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## The National Employment Law Project

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## THE NATIONAL EMPLOYMENT LAW PROJECT

JOSHUA N. LEONARDI\*

Driven by tales of fabled riches, immigrants flock to the United States hoping to fulfill their dreams.<sup>1</sup> Once they arrive, however, many face the prospect of not getting decent work because of their immigration status. Often, they are taken advantage of by unscrupulous employers. Recently, for example, a group of West African immigrants working as deliverymen for New York City supermarkets were paid as little as \$15 for working a ten-to-twelve hour day.<sup>2</sup> In many cases the deliverymen did not receive health insurance, sick pay, holiday pay, or worker's compensation, and were charged rent by the supermarkets for the carts that they used to make deliveries.<sup>3</sup> Further complicating their situation was that they were caught in a "legal limbo" because both the supermarkets they worked for and the delivery company that hired and supervised them insisted that the immigrants were not their employees.<sup>4</sup> The immigrants were left with little recourse except to endure the hard times and hope that their employers relented or that they were able to secure better work.

Concern for the plight of immigrant workers and others similarly situated led to the creation of the National Employment Law Project (NELP). In the late 1960s, lawyers in New York City were increasingly retained to represent low-wage workers with employment-related questions.<sup>5</sup> In an effort to assist a previously under-represented segment of the population, some of the lawyers approached the clinical program at Columbia University Law School

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1. Steven Greenhouse, *Pay Case Does Not Help All of City's Deliverymen*, N.Y. TIMES, Jan. 18, 2001, at B3.

2. *Id.*

3. *Id.*

4. Steven Greenhouse, *Deliverymen to Get \$3 Million to Settle Wage Case*, N.Y. TIMES, Dec. 8, 2000, at A1.

5. See National Employment Law Project, About NELP, <http://www.nelp.org/about/index.cfm> (last visited Nov. 14, 2005).

looking for ways to help. NELP opened its doors to those workers passed over for promotions they were qualified to receive, denied health care, employed in unsafe working conditions, or unjustly denied unemployment benefits, with the goal of providing help and hope.<sup>6</sup>

Today, NELP utilizes a three-tier platform to improve the working conditions of low-wage workers, welfare workers, and nonstandard workers.<sup>7</sup> The first tier attacks the problem of discrimination against immigrant workers by forcing unscrupulous employers to pay employees a fair wage. NELP litigates on behalf of these workers to enforce wage laws and employment contracts. According to its website “[s]uch cases are important because they can potentially bring these workers significant money damages to which they are entitled, and because they send a strong signal to non-compliant employers in various industries that exploitation of workers is not tolerated.”<sup>8</sup> Each successful case is a valuable precedent for future cases and sends a warning to employers in general that courts will not allow this type of behavior to take place. Additional NELP efforts include writing amicus briefs and providing assistance in appellate litigation.

The second tier of NELP’s strategy identifies common themes and goals among labor organizations and community members, and builds upon these themes to bridge gaps among the groups. The lawyers at NELP work as negotiators and facilitators among the different groups and organizations, opening communication channels that allow individuals and groups to share information and make more informed decisions. By unifying these groups with governmental entities, NELP hopes to create a stronger alliance that will ultimately lead to policy reform and stronger laws that protect workers’ rights.

Finally, NELP educates worker advocates on their rights and teaches them how to enforce these rights effectively. NELP educates worker advocates using two distinct methods. First, it publishes policy updates, press releases, quarterly updates, and other

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6. *Id.*

7. Telephone Interview with Catherine Ruckelshaus, Director of Litigation, NELP, in New York, N.Y. (Sept. 8, 2005).

8. National Employment Law Project, Litigation, <http://www.nelp.org/litigation/index.cfm> (last visited Nov. 14, 2005).

materials for workers, much of which is available electronically. These publications provide workers with information about new developments in the law and ways to exercise their existing rights. Second, NELP provides workers and advocacy groups “model legislation and referrals to local lawyers, unions, community-based organizations, and national coalitions.”<sup>9</sup>

NELP also assists litigators by providing them with experiential advice. This includes compiling best practices for litigators and highlighting common mistakes. While NELP provides model briefs and pleadings, Catherine K. Ruckelshaus, litigation director at NELP, notes that it is important for litigators to properly direct their own litigation strategy.<sup>10</sup> One of the biggest mistakes made by attorneys representing illegal immigrant workers is allowing clients to testify, which can reveal a client’s status as an illegal alien.<sup>11</sup> Ruckelshaus contends that this can make or break a case because some courts will look unfavorably upon a plaintiff once his immigration status is known.<sup>12</sup> She suggests keeping this information out of the liability aspect of the case and addressing it only when remedies are being awarded.<sup>13</sup>

Ruckelshaus also emphasizes the importance of getting workers to organize. “The old model was to just ‘sue the bastards,’” she says. “[B]ut this didn’t work because the employers would just close up shop and then open up somewhere else.”<sup>14</sup> She hopes that by successfully organizing, workers will realize that they will be securing their legal rights and remedies for the long term.

In an effort to focus its resources, NELP has created five individual employment law projects with specific directives and goals: the Immigrant Worker Project, the Nonstandard Worker Project, the Unemployment Insurance Safety Net Project, the Welfare and Low Wage Workforce Project, and the Work and Family Project.<sup>15</sup> Each project attempts to address problems that are prevalent within

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9. National Employment Law Project, Organizing Support, [http://www.nelp.org/organizing\\_support/index.cfm](http://www.nelp.org/organizing_support/index.cfm) (last visited Nov. 14, 2005).

10. Ruckelshaus, *supra* note 7.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *See* National Employment Law Project, <http://www.nelp.org> (last visited Nov. 14, 2005).

certain segments of the workforce, seeks to educate individuals, advocate for the unrepresented, and effectuate policy reform.

With “approximately five million undocumented workers who labor in the lowest paid, highest risk jobs in the U.S. economy,” the Immigrant Worker Project focuses on ending discrimination against low-wage and immigrant workers.<sup>16</sup> Many illegal immigrants are either not aware of their legal rights or are too intimidated by their employers to exercise those rights, which complicates the project’s focus. This problem has only been exacerbated by the recent decision in *Hoffman Plastic Compound, Inc. v. NLRB*.<sup>17</sup> In *Hoffman*, the Supreme Court held that undocumented workers were not entitled to back pay awards even though they were illegally fired from their jobs in retaliation for union activities.<sup>18</sup> Unfortunately, some employers are now improperly relying on the holding of this case to threaten and harass workers by telling them that they have no legal rights to organize at all.<sup>19</sup> In response, NELP is taking proactive steps to ensure that immigrant workers are educated about their rights by providing “legal analysis, facts sheets and tools for legislative advocacy related to protecting and expanding the workplace rights of immigrant workers.”<sup>20</sup>

The Immigrant Worker Project also provides assistance to specific industries that are more susceptible to employment law violations.<sup>21</sup> Day laborers, in particular, are prone to abuse by their employers and are subject to egregious treatment such as being abandoned at desolate work sites, going without breaks or water during fourteen-hour workdays, and sometimes being threatened or even robbed by their employers.<sup>22</sup> In addition to providing fact

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16. National Employment Law Project, Immigrant Worker Project, <http://www.nelp.org/iwp/index.cfm> (last visited Nov. 14, 2005).

17. 535 U.S. 137 (2002).

18. *Id.*; see also REBECCA SMITH AND AMY SUGIMORI, UNDOCUMENTED WORKERS: PRESERVING RIGHTS AND REMEDIES AFTER *HOFFMAN PLASTIC COMPOUNDS V. NLRB* (2003), available at <http://www.nelp.org/docUploads/wlghoff040303%2Epdf>.

19. See sources cited *supra* note 18.

20. National Employment Law Project, Immigrant Worker Project, at <http://www.nelp.org/iwp/rights/index.cfm> (last visited Nov. 14, 2005).

21. *Id.*

22. EDWIN MELENDEZ & ABEL VALENZUELA JR., DAY LABOR IN NEW YORK: FINDINGS FROM THE NYDL SURVEY (2003), available at <http://www.nelp.org/nwp/initiatives/day/researchandresources.cfm> (last visited Nov. 14, 2005).

sheets to these workers, NELP produces briefs and other materials that promote legislative reforms to improve the working conditions of these laborers.<sup>23</sup>

The Nonstandard Worker Project seeks to protect workers who have been classified by their employers as temporary workers, independent contractors, or part-time employees.<sup>24</sup> By these classifications, employers can “avoid out of pocket costs, administrative costs, and the loss of control that results from the need to pay wages owing to employees, to comply with regulations protecting employees, and to bargain with unions representing a business’s employees.”<sup>25</sup> More importantly, in some cases, by classifying workers as non-employees, these individuals do not qualify for employment rights under certain laws. NELP attempts to protect nonstandard workers by advocating for the revision of labor and employment laws and providing technical assistance and guidance to groups that attempt to challenge laws on behalf of nonstandard workers.<sup>26</sup> NELP advises workers that they should take proactive steps to end this mischaracterization by enforcing existing requirements that hold employers responsible for workplace violations, following states that have focused efforts in sectors that commonly deal with this problem, and continuing to promote local campaigns.<sup>27</sup>

NELP has instituted the Unemployment Insurance Safety Net Project, which attempts to ensure that unemployment insurance reforms emulate the needs of the evolving workforce.<sup>28</sup> In today’s rapidly changing economy there are now more job opportunities in the service sector while more traditional positions in manufacturing

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23. See National Employment Law Project, Immigrant Worker Project, <http://www.nelp.org/iwp/initiatives/index.cfm> (last visited Nov. 16, 2005).

24. See National Employment Law Project, Nonstandard Worker Project, <http://www.nelp.org/nwp/index.cfm> (last visited Nov. 16, 2005).

25. National Employment Law Project, Employment Rights, <http://www.nelp.org/nwp/rights/index.cfm> (last visited Nov. 16, 2005).

26. See *id.*

27. See National Employment Law Project, Subcontracted Workers: The Outsourcing of Rights and Responsibilities, <http://www.nelp.org/docUploads/subcontracted%20work%20policy%20update%5F072704%5F065405%2Epdf> (last visited Nov. 16, 2005).

28. See National Employment Law Project, Unemployment Insurance Safety Net Project, <http://www.nelp.org/ui/index.cfm> (last visited Nov. 16, 2005).

and other labor intensive positions are declining.<sup>29</sup> These changes cause low-wage and part-time workers, who are more likely to be employed in labor-intensive positions, to be left with few, if any, benefits if they become unemployed. The Unemployment Insurance program was instituted by President Franklin D. Roosevelt as part of the New Deal, with its primary purpose focused upon providing unemployed workers with benefits while they looked for new work.<sup>30</sup> By providing these workers with partial compensation and some limited benefits, the program is able to help working class families maintain suitable living standards and keep the economy moving forward. The program, however, is now failing to serve its original purpose. NELP reports that “during the latest recession, less than half of jobless workers received unemployment benefits in 40 states” and that even when they do receive benefits they are often far too inadequate.<sup>31</sup> The weekly payout to recipients averages roughly \$230, about one-third of lost wages, and lasts only twenty-six weeks, with less than 40% of the recipients qualifying to receive it for that long.<sup>32</sup> The system appears to be failing because eligibility rules usually disqualify those who need the benefits the most — low-income, part-time, and female workers who have lost their jobs. In response to this growing problem, the NELP Unemployment Insurance Safety Net Project “provides in-depth technical assistance, including a broad range of legal and empirical research and analysis, to state policy makers and advocates dedicated to making the [Unemployment Insurance Safety Net] program more relevant to today’s workers and the changing economy” to help protect the long-term unemployed, low-wage workers, immigrants, and working families.<sup>33</sup>

In an effort to help the unemployed return to work more quickly and more successfully, NELP’s Welfare and Low-Wage

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29. See National Employment Law Project, *Changing Workforce, Changing Economy: State Unemployment Insurance Reforms for the 21st Century*, <http://www.nelp.org/changingworkforce> (last visited Nov. 14, 2005).

30. *Id.*

31. *Id.*

32. National Employment Law Project, *Unemployment Insurance Fact Sheet*, available at <http://www.nelp.org/docUploads/pub189%2Epdf> (last visited Nov. 14, 2005).

33. National Employment Law Project, *Unemployment Insurance Safety Net Project*, <http://www.nelp.org/ui/aboutuisnp040403.cfm> (last visited Nov. 6, 2005).

Workforce Project “advocates for the full application of employment laws to welfare-to-work programs, creation of transitional employment programs, stronger job training initiatives, and other workforce development policies that assist welfare recipients and low-wage workers.”<sup>34</sup> Once an individual becomes unemployed or begins to receive welfare, regaining their economic independence is often a struggle. The more time spent unemployed, the more likely workers’ skills will diminish. Many employment laws that provide these workers with minimal protection are no longer applicable because the workers have been unemployed too long. As a result, it is not uncommon that their confidence and self-identity are irreparably damaged. One of the more effective tools in assisting these individuals is the transitional job program, which combines wage-paying employment with support services that help people ultimately get back to full-time work.<sup>35</sup> NELP research indicates that 85% of participants who complete transitional programs find employment and that their new employment results in an increase in their earning capacity by over 40%.<sup>36</sup> Continued support of grassroots organizations and promotion of model workforce development initiatives will ensure that more people are exposed to these helpful programs.

NELP’s Work and Family Project “seeks to enforce existing laws and expand their protections to allow today’s workers to better balance the growing responsibilities of work with their family and medical needs.”<sup>37</sup> The Family and Medical Leave Act, passed in 1993, provides employees with job and benefit-protected leave when a family or medical crisis arises.<sup>38</sup> Despite the Act’s perceived success in allowing employees time to care for personal needs without fear of losing their livelihood, there are still gaps in the legisla-

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34. National Employment Law Project, Welfare and Low-Wage Workforce Project, <http://www.nelp.org/wlwp/index.cfm> (last visited Nov. 6, 2005).

35. See National Employment Law Project, Transitional Jobs Work: What the Research Shows, <http://www.nelp.org/wlwp/development/transitional/tjpswork0402.cfm> (last visited Nov. 14, 2005).

36. *Id.*

37. National Employment Law Project, Work and Family Project, <http://www.nelp.org/wfp/index.cfm> (last visited Nov. 14, 2005).

38. See CATHERINE RUCKELSHAUS, AMERICANS NEED A RAISE AND A BREAK: PROMOTING FAMILY LEAVE AT THE STATE AND LOCAL LEVEL, *available at* <http://www.nelp.org/docUploads/pub52%2Epdf> (last visited Nov. 14, 2005).



tion. Most notable are the jurisdictional prerequisites, which hinge on employer size and employee tenure and eliminate 50% of the U.S. workforce from eligibility. Moreover, because the leave is unpaid, lower-income workers are often unable to take the full twelve weeks of leave.<sup>39</sup> It is NELP's position that the existing legislation should be amended to provide paid leave and expand the current eligibility requirements to include more low-wage and part-time employees.<sup>40</sup>

NELP's projects provide ammunition for the uneducated and unrepresented workers and immigrants who go to work each day not knowing their legal rights and who are often in no position to exercise them. When Ruckelshaus first heard of the West African immigrants' plight, she said, "This is one of the worst situations of sweatshop treatment that I've seen. Given the magnitude of the hours and the puny amount they were paid, it just shows how misclassifications of workers acts to put them into servitude."<sup>41</sup> NELP quickly put together a class of immigrants who had been taken advantage of by the supermarkets. By reaching out to the immigrants who had worked at the supermarkets to create a large class of plaintiffs, informing the workers of their legal rights, and publicizing the events that took place, NELP exerted a considerable amount of pressure on the supermarkets to reach a settlement. Food Emporium was the first to settle for \$3.2 million in early 2001. Then, after a protracted legal battle over who was actually the workers' employer, Gristedes reached a settlement with the immigrant workers in excess of \$3 million.<sup>42</sup> As a result of the settlements, employees stand to collect as much as \$30,000 in back pay owed to them.<sup>43</sup> The windfall received by many of the employees will be used towards the ambitious goals they set for themselves when they first arrived in this country. One of the immigrant workers, Ismail Ngendakumana, a Gristede's deliveryman who is from Burundi, can now afford to enroll in college and bring his family to America. As

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39. *See id.* at 2.

40. *See id.* at 6-11.

41. Greenhouse, *supra* note 4 (quoting Ruckelshaus).

42. Steven Greenhouse, *Waging War, From Wall Street To Corner Grocery; Beyond the High-Profile Cases, Spitzer Helps Low-Wage Workers*, N.Y. TIMES, Jan. 21, 2004, at B1.

43. Greenhouse, *supra* note 4.

Mr. Ngendakumana put it best: “A lot of workers are very happy . . . I knew one day we would have justice.”<sup>44</sup>

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44. Greenhouse, *supra* note 42.

