

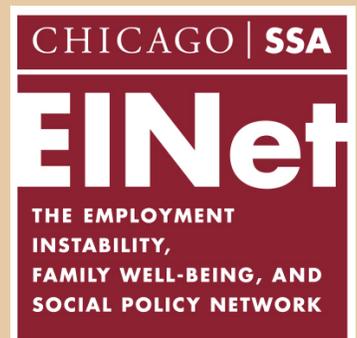


Estimating the Prevalence of Workplace Violations

A WORKING PAPER OF THE EINet MEASUREMENT GROUP

Ruth Milkman | CUNY Graduate Center

September, 2014



The Employment Instability, Family Well-being, and Social Policy Network (EINet)

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EINet provides a venue for scholars and professionals to interact, collaborate, and develop new research infrastructure to better understand the causes and consequences of employment instability. EINet is particularly concerned with promoting research about instability in the low-wage labor market and its effects on family well-being.

For more information, please contact:

Susan Lambert, Associate Professor and Principal Investigator
The University of Chicago School of Social Service Administration
slambert@uchicago.edu

ssascholars.uchicago.edu/einet

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Recent literature abounds with accounts of widespread violations of the Fair Labor Standards Act (FLSA) and similar state and local laws specifying minimum wages and other labor standards. This phenomenon, often called wage theft (a term popularized by Bobo, 2008), has become widely known through the efforts of worker centers and other advocacy groups representing low-wage workers. They have called attention to and have sought to remedy many instances in which employers pay workers less than the legal minimum wage, fail to provide legally required overtime pay, deny workers the meal breaks to which they are entitled, and sometimes fail to pay them at all. Another common violation involves off-the-clock work, in which workers are paid for their official hours in keeping with the law but then are required to work additional hours at no pay.

Women, people of color, and foreign-born workers, especially undocumented immigrants — who are fully covered by the FLSA and similar state-level statutes, contrary to popular belief — disproportionately experience violations, but many other workers, including those born in the U.S., are affected as well. Small employers (including private households that employ domestic servants or day laborers) are overrepresented among offenders, but major corporations have also been implicated in some of the most common violations. And many violations (especially those involving overtime pay requirements) are no longer confined to the low-wage labor market, but also have been reported widely among middle-strata workers.

The apparent epidemic of FLSA and related violations in the low-wage labor market is tied to declining private-sector unionization as well as to the long-term decline in resources devoted to labor standards enforcement, both in absolute terms and relative to the size of the labor force. In addition, many commentators have suggested that the widespread reporting of violations is linked to what David Weil (2014) calls the fissured workplace, by which he means the increasingly common arrangements under which large firms transfer risk to smaller ones, or to individual workers, by subcontracting or outsourcing many of the functions they formerly accomplished internally. This not only helps large firms manage market risks, but it also enables them to avoid being held accountable for failing to obey labor standards laws and regulations. A closely related phenomenon is the widespread misclassification of employees as independent contractors, even in cases where the firms they work for set their hours, define their tasks and specify the manner in which they should be carried out, and dictate other conditions of employment.

Lawsuits and media accounts documenting particular instances of wage theft and other violations abound, but representative data that measure its prevalence are few and far between, and none are available to date to permit analysis of trends over time. The basic labor market surveys that analysts rely on were designed in an era when precarious work and the violations under consideration here were not yet a focus of public or scholarly concern (Bernhardt, 2014).

I was a co-PI on a five-year study that aimed to systematically estimate the prevalence of wage theft and other violations (Bernhardt, Milkman, Theodore, et al., 2009). Our study focused on the three largest U.S. cities (New York, Chicago, and Los Angeles) and used Respondent Driven Sampling (RDS) to generate a representa-

tive sample of over 4,000 workers in low-wage jobs (roughly the bottom 15 % of the labor market), whom we interviewed in 2008.

We found prevalence levels for key violations that surprised us, even though we were familiar with the problem long before we undertook the study. For example, one-fourth of our respondents (i.e., 25 % of the bottom 15 % of the labor market, or about 3.5 % of all workers in our three cities) had experienced a minimum wage violation in the previous work week. And among those respondents who worked more than 40 hours a week, 70 % had not been paid properly for their overtime work.

This was the first systematic effort to estimate the prevalence of such violations, apart from some U.S. Department of Labor (USDOL) studies conducted during the Clinton years of individual industries in particular labor markets (USDOL, 2001). Those studies found extremely high levels of violations across multiple industries (including garment manufacturing, agriculture, food processing, restaurants, and construction) in cities around the country. Data also are available on the numbers and types of complaints involving violations that have been filed with the Wage and Hour Division of the USDOL, and similar data exist for some state-level enforcement agencies as well (see Meixell & Eisenbrey 2014; Weil, 2014; Gleeson, 2013). The obvious limitation here is that only a small proportion of violations generate complaints, due to fear of job loss and other types of employer retaliation; the volume of complaints also varies over time and space depending on such factors as the availability of legal representation for affected workers and the real or perceived degree of responsiveness to complaints from enforcement agencies.

In any case, at this time there is no reliable source of comprehensive national data estimating the extent to which wage theft and related violations occur. That reflects the formidable challenges involved in capturing these phenomena in conventional labor market surveys. One cannot ask directly about whether violations occurred, since many workers are not educated about their legal rights (for example, many are not aware of the amount of the legal minimum wage).

Another basic problem is that undocumented workers, in particular, and low-wage workers generally include hard-to-reach populations that are often overlooked in surveys. One of the advantages of our 2008 survey is that it effectively addressed that problem by building a sample through workers' own social networks, thus overcoming the trust barriers that often prevent survey researchers from reaching vulnerable workers. We were fortunate to have the resources to conduct the survey interviews face-to-face in multiple languages, and to pay respondents incentives both for their own interviews and for recruiting other respondents. Even without the face-to-face element, the RDS methodology that we used is extremely expensive and labor-intensive to implement, and is not practical as a methodology for regular, repeated surveys that attempt to track violations over time. Our study also encountered unexpected and severe problems of racial/ethnic homophily in the recruitment chains; although we found a workaround to address this problem, it also makes RDS problematic for future research of this kind.

Government sweeps like those that were the basis for the 1990s USDOL surveys are far more effective and cheaper to implement, but of course few, if any, academic researchers have the ability to enter workplaces unannounced. If we could persuade USDOL to undertake such efforts again, they could be a highly valuable source of data, especially if they were conducted repeatedly, at regular time intervals.

Another challenge is the fact that pay arrangements in the low-wage labor market vary widely. Some workers are paid by the hour, while others are paid by the day, week, or month. In the latter cases, if one wants to assess whether a pay violation occurred, data need to be collected to determine how many hours the individual in question actually worked, which is a time-consuming task since many low-wage workers also have irregular and unstable schedules. In the 2008 study, we had separate streams of questions for these two groups. In addition, some workers are paid in cash, others by check; sometimes deductions are taken (not all of them legal)

from paychecks as well. And while most respondents will be able to report their net earnings accurately, many are unable to do so for gross earnings. Finally, tip income is notoriously prone to inaccurate reporting, and in some low-wage jobs this makes up a substantial portion of workers' earnings.

Yet another problem involves misclassified independent contractors. If these workers are genuinely independent, they are not covered by the FLSA and related laws. But any survey that aims to cover the true scope of violations would need to include misclassified independent contractors as well. Screening questions could be used to determine whether or not those who are independent contractors are properly classified, and they could then be included in the survey if they are found to be misclassified — that is, if the questions reveal that they should be considered ordinary employees. (Our 2008 survey did *not* include these workers.) A parallel problem involves workers who are misclassified as managers (true managers are not covered by FLSA); this too would require carefully designed screening questions. And while the FLSA covers the bulk of the nation's workers, state laws vary, so survey methods must be tailored to the particularities of each location. Not only do minimum wage standards vary by state (and increasingly by city as well), but so do provisions for rest breaks and for daily vs. weekly overtime pay.

Minimum wage violations are the most challenging ones to measure, and require an extensive battery of questions that establish a respondent's exact working hours as well as the compensation received. Other violations can potentially be more accurately measured with relatively few questions, which could be included in a broad workforce survey. Although far from complete, and likely to yield underestimates due to the difficulties in recruiting unauthorized immigrants and other hard-to-reach populations in such surveys, such an effort would significantly improve on existing data sources and would begin to systematically capture the extent of the problem as well as trends over time.

Below are a few possible foci for such an undertaking. For all but the first one listed, questions could easily be adapted from our 2008 survey of New York, Los Angeles, and Chicago. For all but the first one listed, as well, a screening question would be needed to eliminate managers and supervisors (who are exempt from FLSA).

- *Misclassified independent contractors.* Respondents could be asked whether they receive a W-2 or a 1099 form for their work, and then those who report being 1099 recipients could be screened using the standard legal tests for misclassification (e.g. who determines the worker's hours, who controls the way in which the work tasks are performed)
- *Off-the-clock work.* Respondents could be asked whether or not they ever were required to work after the end of their scheduled shift and, if so, for how long and whether they received pay for that unscheduled time.
- *Overtime violations.* A screening question could identify respondents who had worked more than 40 hours per week in a specific time period and a follow-up question could ask whether or not they were compensated at all for the additional hours and, if so, whether the pay rate was higher than usual.
- *Meal breaks.* A screening question could identify respondents who worked shifts with sufficient hours (usually 8 per day) to be covered by meal break regulations and follow-up questions could ask whether or not their meal breaks were denied, shortened, interrupted, or otherwise compromised.
- *Nonpayment.* A relatively rare but memorable violation is outright nonpayment of promised pay. A simple question could ask respondents whether they had experienced this over the previous five years, with follow-up questions for those who respond affirmatively to capture information about the employer and job involved.

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