND POLICY PRIORITIES, WAS THERE ENOUGH ROOM IN THE TAX BILL FOR THE LOW-INCOME CHILD TAX CREDIT PROVISION? (2003).

2. See, e.g., Leslie Casmir, *Caught in Death Trap: Immigrants Killed on Job, Relatives Stiffed*, N.Y. DAILY NEWS, August 31, 2003, at 26; *Underage Immigrant's Death Raises Worker Safety Concerns*, CLEVELAND PLAIN DEALER, Aug. 7, 2003; REBECCA SMITH ET. AL., NATIONAL EMPLOYMENT LAW PROJECT, UNDOCUMENTED WORKERS: PRESERVING RIGHTS AND REMEDIES AFTER *HOFFMAN PLASTIC COMPOUNDS v. NLRB 2* (2003) [hereinafter UNDOCUMENTED WORKERS: PRESERVING RIGHTS AND REMEDIES] (describing injuries and deaths among immigrant workers).

3. See, e.g., PAMELA LOPREST, URBAN INSTITUTE, SNAPSHOTS OF AMERICA'S FAMILIES III, NO. 5, FEWER WELFARE LEAVERS EMPLOYED IN WEAK ECONOMY (2003).

I. WHO ARE THE LOW-WAGE WORKERS?

A. *General Demographic Data*

In the Bureau of Labor Statistics' ("BLS") most recent review of its data concerning persons working for low wages, it reported that there were 6.4 million working poor in the United States in 2000.⁴ The working poor constituted 4.7% of all workers in the labor force.⁵

BLS recorded the following demographic information about the working poor in 2000:

- **Race:** Black and Hispanic workers were much more likely to be among the working poor than white workers. Of Hispanic labor force participants, fully 10.0% were poor. Among Blacks, the percentage was 8.7%. By contrast, only 4.0% of white workers had incomes below the poverty line.⁶
- **Gender:** The percentage of women classified as among the working poor (5.5%) did not greatly exceed the percentage of poor working men (4.0%). However, if a woman worker was a head of household, her chances of being poor increased sharply, to 16.7%.⁷
- **Age:** Young people were particularly likely to work for wages that left them in poverty. Of working teenagers, 9.2% were in poverty, decreasing only to 8.7% for workers twenty and twenty-four years of age.⁸ Often, the low wages of young

4. BUREAU OF LABOR STATISTICS, A PROFILE OF THE WORKING POOR, 2000 1 (2002) [hereinafter A PROFILE OF THE WORKING POOR]. BLS defines the "working poor" as persons who were in the labor force for at least twenty-seven weeks in a year but whose incomes fell below the poverty level. However, workers with incomes significantly higher than 100% of poverty could be classified as among low-wage workers. *See, e.g.*, GREGORY ACS ET AL., THE URBAN INSTITUTE, PLAYING BY THE RULES BUT LOSING THE GAME: AMERICA'S WORKING POOR (2000) [hereinafter PLAYING BY THE RULES BUT LOSING THE GAME] (indicating that the official poverty guidelines exclude many struggling families and suggesting an alternative definition of the "working poor" as the share of persons living in families with incomes below twice the poverty line and whose average hours worked per adult is at least 1,000).

5. A PROFILE OF THE WORKING POOR, *supra* note 4, at 2 tbl. A.

6. *Id.* at 2.

7. *Id.* at 1-2.

8. *Id.*; *see also* Alan Houseman, *Introduction* to CENTER FOR LAW AND SOCIAL POLICY, LEAVE NO YOUTH BEHIND: OPPORTUNITIES FOR CONGRESS TO REACH DISCONNECTED YOUTH 3-11 (2003) (describing both the characteristics of and the employment challenges facing at-risk and disconnected youth between ages sixteen and twenty-four).

people are dismissed as “a place to start,” with the expectation that former minimum wage earners will steadily increase their wages over their work lives. However, a significant number of workers do not experience this wage growth, and they are disproportionately female and minority.⁹

- Occupation: About 31% of the working poor were employed in the service sector of the labor economy. Of these service sector workers, domestic workers were most likely to be poor (20%). Agriculture was another occupational category with a relatively high proportion of workers living in poverty (13.7%).¹⁰
- Education: Not surprisingly, high school dropouts were especially likely to be poor — more than twice as likely as high school graduates (12.9% compared to 5.4%). The more post-secondary education workers had, the less likely it was that they were poor.¹¹

A risk of focusing on these demographic characteristics separately is that observations about populations sharing several characteristics may be obscured. For instance, the Center on Law and Social Policy (“CLASP”) recently documented the increased unemployment and lower wages of less-educated young men.¹²

B. Welfare Recipients

Many low-wage workers have received or are receiving welfare. Even before Congress enacted welfare reform legislation in 1996,¹³ many heads of households receiving cash assistance¹⁴ had work histories.¹⁵ But under

9. William J. Carrington & Bruce C. Fallick, *Do Some Workers Have Minimum Wage Careers?*, MONTHLY LABOR REVIEW (May 2001), at 17. Carrington and Fallick found that more than 8% of workers spend at least half of their first ten years of work with wages within a dollar of minimum wage. *Id.*

10. A PROFILE OF THE WORKING POOR, *supra* note 4, at 2.

11. *Id.*

12. ELISE RICHER ET AL., CENTER FOR LAW AND SOCIAL POLICY, BOOM TIMES A BUST: DECLINING EMPLOYMENT AMONG LESS-EDUCATED YOUNG MEN (2003) [hereinafter BOOM TIMES A BUST].

13. The Block Grants to States for Temporary Assistance for Needy Families program (“TANF”), 42 U.S.C. §§ 601-1788 (2001). The TANF program was part of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“PRWORA”), Pub. L. No. 104-193, 110 Stat. 2105.

14. The vast majority of these heads of households are women, while only about one in ten were men in 2001. U.S. DEP’T OF HEALTH AND HUMAN SERVICES, 2002 TANF ANNUAL

TANF, Congress's entire push has been to get welfare recipients off the caseload and into low-wage work.¹⁶

The efforts to move welfare recipients to low-wage work have largely succeeded. According to a recent report by the U.S. Department of Health and Human Services ("HHS"), the national caseload of families on welfare declined from 5.0 million in 1994, to 2.1 million in 2001.¹⁷ And with misplaced pride, HHS also reported that the average monthly wage for persons on welfare rose from \$466 in 1996, to \$686 in 2001.¹⁸ The reasons for low wages among welfare recipients and leavers are legion, including: (1) employment barriers, such as health problems, children's health needs, domestic violence, low education levels, limited English proficiency, and learning disabilities;¹⁹ (2) "quick attachment" or "work first" policies, by which state welfare departments press welfare recipients to take the first available job, irrespective of its wages or benefits;²⁰ (3) policies disfavoring education and training;²¹ and (4) work which is compensated only through the provision of welfare benefits at the minimum wage rate.²²

REPORT TO CONGRESS x-186 (2002) [hereinafter 2002 TANF ANNUAL REPORT TO CONGRESS].

15. Four of ten women who received Aid to Families with Dependent Children, the federal cash assistance program preceding TANF, had significant work histories of close to 1,000 hours per year. YOUNG-HEE YOON ET AL., NATIONAL COMMISSION FOR EMPLOYMENT POLICY RESEARCH, REPORT NO. 95-06, UNEMPLOYMENT INSURANCE: BARRIERS TO ACCESS FOR WOMEN AND PART-TIME WORKERS 42 (1995).

16. TANF's incentives for the states to put welfare recipients to work are found primarily in three provisions: (1) a requirement that non-exempt parents must engage in work activities after 24 months of receiving assistance, 42 U.S.C. § 602(a)(1)(A)(ii) (1998); (2) "work participation rates" of welfare recipients engaging in requisite numbers of hours of approved activities which states must meet to avoid reduction of their block grants, 42 U.S.C. § 607 (1998); and (3) a five-year time limit on the receipt of cash assistance benefits, 42 U.S.C. § 608(a)(7) (1998).

17. 2002 TANF ANNUAL REPORT TO CONGRESS, *supra* note 14, at x-191.

18. *Id.* at IV-2. By comparison, the 2001 Federal Poverty Income Guidelines established a monthly poverty level benchmark for a family of three of \$1,219.17—\$533.17 more than the average monthly earnings of a welfare recipient. 66 Fed. Reg. 33, 10695-97 (Feb. 16, 2001).

19. *See, e.g.*, HEIDI GOLDBERG, CENTER ON BUDGET AND POLICY PRIORITIES, IMPROVING TANF PROGRAM OUTCOMES FOR FAMILIES WITH BARRIERS TO EMPLOYMENT (2002).

20. The Economic Policy Institute ("EPI") has found that the higher the quality of the first job held by a welfare recipient (measured by starting wage and health insurance availability), the longer the employment duration. EPI indicates that this conclusion should lead states to rethink "work first" policies. HEATHER BOUSHEY, ECONOMIC POLICY INSTITUTE, STAYING EMPLOYED AFTER WELFARE: WORK SUPPORTS AND JOB QUALITY VITAL TO EMPLOYMENT TENURE AND WAGE GROWTH (2002) [hereinafter STAYING EMPLOYED AFTER WELFARE].

21. *See, e.g.*, KARIN MARTINSON & JULIE STRAWN, CENTER FOR LAW AND SOCIAL POLICY, BUILT TO LAST: WHY SKILLS MATTER FOR LONG-RUN SUCCESS IN WELFARE REFORM (2003).

22. Workfare (in which a state provides work) and community service (in which the

C. “Contingent” or “Non-Standard” Workers

Many low-wage workers are among the “contingent” or “non-standard” workforce, as the members of the labor force who do not work in traditional open-ended, full-time jobs have come to be known. These “non-standard” workers include day laborers, temps, part-timers, agency employees, and independent contractors.²³

Not all contingent workers are poor; indeed, many of them are well compensated.²⁴ Nevertheless, there is a clear correlation between certain types of contingent work and poverty. For instance, the Department of Labor (“DOL”) has noted that part-time workers are three times more likely to be poor than full-time workers.²⁵ Other types of contingent jobs that are quite likely to produce low wages include: (1) day labor jobs, where people find work by waiting at places where employers are known to hire help for the day;²⁶ and (2) agency temp jobs, where persons who work for temp agencies are placed with client firms.²⁷

In addition to low wages, contingent workers are particularly vulnerable to abuse. They are less likely to be covered by employment laws or may be misclassified as independent contractors by their employers

recipient finds “volunteer” work) are the activities in which welfare recipients work in exchange for their welfare benefits. Although TANF does not address the question of whether minimum wage applies to persons working off their welfare benefits, the United States Department of Labor (“DOL”) has indicated that it does. U.S. DEP’T OF LABOR, HOW WORKPLACE LAWS APPLY TO WELFARE RECIPIENTS (last modified Feb. 1999), *available at* <http://www.dol.gov/asp/w2w/welfare.htm>.

23. *See, e.g.*, U.S. GEN. ACCOUNTING OFFICE, CONTINGENT WORKERS: INCOMES AND BENEFITS LAG BEHIND THOSE OF REST OF WORKFORCE 10-11 (June 2000), *available at* <http://www.gao.gov/new.items/he00076.pdf> (last visited Mar. 28, 2004) [hereinafter CONTINGENT WORKERS: INCOMES AND BENEFITS LAG]; JEFFREY WENGER, ECONOMIC POLICY INSTITUTE, BRIEFING PAPER NO. 137, SHARE OF WORKERS IN NONSTANDARD JOBS DECLINES: LATEST SURVEY SHOWS A NARROWING—YET STILL WIDE—GAP IN PAY AND BENEFITS 15 app. A (2003), *available at* <http://www.epinet.org/briefingpapers/bp137.pdf> [hereinafter SHARE OF WORKERS IN “NONSTANDARD” JOBS DECLINES].

24. Researchers note that wage levels depend on the nature of the work arrangement within the “contingent work” rubric. Independent contractors and workers employed by contracting companies tend to enjoy the most remunerative type of non-standard work, paying wages in excess of regular full-time employment. SHARE OF WORKERS IN “NONSTANDARD” JOBS DECLINES, *supra* note 23, at 3-4 tbl. 1; CONTINGENT WORKERS: INCOMES AND BENEFITS LAG, *supra* note 23, at 18.

25. According to DOL, the poverty rate for part-time employees is 10.2%, compared to 3.5% for full-time workers. A PROFILE OF THE WORKING POOR, *supra* note 4.

26. 18.5% of workers in this category have incomes below \$15,000. CONTINGENT WORKERS: INCOMES AND BENEFITS LAG, *supra* note 23, at 19 tbl. 3.

27. *Id.* at 19. 29.8% of agency temps have family incomes of less than \$15,000. They are three times more likely than standard full-time workers to have incomes below \$15,000. *Id.* at 19 and tbl. 3.

in an attempt to avoid coverage.²⁸ Day laborers are particularly at risk of abuse because they tend to be young Hispanic men, often recent immigrants, with limited education and poor English proficiency.²⁹ To remedy these abuses, an array of strategies—such as enforcement of existing protections, state and local legislation and advocacy, community organizing, and policy initiatives—must be employed.³⁰

D. *Immigrant Workers*

Immigrants, both documented and not, participate significantly in the low-wage workforce. Although immigrant workers make up only 14% of the population, they constitute 20% of the low-wage labor force.³¹ Of 43.1 million low wage workers in the United States in 2002, 8.6 million were not natives.³² About 62% percent of low-wage immigrant workers lack English proficiency, and 45% of them have less than a high school education.³³

In light of these employment barriers, it is not surprising that immigrants are also disproportionately represented among the lowest earners. Almost half of immigrant workers earned less than twice the minimum wage.³⁴ The average wage among low-wage immigrant workers was \$14,400 in 2001.³⁵

But if the lot of immigrants with work authorization compared poorly to the lot of native workers, the situation of undocumented workers was even grimmer. In 2002, the United States Supreme Court decided that undocumented workers are not entitled to backpay even if they are fired in violation of the National Labor Relations Act for participating in an

28. *Id.* at 27-34.

29. U.S. GEN. ACCOUNTING OFFICE, WORKER PROTECTION: LABOR'S EFFORTS TO ENFORCE PROTECTIONS FOR DAY LABORERS COULD BENEFIT FROM BETTER DATA AND GUIDANCE 10 (2002), available at <http://www.gao.gov/cgi-bin/getrpt?GAO-02-925.pdf> (last visited Mar. 28, 2004).

30. See generally CATHERINE RUCKELSHAUS & BRUCE GOLDSTEIN, NATIONAL EMPLOYMENT LAW PROJECT AND FARMWORKER JUSTICE FUND, INC., FROM ORCHARDS TO THE INTERNET: CONFRONTING CONTINGENT WORK ABUSE (2002), available at <http://www/nelp.org/swi> (last visited May 23, 2004) (summarizing two conferences concerning the prevention of wage and working condition deterioration because of labor contracting).

31. RANDY CAPPS, ET. AL., A PROFILE OF THE LOW-WAGE IMMIGRANT WORKFORCE 2 (The Urban Institute, Immigration Studies Program: Immigrant Families and Workers Facts and Perspectives Brief No. 4, Nov. 2003) [hereinafter A PROFILE OF THE LOW-WAGE IMMIGRANT WORKFORCE].

32. *Id.*

33. *Id.* at 3.

34. *Id.* at 2.

35. *Id.*

organizing campaign.³⁶ Since the Supreme Court's ruling, employers have tried, with mixed success, to contend that undocumented workers are not entitled to the protections of wage and hour, anti-discrimination, and workers' compensation laws, and employers have threatened undocumented workers who try to enforce labor standards with possible deportation.³⁷

The population of undocumented workers subject to this uncertain legal climate is estimated at 5.3 million.³⁸ They tend to be concentrated in certain industries, such as construction, garment, restaurants, building maintenance, and private household work.³⁹ An estimated 1.2 million undocumented workers work in agriculture, an industry in which a large temporary workforce is needed on a seasonal basis for physically difficult work.⁴⁰ Indeed, the economy's need for foreign-born workers willing to perform this undesirable work is a major impetus to discussions about revisions to the United States' immigration policy.⁴¹

II. THE PRIMARY PROBLEM OF LOW-WAGE WORKERS: LOW WAGES

Although this proposition may seem self-evident, in fact, it bears acknowledgment: low earnings is the most common labor market problem suffered by low-wage workers. According to DOL, 73% of the working poor faced this problem in 2000.⁴² This problem is exacerbated by the minimum wage of \$5.15 per hour—the level at which it has stood since 1997. In 2003, a head of household working 40 hours per week at minimum wage would attain only 70% of the Federal Poverty Income Guideline for a family of three.⁴³

36. *Hoffman Plastic Compounds v. N.L.R.B.*, 535 U.S. 137 (2002).

37. See MEXICAN AMERICAN LEGAL DEFENSE & EDUCATIONAL FUND AND NATIONAL EMPLOYMENT LAW PROJECT, *USED AND ABUSED: THE TREATMENT OF UNDOCUMENTED VICTIMS OF LABOR LAW VIOLATIONS SINCE HOFFMAN PLASTIC COMPOUNDS V. NLRB* 2-6 (Jan. 2003)(discussing the abuse facing immigrant workers since *Hoffman*), available at <http://www.nelp.org/document.cfm?documentID=294> (last visited Mar.28, 2004). See also UNDOCUMENTED WORKERS: PRESERVING RIGHTS AND REMEDIES, *supra* note 2, part B (summarizing post-*Hoffman* rulings on the availability of employment law remedies for undocumented workers).

38. B. LINDSAY LOWELL & ROBERTO SURO, PEW HISPANIC CENTER, *HOW MANY UNDOCUMENTED: THE NUMBERS BEHIND THE U.S. — MEXICO MIGRATION TALKS 7* (2002), available at <http://www.pewhispanic.org/site/docs/pdf/howmanyundocumented.pdf> (last visited Mar. 28, 2004) [hereinafter *HOW MANY UNDOCUMENTED*].

39. *Id.* at 7-8.

40. *Id.* at 8.

41. *Id.* at 7-9.

42. A PROFILE OF THE WORKING POOR, *supra* note 4. The other two primary labor market problems of this sector are unemployment and involuntary part-time employment. *Id.*

43. In 2003, the Federal Poverty Income Guideline for a family of three was \$15,260.

In addition to low earnings, the compensation packages of low-wage workers tend to be characterized by the absence of benefits. While the number of uninsured workers is climbing in all sectors of the labor economy, low-wage workers are particularly unlikely to have employer-provided health benefits.⁴⁴ They are also unlikely to have paid leave, such as vacation, sick, and personal days, which can make job retention precarious when personal needs conflict with work attendance requirements.⁴⁵ Similarly, a lack of disability insurance can prove devastating if a low-wage worker must miss work because of illness or injury not caused by his or her job.⁴⁶

Fortunately, there are hosts of governmental income support for which low-wage workers might be eligible, supplementing their low wages.⁴⁷ These income supplements include: the Earned Income Tax Credit (“EITC”), a refundable tax credit targeted especially to low-wage families with children;⁴⁸ food stamps, which are available until a family’s income

Annual Update of the HHS Poverty Guidelines, 68 Fed. Reg. 6456, 6457 (Feb. 7, 2003). A minimum wage earner who was paid for a full 2,060-hour work-year would earn \$10,609.

44. PLAYING BY THE RULES BUT LOSING THE GAME, *supra* note 4 (noting that only 54.3% of working poor families have employer-provided health insurance, compared to 88.6% of non-poor workers).

45. Of workers in the lowest quartile of income (0-25%), 54% lacked both paid sick and vacation leave. JODY HEYMANN, THE WIDENING GAP: WHY AMERICA’S WORKING FAMILIES ARE IN JEOPARDY AND WHAT CAN BE DONE ABOUT IT 114-115 and fig. 6.1 (Basic Books 2000).

46. Like other workers, low-wage workers typically are qualified for workers’ compensation, providing income and paying medical bills associated with a work-related injury or illness. However, workers’ compensation will not provide replacement income for someone whose medical problems are not work-related. *See* 82 Am. Jur. 2d, Workers’ Compensation § 263 (concerning required causal connection between illness or injury and employment). Also, unemployment insurance will typically not provide income under those circumstances, because a worker must be “able and available” for work to qualify. U.S. DEP’T OF LABOR, COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS § 400 (2001), available at <http://workforcesecurity.doleta.gov/unemploy/comparison.asp> (last visited Mar. 28, 2004). Six states offer government-provided temporary disability insurance (“TDI”) benefits. *Id.* at § 600. In other states, workers are reliant either on employer-provided disability insurance or possibly on federal or state welfare benefits. *See, e.g.*, U.S. DEPT. OF LABOR, FMLA REPORT: BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS 4.2 (2001)(discussing financial issues during leave).

47. Despite misconceptions to the contrary, eligibility for these income supports generally is not limited to current or former welfare recipients. These misconceptions often arise from the facts that some of these benefits were linked to cash welfare benefits before PWRORA was enacted and that some of them continue to be administered by “welfare offices.” NISHA PATEL ET AL., CENTER FOR LAW AND SOCIAL POLICY, MAKING ENDS MEET: SIX PROGRAMS THAT HELP WORKING FAMILIES AND EMPLOYERS 1 (2002) [hereinafter MAKING ENDS MEET].

48. In 2001, workers with one child and an income below \$28,281 could receive an EITC up to \$2,428. Workers with two or more children and wages below \$32,121 could receive an EITC up to \$4,008. Even workers between the ages of twenty-five and sixty-four without children could receive a small EITC, up to \$364 if their income was below \$10,710

reaches 130% of poverty;⁴⁹ health insurance for some families, particularly for children;⁵⁰ child care subsidies, although funding is limited and waiting lists are common;⁵¹ utilities assistance, such as the Low Income Home Energy Assistance Program (“LIHEAP”);⁵² and, in some states, programs designed to provide non-cash assistance to low-wage workers through creative uses of TANF funds.⁵³

Unfortunately, very few low-wage workers get all of the income supports to which they are entitled. These supports are not administered in a coordinated fashion, but by a number of agencies which may require

in 2001. In 1999, the EITC lifted more children out of poverty than any other government program. *Id.* at 4-5.

49. In the 1999 fiscal year, the average working family receiving food stamps received almost \$200 per month. Working families made up 42% of families with children who received food assistance. *Id.* at 8-9.

50. Although Medicaid rules vary from state to state, states are required to cover all children under age nineteen if the household’s income is below the poverty level. Additionally, Transitional Medicaid must be provided for up to one year for families who otherwise would become ineligible because of increased earnings from employment (often because of welfare-to-work activities). Finally, the State Children’s Health Insurance Program (“SCHIP”) provides insurance to children in families with income up to 200% of poverty. *Id.* at 10.

51. Child care subsidies are funded primarily through the Child Care and Development Fund (“CCDF”) and TANF. States have a great deal of discretion to determine eligibility levels, although there are maximum income levels established under the federal funding streams. *Id.* at 6-7.

Research has indicated that low-wage workers, whether or not they are former welfare recipients, tend to have longer employment durations and higher wages if they receive child care subsidies. *See, e.g.*, STAYING EMPLOYED AFTER WELFARE, *supra* note 20, at 9-11. Unfortunately, according to HHS estimates, only 12% of the 14.5 million children potentially eligible for CCDF-funded assistance received it in 1999. MAKING ENDS MEET, *supra* note 47, at 7. The need for increased federal funding for child care has been a major issue in TANF Reauthorization. *See, e.g.*, JENNIFER MEZEY, CENTER FOR LAW AND SOCIAL POLICY, CHILD CARE AND EARLY EDUCATION, SERIES BRIEF NO. 2, THREATENED PROGRESS: U.S. IN DANGER OF LOSING GROUND ON CHILD CARE FOR LOW-INCOME WORKING FAMILIES (2003).

52. LIHEAP is a federally-funded program that is administered by the states to provide assistance for bill payment, energy crisis assistance, and weatherization. The states determine the eligibility levels. While payments can be made during the summer for cooling purposes, most LIHEAP funds are distributed in the winter for heating. Assistance is not an entitlement, and funds are often exhausted. U.S. DEP’T OF HEALTH AND HUMAN SERVICES, ADMIN. FOR CHILDREN AND FAMILIES, LIHEAP BROCHURE (2002), *available at* <http://www.acf.hhs.gov/programs/liheap/brochure.htm> (posted on Mar. 6, 2003).

53. MAKING ENDS MEET, *supra* note 47, at 13. In Pennsylvania, for example, the Department of Public Welfare has used this flexibility to create a “retention and advancement” program in which a working head of household with income below 235% of poverty can get case management, job training subsidies, one-time emergency payments, and other assistance to retain his or her job and to advance to a better one. PENNSYLVANIA DEP’T OF PUBLIC WELFARE, OFFICE OF INCOME MAINTENANCE, PART II: PROGRAM REQUIREMENTS, *available at* http://www.dpw.state.pa.us/oim/JRARRE/jrarre_part_ii.asp (last modified June 25, 2003).

numerous applications for each type of benefit and which may not be accessible during non-work hours. Few low-wage workers know about the full range of income supports for which they may be eligible. When they are aware of benefits, they are often put off by a perceived stigma around these benefits or by a “hassle factor” associated with the welfare office that administers some of these programs.⁵⁴ But with innovative program design, states could better target low-wage workers and increase participation in these programs.⁵⁵

III. OTHER PROBLEMS AND BARRIERS ENCOUNTERED BY LOW-WAGE WORKERS

From the perspective of a practitioner of employment law for low-wage workers, the work-related problems experienced by low-wage workers are extensive and more insidious than those suffered by their higher wage counterparts. They include:

- Criminal records as a barrier to employment;⁵⁶
- Records of child abuse or neglect created by child welfare agencies;
- Problems with occupational licenses;
- Employment discrimination;
- Illness of the worker or his/her family member, requiring time away from the job, and requiring assistance in being able to keep the job and in obtaining income while out of work; and
- Payment of wages due to the worker.

Other issues typically faced by low-wage workers may not present

54. MAKING ENDS MEET, *supra* note 47, at 1. See also DEBBIE GREENBERGER & ROBERT ANSELM, MDRC, MAKING WORK PAY: HOW TO DESIGN AND IMPLEMENT FINANCIAL WORK SUPPORTS TO IMPROVE FAMILY AND CHILD WELL-BEING AND REDUCE POVERTY (2003) [hereinafter MAKING WORK PAY], at 31-32.

55. See *id.* at 56 (describing and suggesting innovative ways that states can design and implement financial work supports).

56. In our practice, this is the most common type of problem for which our clients seek legal assistance. According to a research study, 60% of employers who hire low-wage workers indicated that they would not hire ex-offenders; in fact, they were less likely to hire ex-offenders than any other stigmatized group. BOOM TIMES A BUST, *supra* note 12, at 8. For more on the legal problems of and legal remedies available to ex-offenders, see AMY HIRSCH ET AL., CENTER FOR LAW AND SOCIAL POLICY AND COMMUNITY LEGAL SERVICES, EVERY DOOR CLOSED: BARRIERS FACING PARENTS WITH CRIMINAL RECORDS 13-26 (2002).

employment law problems per se, but are challenges nevertheless. They include:

- Lack of affordable housing, as a result of a mismatch between low wages and affordable housing;⁵⁷
- Lack of medical insurance; and
- Lack of employment skills/upward mobility.

IV. ROLE OF EMPLOYMENT LAWS FOR LOW-WAGE WORKERS

Employment laws are very significant for low-wage workers. With few unions and little leverage, these workers need legal protections on the job more than their higher wage counterparts. For example, the commission appointed by Congress to report on the early results under the Family and Medical Leave Act (“FMLA”) found disproportionate use of that law by low-to-moderate wage workers, notwithstanding that the mandated leave is unpaid.⁵⁸ The Fair Labor Standards Act (“FLSA”) provides legal remedies only for violation of minimum wage and overtime provisions,⁵⁹ yet its safeguards are violated more often than seems possible.

But despite the importance of these employment laws to leveling the playing field for low-wage workers, enforcement of these laws is problematic. Governmental agencies that enforce the employment laws seldom have enough resources to do so adequately.⁶⁰ Private attorneys seldom take the cases of low-wage workers, despite the availability of attorneys’ fees under most employment law statutes, for a host of reasons,

57. See, e.g., JOINT CENTER FOR HOUSING STUDIES OF HARVARD UNIVERSITY, THE STATE OF THE NATION’S HOUSING, 2003 (2003), available at <http://www.jchs.harvard.edu/publications/markets/son20003.pdf> (last visited Mar. 8, 2004). Welfare-to-work case managers report that lack of affordable and stable housing is one of the most serious challenges to their participants. Housing problems cause low-wage workers to miss work, reducing their wages and possibly costing them their jobs for attendance reasons. BARBARA SARD AND MARGY WALKER, HOUSING STRATEGIES TO STRENGTHEN WELFARE POLICY AND SUPPORT WORKING FAMILIES 4 (The Brookings Institute and the Center on Budget and Policy Priorities, Research Brief, April 2002).

58. COMMISSION ON FAMILY AND MEDICAL LEAVE, A WORKABLE BALANCE: REPORT TO CONGRESS ON FAMILY AND MEDICAL LEAVE POLICIES 93 (1996) (noting that families with incomes of \$20,000 to \$30,000 are more likely to take leave than other employees).

59. The FLSA does not provide a remedy for workers who are cheated out of wages above minimum wage, but many states have wage payment laws which provide such protection. See LABOR LAW REPORTER, STATE LAWS, ¶ 40,363 (1996)(depicting table of states which permit wage recovery by suit).

60. In this practitioner’s experience, the inadequacy of resources is particularly problematic in the Wage and Hour Division of DOL, which enforces the FLSA and the FMLA.

including the inability of the clients to provide retainers and the lower backpay awards (because of low wages) from which they can seek a contingency fee. Among legal aid programs, few have employment law practices, although the number of such resources is growing.⁶¹ Clearly, a serious policy initiative to address the gross inadequacy of resources to protect the employment law rights of low-wage workers is needed.

V. CONCLUSION

Like other American workers, low-wage workers work hard to earn their paychecks to support their families and themselves. But their chances of sharing in the “American Dream” are much slimmer than those of the rest of the workforce, perhaps even illusory. Until this country decides that it is unacceptable for working people to put their children to bed hungry, there is much work to be done to give them a fair chance at an adequate standard of living for their families.

61. For a listing of legal aid employment staff, see the website of the National Employment Law Project, at <http://www.nelp.org/about/links/practitioners/index.cfm> (last visited Mar. 20, 2004).