Advancing Low-Wage Worker Organizing Through Legal Representation

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Advocacy Stories

Advancing Low-Wage Worker Organizing Through Legal Representation

Eighteen workers at the Hilton Long Beach Hotel and Executive Meeting Center settled denial of meal and rest break claims with the hotel’s owner, HEI Hotels and Resorts LLC (HEI), on November 27, 2012—the culmination of a multiyear campaign led by the workers and supported by Unite Here Local 11, the Southern California affiliate of the North American hospitality workers union. The workers were represented in the last stages of the agency adjudication by the Immigrant Rights Clinic of the University of California (Irvine) School of Law and the Legal Aid Society—Employment Law Center.

In hearings before the California Division of Labor Standards Enforcement, the workers described facing direct pressure from supervisors to work through meals and to skip rest breaks to keep up with increasingly heavy workloads. Some employees suffered injuries due to the unremitting nature of their work. Employees in the hotel’s kitchen, restaurant, room service, banquet services, and housekeeping departments—mostly monolingual Spanish speakers—bravely stepped forward to participate in the legal action. Through persuasive testimony and painstaking analysis of time records, the workers, law students, and public interest lawyers overcame the odds in a challenging area of the law. They showed that groups of low-wage employees with dedicated legal support can hold employers accountable for deplorable employment conditions.

In this advocacy story we describe the conditions faced by workers at the Hilton Long Beach, the legal and institutional framework in which claims were brought, and the basic contours of the legal action on behalf of the workers. We then draw preliminary policy conclusions.

The Workers


The unlawful work conditions at the Hilton Long Beach were not isolated to one hotel service. Those who banded together to sue the hotel were cooks, stewards and runners, room-service workers, banquet housemen, restaurant servers, and housekeepers.

Between cooking for guests in the 250-seat restaurant, the lobby bar, the on-site employee cafeteria, the banquet facilities, and offering room service for 398 rooms, enormous demands were placed on the Hilton hotel cooks. However, HEI regularly understaffed the kitchen to save money, cutting the number of cooks by nearly half in recent years. As a result, cooks regularly worked though their meal breaks and almost never took the rest breaks. One of the claimant cooks was diabetic but was not allowed to eat or drink in the kitchen, thereby putting him at grave health risk.

Stewards and runners are responsible for a host of tasks, from stocking supplies to dishwashing to preparing food. Like the cooks, the Hilton stewards who participated in the lawsuit were discouraged from taking all of the rest and meal breaks to which they were entitled. Claimants were unable even to go to the restroom without a supervisor interrupting them by banging on the door and demanding they get back to work.

The room-service workers also felt the pressure of low staffing levels on their taking breaks or having time to eat. They were constantly on call, preparing trays for delivery, taking orders, delivering meals, or retrieving trays. During the night shift, there was no one else available to cover the room-service phones while a server took a break. Denied permission to take meal breaks, servers clocked out at the assigned meal time while continuing to work.

One restaurant server-claimant held her position for 15 years. For the first 11 years, she never took a full 30-minute break and, until the hearings, had taken no more than a handful of 10-minute breaks. Another claimant worked for five years as a banquet houseman, setting up events at the hotel. Always on call, he missed almost all of his rest breaks and meals. Like his colleagues in other departments, he would continue working after clocking out for a meal break with the full knowledge of his supervisor.

Housekeepers were required to clean 16 rooms during an eight-hour shift. With the expectation that they spend 30 minutes cleaning each room, no time remained for breaks, and so the housekeepers rarely took them. Sometimes a very dirty room would take 45 minutes to an hour to clean, and the housekeepers reported that their supervisors would get angry if they did not finish on time. The housekeepers feared being terminated from their jobs.

The Employer and the Union

HEI owns and operates hotels under various brand names, including Marriott, Hilton, Westin, Le Méridien, Embassy Suites,

Unite Here knew that HEI was a powerful, norm-setting owner-operator in the hospitality industry, and Unite Here Local 11 had been trying to support the workers who came seeking assistance on work conditions at the Hilton Long Beach for some time. There was no union contract in place at the hotel. A few of the 18 claimants were active in the union, although most were not.

The Lawyers

Workers with similar claims at the Embassy Suites Irvine, also owned by HEI, had successfully settled their cases in November 2011. The workers had been represented in those cases by Randy Renick and Cornelia Dai of the Pasadena employment and labor firm Hadess Stormer Richardson & Renick LLP. The Embassy Suites cases were labor intensive without explicit provision for attorney fees, at least at the agency level. The Hilton workers were moving toward December 2011 preliminary conferences, with hearings to follow shortly thereafter.

The Immigrant Rights Clinic had just been founded in August 2011 at the newest law school in the University of California system. In the clinic, teams of students serve as the lead lawyers in complex deportation and workers’ rights cases. During the fall of 2011, the clinic was composed of a faculty supervisor and five students from the law school’s first class. The Division of Labor Standards Enforcement referred 18 Hilton workers to the clinic in October 2011, and the clinic agreed to represent the workers. One of the three students on the Hilton team, Ari Yampolsky, had spent almost 10 years as a union organizer and researcher. Acrivi Coromelas had taught in public schools in Long Beach. David Rodwin had worked with a grassroots group fighting for the rights of Dalits in rural India. The team quickly set about interviewing clients and preparing for the upcoming preliminary conference.

The Legal Aid Society–Employment Law Center joined the team and represented the room-service workers after the hearings began. The tactical approaches used by the claimants and the defendant necessitated a long series of hearings that stretched out over six months. Legal Aid provided key legal support during that extended period.

HEI was represented by a 20-lawyer labor and employment practice that exclusively represents employers. The same firm also represented HEI before the Division of Labor Standards Enforcement in the Embassy Suites Irvine cases.

Mandatory Break Laws

As in other states, California has adopted laws intended to protect workers from employers who do not comply with minimum labor protections. This policy particularly serves the interests of employees in low-wage industries but is also designed to eliminate any unfair advantage that law-breaking businesses may have over employers who comply with the labor code.

A common form of labor abuse is wage theft. Coming in many forms, wage theft can be pervasive in low-wage industries. While failing to pay minimum wages, failing to pay overtime wages, and failing to pay double-time wages are common wage-theft complaints, employees also suffer workplace violations such as tip violations, inadequate timekeeping and pay-roll records, and failure to reimburse employees for business expenses. Under California law employers have a responsibility to establish practices that do not discourage workers from exercising their rights to full, uninterrupted 30-minute meal periods and 10-minute rest breaks for break-eligible shifts.

Meal Breaks. The Labor Code states plainly that “[a]n 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” (Cal. Lab. Code § 512(a) (Deering 2013); California Industrial Welfare Commission Order No. 5-2001, Regulating Wages, Hours and Working Conditions in the Public Housekeeping Industry § 11(A) (amended 2007), http://bit.ly/1eGATbM). After 10 hours of work, the employer must provide “a second meal period of not less than 30 minutes” (Cal. Lab. Code § 512(a) Employees must be “relieved of all duty” during a meal period, or the meal “count[s] as time worked” (California Industrial Welfare Commission Order No. 5-2001 § 11(A)). In Brinker v. Superior Court the California Supreme Court further elaborated the general rule that meal period requirements are satisfied if the employer “relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so” (Brinker v. Superior Court, 273 F.3d 513, 536–37 (2012)). The Brinker court emphasized how actual practices—such as pressuring employees to work in ways that omitted breaks—could undermine an employer’s written policy and therefore violate the law (id. at 536 (citations omitted)).

Some of the factors that determine whether an employee was deprived of a break may include sheer volume of work, the time-sensitive nature of the work, and expectations of efficiency by the employer (Brown v. Federal Express Corporation, 249 F.R.D. 580, 586 (C.D. Cal. 2008)).

Rest Breaks. Under California Wage Order No. 5-2001, all employers must “authorize and permit all employees to take rest periods” of ten minutes for every four hours worked (California Industrial Welfare Commission Order No. 5-2001 § 12(A)). These rest periods are counted as hours worked. A rest period “begins when the employee reaches an area away from the work station that is appropriate for rest” (California Division of Labor Standards Enforcement, The 2002 Update of the DLSE Enforcement Policies and Interpretations Manual (Revised) § 45.3.3 (March 2006), http://bit.ly/1a3Ksi8; Zavala v. Scott Brothers Dairy, Incorporated, 49 Cal. Rptr. 3d 503, 506 (Cal. Ct. of App. 2006)). That is, employees must be permitted to take “net” 10-minute breaks that do not include travel time to a break area. In White v. Starbucks the court held an employer liable for violating the Industrial Welfare Commission wage order if the employer coerced or encouraged the employee to forgo a rest period (White v. Starbucks, 497 F. Supp. 2d 1080, 1086 (N.D. Cal. 2007)). As with meal periods, the culture of a workplace and the pressures on employees may be factored into whether an employer actually permitted its employees to exercise their right to a 10-minute break. In Cicairos v. Summit Logistics Incorporated the court held that an employer, “as a
practical matter, did not permit [its workers] to take their rest breaks " because its practices discouraged doing so (Gicais v. Summit Logistics Incorporated, 35 Cal. Rptr. 3d 243, 253 (Cal. Ct. App. 2005)).

Penalties. For every statutorily mandated meal or rest period that the employer does not allow an employee to take, the employer must pay the employee a full hour of wages at the employee’s regular rate (Cal. Lab. Code § 226.7(b) (Deering 2013); California Industrial Welfare Commission Order No. 5-2001 § 11(b); DLSE Enforcement Policies and Interpretations Manual § 45.2.7). This premium pay is considered a "gage" (Murphy v. Kenneth Cole Productions Incorporated, 155 P.3d 284, 288–95 (2007)). (The claimant in the landmark Murphy case was represented by faculty and students in the Civil Justice Clinic of the University of California Hastings School of Law. The Legal Aid Society–Employment Law Center coauthored one of the amicus briefs supporting claimant.) Workers who no longer work for the employer may claim waiting-time penalties if the employer willfully did not pay in full all of their earned wages within 72 hours of the employment relationship ending (Cal. Lab. Code §§ 202(a), 203 (Deering 2013)).

Jurisdictional Framework for Pursuing Wage Claims

California has a multitiered jurisdictional framework for enforcing minimum labor protections. A worker who is not adequately compensated can chose to go directly to court and file a civil action. If a worker pursues both federal and state law protections against, for example, violations of the Federal Labor Standards Act and the California Labor Code, the worker has the option of pursuing claims in federal court, under fair question jurisdiction, or through state court. These judicial forums typically require that the worker retain an attorney.

California’s working population can also pursue claims for wage and hour violations through the Division of Labor Standards Enforcement. Commonly known as the Labor Commissioner’s office, this agency has the authority to process wage theft and retaliation complaints, conduct hearings, and investigate work-sites (Cal. Lab. Code §§ 90, 90.5(b), 98(a) (Deering 2013)).

Upon the filing of an administrative complaint with the Division of Labor Standards Enforcement, the labor commissioner schedules a settlement conference. The first purpose of this conference is to determine whether the commissioner has jurisdiction to investigate the claim. In particular, settlement conference deputies determine whether the alleged violations are in fact wage and hour claims and whether they occurred in California. And, second, deputies attempt to determine whether the parties are interested in settling the particular claims. If the parties are interested in negotiating, a deputy will communicate offers from one party to the other. If the parties are not interested in settling, the deputy will process the claim and forward it to a hearing officer. The hearing officer then schedules a date for a hearing that is similar to a minitrial. In a minitrial, though less formal than a trial, parties present witnesses and documentary evidence as exhibits and are given the opportunity to cross-examine each other and make closing arguments. The hearings are conducted under oath and are audiorecorded. This entire process is known as the Berman process, named after former California assemblyman Howard Berman (see Post v. Palol/Haklar and Associates, 4 P.3d 928, 930 (2000)).

Case Investigation

The Hilton Long Beach workers had filed complaints about the lack of rest breaks at the hotel more than one year before they retained the clinic. In that period the Division of Labor Standards Enforcement’s in-house investigative unit, the Bureau of Field Enforcement, reviewed time records and other case-related documents. The bureau indicated that the workers had viable claims, and HEI responded by offering nuisance value to settle the cases.

In fall 2011 the clinic team conducted iterative intake interviews with the workers and represented them at the December settlement conference before a Division of Labor Standards Enforcement deputy. The students identified claims not included in the workers’ original filings. The team determined that HEI was liable for missed meal breaks and wage and hour violations for the work time when claimants had been directed (or encouraged) to clock out. These additional claims nearly doubled the dollar amount of the workers’ claims.

In March 2012 the clinic team requested and won a subpoena for two categories of probative documents held by HEI. But HEI submitted a motion to quash the subpoena and ignored the agency’s deadline requiring the subpoenaed documents to be produced 10 days before the first hearing. There were two types of documents which the workers indicated were in the hotel’s possession but not produced: (1) daily time logs maintained by the housekeeping department, signed by the housekeepers, and documented the times that they take their 10-minute rest breaks; and (2) meal period waiver forms that some claimants had purportedly signed waiving their right to a 30-minute meal period in particular circumstances. Each of these documents constituted an “instrument [an employee signs] relating to the ... holding of employment” under the labor law and was required to be produced according to the statute’s terms (Cal. Lab. Code § 432 (Deering 2013)). The waiver forms were ultimately produced by opposing counsel in the midst of the hearings. A small sample of daily time logs from the housekeeping department was also produced during the hearings.

The clinic team, augmented by four students—Dave Koch, Sam Lam, Emma Soichet, and Irina Trasovan—in January 2012 analyzed the time records, disciplinary files, and hotel policy documents. As the first individual hearings approached in April 2012, the students found uncompensated violations of the law on the face of the time records from HEI. They developed a nuanced theory of the case: after a period in which the hotel more obviously violated meal and rest break provisions, it created a system of paper compliance that masked ongoing violations of the break laws.

HEI also requested a subpoena from the agency mandating production of documents linking the workers and their claims to Unite Here Local 11 and general union activity at the hotel. The clinic team understood from the Embassy Suites Irvine cases that defense counsel would attempt to use union involvement to delegitimize the claims in the eyes of the hearing officer. However, the assigned hearing officer in these cases ruled that evidence of union involvement, other than specific questions as to whether such activities were undertaken by workers during breaks, was well outside the focus of the hearings.
The size of the clinic team, the number of claimants represented, the range of litigation decisions, and the rapidly approaching hearings at which students would be doing direct examination and cross-examination for the first time put pressure on the dynamic within the team. While all of the students were driven by their commitments to clients, they approached preparation for the hearings with varying levels of intensity and anxiety.

The Hearings

The hearings for the 18 workers were all scheduled during a single four-day period in April 2012. Only 4 workers were able to complete their testimony in that initial period. A significant amount of time was spent going over discovery issues and structuring the hearings. The hearing officer determined that the hearings would be clustered by job category with workers in each category available to present their testimony followed by defense witnesses who could speak to those workers’ claims.

The students, incorporating the documents they had obtained, prepared thorough direct examinations of their clients. The clinic team also prepared detailed cross-examination questions for employer witnesses. The hearing officer allowed both sides nearly limitless questioning. Opposing counsel treated the hearings like depositions, and, in a few cases, the hearing officer permitted opposing counsel to cross-examine the workers for nearly double the time of their direct examinations. The workers were physically and emotionally exhausted after long hours of grueling, repetitive cross-examination.

The entire student team was set to graduate just a few weeks after the first set of hearings. One student volunteered to come back after graduation and before bar review began to present the cases of her clients. Another volunteered to present the cases of his group of clients in the days following the bar examination in the first week of August 2012, just weeks before he was to begin his judicial clerkship. These students felt that they had an obligation to see the hearings through for their clients. In need of additional support, the clinic reached out to the Legal Aid Society–Employment Law Center to represent a cluster of workers at their upcoming July 2012 hearings. Legal Aid responded to the clinic’s request and agreed to cocounsel and represent these workers.

Twelve of the 18 workers involved in the legal campaign completed their Division of Labor Standards Enforcement hearings between May and August 2012. The parties began to negotiate in earnest as the dates of the last set of hearings approached in September. The key terms of the deal were agreed upon just a few days before the last 6 workers were set to testify. The workers unanimously approved the settlement.

Worker Solidarity Through Administrative Process

We identify three major sets of issues that workers, organizers, and lawyers may need to think through before embarking on a legal campaign like ours: (1) the scarcity of available legal resources for the kinds of “gateway” claims made in this legal campaign; (2) the strength of the agency process; and (3) the strength of organizing among the workers.

Scarce Legal Resources. There is a significant mismatch between the legal needs of workers in the low-wage sector and the supply of lawyers available to pursue such claims. Break violations and off-the-clock work without pay are widespread conditions in the low-wage sector (Annette Bernhardt et al., Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America’s Cities (2009), http://bit.ly/m2XDf). Lawyers willing and able to take on clients who have suffered these violations are rare.

The gap between the legal needs of low-wage, immigrant workers and the available pool of qualified lawyers surfaced repeatedly in this legal campaign: (1) at the outset, when the workers did not have representation as their hearings approached; (2) during the case investigation phase, when the law students dealt with the challenges of representing a large number of Spanish-speaking workers as their first experience in legal practice; and (3) during the hearing, when the clinic team needed new legal resources to sustain the campaign. The clinic greatly benefited from the Legal Aid Society–Employment Law Center’s cocounseling, which was available because the San Francisco–based organization was pursuing initiatives in Southern California, including one with the University of California (Irvine) School of Law. That every case or campaign can be staffed in a similar fashion is unlikely.

Agency Process. At least two observations about the California agency process are worth examining through the lens of this legal campaign: first, that workers can successfully pursue their wage and hour claims through the Division of Labor and Standards Enforcement without legal representation; and, second, that groups of workers may benefit from bringing their claims together before the agency.

In this campaign the agency referred the case to the clinic, after an initial investigation. The current labor commissioner, Julie Su, is a former low-wage worker advocate and has made great strides in targeting and adjudicating wage claims in low-wage industries. She has also sought out ways to strengthen the agency’s investigation of retaliation complaints. The agency has interpreted ambiguous legal precedents so as to reinforce worker protections in the state. Further, an agency finding can offer leverage to an employee engaged in a conflict with the employer. These factors argue in favor of the use of the agency process by pro se low-wage workers.

Nevertheless, certain procedural aspects of the Berman process may limit the ability of workers to represent themselves. Workers are not likely to be able to uncover evidence of legal violations on their own, and the agency’s investigative unit, the Bureau of Field Enforcement, is overwhelmed by wage claims and underresourced by the state. In this case, even when workers had lawyers, the agency was able to enforce its own subpoena only through an internal process but not in state court, due to resource constraints. Because employers generally possess the most important and probative documents, having a court-enforced mechanism available in situations where an employer willfully ignores a Division of Labor Standards Enforcement–issued subpoena would be beneficial.

In the course of the hearings, the lack of constraint placed on the defense lawyer’s examination of vulnerable workers confronting their bosses also called into question whether workers can effectively proceed pro se before the agency. Extensive or
With regard to worker solidarity, what remains unclear is whether the Berman hearing process effectively accommodates large groups of workers with common claims against an employer (unlike the Bureau of Field Enforcement process, which has been used successfully in particular industries during the administration of Gov. Jerry Brown and Commissioner Su). The hearing process is individualized and designed to facilitate collective solidarity (William H. Simon, Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism, 46 William and Mary Law Review 127, 139–40 (2004)). The National Labor Relations Board has been charged with protecting concerted activities among workers but is constrained by an active effort in Washington, D.C., to hobble the agency’s enforcement authority (David Moberg, America’s 200-Year-Long Battle for Workplace Democracy, In These Times (Sept. 2, 2013), http://bit.ly/1gLg9BO). Class and collective action structures in state and federal courts may enhance client solidarity, or such rules may enhance the power of lawyers over clients, depending on the consciousness and intentionality of counsel and courts (Judith Resnik, Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers, 125 Harvard Law Review 78 (2011)). However, as demonstrated in this campaign, workers may achieve a degree of solidarity and a modestly successful litigation outcome even through an imperfect adjudication process. In this case, lawyers and agency personnel creatively modified the legal process to meet the needs of low-wage workers. For cases involving groups of workers, the flexibility of the process may be a more significant factor in an advocate’s choice of forum than is commonly understood.

Organizing. The union involved in this legal campaign was committed to improving overall conditions in the hospitality industry by (1) winning union contracts, (2) supporting workers at nonunion hotels, and (3) through policy initiatives in particular localities. The union did not view these approaches as mutually exclusive. Indeed, just before the final settlement of these claims was reached, Unite Here Local 11 provided key support for the passage of a living-wage referendum applicable to large hotels in Long Beach. Several of the worker-leaders from the Hilton participated in the living-wage campaign. And several of the workers had participated in convincing universities to “divest” from HEI’s equity funds.

The union did not win a union contract at the Hilton Long Beach, and HEI appears to be selling the property. But the union’s larger strategic vision embedded this legal campaign in several wider organizing campaigns, both across the hospitality sector in Long Beach and nationally at HEI-owned hotels. The paid organizers of the union were key figures in keeping the group of workers together during the drawn-out administrative process, helping workers gather documents and marshal facts for the legal case, and putting pressure on the employer and agency to secure a positive outcome for the workers. Because of the organizing strength, the legal campaign advanced key goals for workers beyond the individual settlement amounts that ran from a few thousand dollars to tens of thousands of dollars per worker. Consistent and well-resourced organizing was the essential factor in this campaign, as lawyers adapted the agency process to advance worker solidarity.

This campaign required the endurance and courage of workers, the commitment of organizers, and the labor and time of pro bono lawyers and law students. A group of long-term, low-wage employees at the Hilton Long Beach received significant amounts of remedial pay. Otherwise submerged employer practices with regard to meal and rest breaks were brought to the surface by an intrepid group of law students. An agency adapted its hearing process to accommodate workers with common claims and an interest in collective, rather than individual, justice. This is one story in a larger, longer struggle for low-wage workers’ rights in the context of untethered capital and global inequality.

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