

THE RECORDER

LABOR & EMPLOYMENT LAW

Construction's Wage and Hour Woes

In an industry rife with violations, holding employers accountable can be a challenge

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The construction industry is rife with wage and hour violations, especially because many companies fail to accurately record their employees' hours. Enforcing labor laws against the industry is, however, uniquely challenging. This is due to several factors, including a safe haven carved into the California Labor Code for unionized employers, employee language barriers, and a work schedule that varies daily, resulting in significant opportunities for retaliation. There are strategies for overcoming those barriers and also courses of action for construction employers who seek to avoid costly litigation.

California and federal law clearly prohibit failure to pay for employer-mandated loading and transport time. All employer-mandated travel that occurs after the employee's first reporting location must be compensated at the regular rate of pay (or overtime rate, if applicable). If the employee works more than five hours, California law requires the employer to permit a 30-minute, uninterrupted meal break or compensate the employee for an "on-the-job paid meal period." In addition, the employee is entitled to a 10-minute rest break for every four hours of work or major fraction thereof.

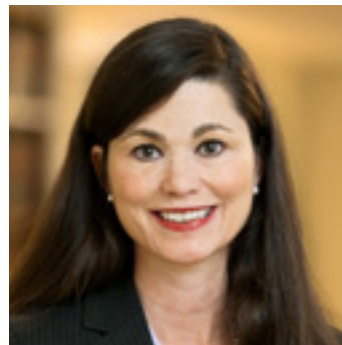
Violations of these standards are common in the construction industry. A 2013 study of 1,194 workers in Texas found that 22 percent were not paid for all of the work they did, and 50 percent received no overtime pay, even when they worked up to 80 hours a week. In another study of low-wage work-

ers in three large U.S. cities, researchers found that more than 65.5 percent of construction workers were required to work hours off-the-clock, over 54 percent were denied meal breaks, and 66 percent were not paid overtime.

In a recent case, three unionized Latino construction workers were required to arrive at their employer's Bay Area yard one to three hours before the official start time of their scheduled shifts. They performed maintenance on the trucks, loaded equipment, and drove to the job sites — but were not paid for their time until they actually reached the job site. They and other laborers were often denied meal or rest breaks. At the "end" of the shift, these laborers reloaded the equipment and returned it to the yard — often resulting in another hour or more of unpaid work. After years of putting up with this treatment, the three men finally sued — but only after their employer repeatedly failed to make changes and a supervisor yelled racist remarks at one of them. Their class action settlement recently received preliminary approval by the United States District Court for the Northern District of California.

LEGAL AND PRACTICAL OBSTACLES TO ENFORCEMENT

Legal and practical obstacles make enforcement of labor protections for construction workers difficult. Accurate timekeeping



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is rare. Even companies that use time clocks or sign-in sheets are likely to miss time when the worker is not at the job site — because he is loading or transporting equipment, for instance. Further, because start times are so often unrecorded, it is impossible for the site foreman to determine at what point in the shift to allow rest and meal breaks. Tight profit margins and highly competitive bidding are further incentives to discourage workers from taking rest or meal breaks while at the job site, or requiring them to spend some hours working off-the-clock.

Fear of retaliation is a powerful force preventing workers from reporting violations and seeking remedies. A collective action under the federal Fair Labor Standards Act, for example, requires workers to "opt-in" affirmatively to the lawsuit — which many may not do for fear of retaliation, threats to their future employability, and employer calls to Immigration and Customs Enforcement. Because schedules for construction change daily, a worker who demands a lunch break risks not being assigned for work the following day.

This means a lost day of pay that week, placing a significant financial penalty on reporting violations.

Roughly one-quarter of construction workers are foreign-born, the majority of whom are Hispanic and not fluent English-speakers. In the case described above, the company required its Spanish-speaking workers to sign “safety sheets” in English prior to receipt of their paychecks, falsely confirming that they had taken all rest periods and been paid all wages due. The employer unsuccessfully attempted to use these safety sheets, as well as wage “discrepancy reports,” to defeat the plaintiffs’ claims.

In addition to practical barriers, federal and state labor laws are complex, with varying exemptions and mixed effectiveness in the remedies they offer. For example, construction workers covered by a “valid” collective bargaining agreement containing certain provisions are exempt from some California Labor Code protections. These exemptions only apply if the CBA expressly provides for wages, working conditions, overtime, and meal periods. Surprisingly, whether a particular CBA is “valid” has rarely been addressed by appellate decisions.

Assuming that a worker is covered by a valid CBA, he would not need to rely on the Labor Code provisions. If, however, the worker’s union is unable or unwilling to hold the employer accountable, then the CBA’s protections are virtually useless. A lawsuit to enforce the CBA provisions under California law would be preempted by §301 of the Labor Management Relations Act, even if brought in state court.

Federal FLSA claims can also pose challenges. Depending on the circuit’s view of “gap time” claims, an employee’s recovery may be more limited than what California law provides. “Gap time” claims are claims for uncompensated hours worked during a week in which the employee is not entitled to federal overtime (because he worked 40 hours or less), and the average wage for that pay period (including compensated and uncompensated hours) exceeds the federal minimum wage of \$7.25 an hour.

Because construction wages are often significantly higher than the federal minimum wage (the mean hourly wage for construction workers in California is \$20.57), if a court rejects “gap time” claims, then the federal recovery is likely to be less than that which could be recovered under California law, making costly litigation over federal claims not worthwhile. Thus far, the Ninth Circuit Court of Appeals has declined to de-

cide how to value “gap time” claims. Other circuits are divided on whether gap time claims are cognizable. The Second, Fourth, and District of Columbia Circuits have held that gap time claims are not recoverable, while the claims have been accepted in the Tenth Circuit and by a district court in the First Circuit.

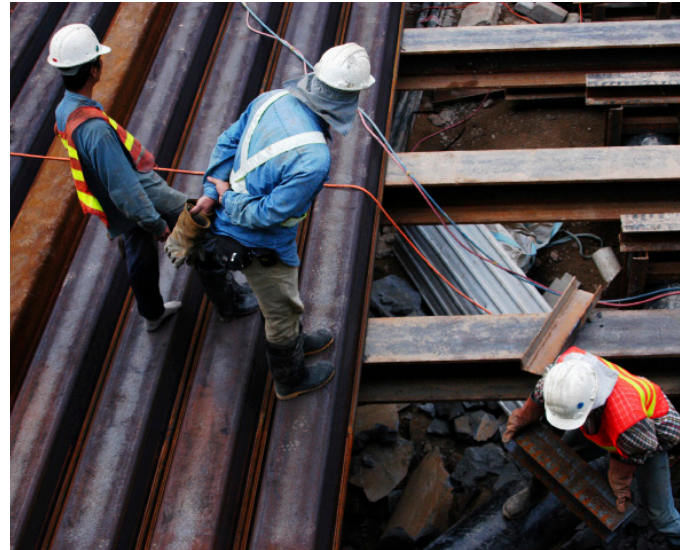
Outside of the FLSA collective action, workers may pursue a Rule 23 class action to enforce state labor laws in federal court, but may have difficulty proving a common question of law or fact after *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). Absent a clear, unlawful policy that affects all workers, employers will likely argue that a multitude of individualized factors affects the determination of liability in each claim and destroys commonality. Meal and rest break claims can be especially challenging for construction workers because they regularly work at different job sites, under different foremen, and with different levels of supervision.

ENSURING ENFORCEMENT OF WAGE AND HOUR LAWS

While skirting the law may save employers money in the short term, in the long run they face liability for unpaid wages, civil penalties, attorneys’ fees, and court costs, despite the obstacles discussed above. In fact, under the California wage and hour statutes, penalties and interest plus attorneys’ fees and costs can quickly dwarf lost wages.

One efficient and reliable way to avoid costly litigation is to implement electronic time-keeping systems. New technology permits employees to clock in and out from a mobile device, so that working time is counted as soon as an employee reaches the first reporting location. These electronic systems also facilitate tracking of rest and meal breaks. Employers can further shield themselves from liability by providing translations of all documents and waivers provided to workers with limited English proficiency.

Employees can protect their rights by filing a grievance with their union or a complaint with California’s Division of Labor Standards Enforcement, or suing. To help prove their claims, employees should keep



a contemporaneous journal recording all possible violations, as well as any perceived instances of retaliation, and as much documentation as possible.

Labor commissioners and agencies have recently prioritized improved enforcement of labor protections in the construction industry. Enforcement of these protections is essential to the continued viability of law-abiding employers, who are otherwise unable to compete with employers who disregard basic labor standards like overtime and meal and rest breaks. Construction is a highly skilled and labor-intensive industry. Injuries are common, and workers often must retire earlier than in other industries. Common sense dictates and research supports that denial of rest breaks greatly increases the risk of workplace injuries — already a significant problem in the construction industry. Without rigorous enforcement, construction workers and employers face a race to the bottom — where unscrupulous companies out-compete those that adequately provide for their employees, and employees cannot maintain a sustainable and rewarding career in the industry.

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