

# From Weight Checking to Wage Checking: Arming Workers to Combat Wage Theft

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## I. Wage Theft

Wage theft refers to employer practices that result in employees taking home less than they are legally entitled to under federal and state law: paying below the legal minimum; not paying for time worked by having workers work “off the clock” before checking-in, after clocking-out, or by requiring work during unpaid break time; not paying for overtime work at the statutory overtime rate; expropriating tips that should be the employee’s; or, just not paying at all. In tandem with the massive shift in the economy from well-paid manufacturing jobs to low wage service jobs, wage theft has emerged in the public forum as a significant economic and social problem.<sup>1</sup>

In popular culture, wage cheating is an aberration, characteristic of fly-by-night sweatshops: enterprises that lack a business address, that may not be registered and that overwhelmingly employ undocumented workers on a casual basis. There are such enterprises.<sup>2</sup> But, these employers do not define the cohort of workers subject to wage theft. David Weil has

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<sup>1</sup> Marc Doussard, *DEGRADED WORK: THE STRUGGLE AT THE BOTTOM OF THE LABOR MARKET* (2013); Fast Food Forward, *NEW YORK’S HIDDEN CRIME WAVE: WAGE THEFT AND NYC’S FAST FOOD WORKERS* (2013); Ruth Milkman, Ana Luz González, and Peter Ikeler, *Wage and hour violations in urban labor markets: a comparison of Los Angeles, New York and Chicago*, 43 *Indus. Rel. J.* 378 (2012); David Weil, *IMPROVING WORKPLACE CONDITIONS THROUGH STRATEGIC ENFORCEMENT* (2010); Annette Bernhardt, Diana Polson, and James DiFilippis, *WORKING WITHOUT LAWS: A SURVEY OF EMPLOYMENT AND LABOR LAW VIOLATIONS IN NEW YORK CITY* (2010); Zach Schiller and Sarah DeCarlo, *INVESTIGATING WAGE THEFT: A SURVEY OF THE STATES* (Policy Matters Ohio 2010); Annette Bernhardt, *et. al.*, *BROKEN LAWS, UNPROTECTED WORKERS: VIOLATION OF LABOR LAWS IN AMERICA’S CITIES* (2009); Steven Greenhouse, *THE BIG SQUEEZE* (2008); Kim Bobo, *WAGE THEFT IN AMERICA* (2009); Catherine Ruckelshaus, *Labor’s Wage War*, 35 *Fordham Urban L.J.* 373 (2008).

<sup>2</sup> Marc Doussard has compared the use of casual and largely undocumented labor, often picked up on the street by small residential contractors, who conform to this model, with grocery store workers in mid-size Hispanic food markets, who do not conform to it. Marc Dousard, *DEGRADED WORK*, *supra* n. 1.

identified the employments most likely to engage in wage theft on the basis of the disproportion of federal wage and hour violations they display. These are set out in Table 1.

**Table 1.**  
**Employments Particularly Prone to**  
**Wage & Hour Violations**

Eating and drinking—Limited service (fast food)/Full service  
Hotel/motel  
Residential construction  
Janitorial services  
Moving companies/logistics providers  
Agricultural products—multiple sectors  
Landscaping/horticultural services  
Health care services  
Home health care services  
Grocery stores—retail trade  
Retail trade—mass merchants; department stores; specialty stores

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Source: David Weil, *Improving Workplace Conditions Through Strategic Enforcement 2* (2010).

In turn, these employers can be further segmented in a variety of ways, for example, by size, ownership, and control, in terms of their propensity to engage in wage theft. David Weil found that fast food franchisees were more likely to be violators than franchisor-owned outlets.<sup>3</sup>

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<sup>3</sup> David Weil, *Improving Workplace Conditions Through Strategic Enforcement* (2010). Even within a general category – residential construction, food service – there is enormous variation. The restaurant industry alone employs ten million people, 9% of the total U.S. workforce. Rosemary Batt, Jae Eun Lee, Tashlin Lakhani, *A National Study of Human Resource Practices, Turnover, and Customer Service in the Restaurant Industry 5* (January 15, 2014). This study breaks the industry down into four major categories – upscale fine dining, casual fine dining, moderately-priced, and fast food – each with its own characteristics. Nevertheless, the study reveals some areas of commonality in human resource policy, training, job longevity, and employee turnover.

Smaller employers, those with twenty or fewer employees, were more likely to violate the law,<sup>4</sup> though some large employers are not immune from the allure of cheating as successful class claims brought against Wal-Mart, the nation's largest private sector employer, evidence.<sup>5</sup>

Traditionally, a union would be expected to police an employer's adherence not only to negotiated wages and hours but to the law as well. Consequently, "Absent the presence of third party representatives, workers face substantial impediments to effectively exercising their rights."<sup>6</sup> But the employees most vulnerable to being cheated have low union density. They may have constrained alternative job opportunities due to limited language, education, or mobility; they may have limited knowledge of what their legal rights are; and, even if they do complain, they are often subject to retaliation.<sup>7</sup> As a student of midsize Hispanic food markets in Chicago observes:

Grateful or just desperate to maintain a steady income, employees in Chicago's midsize supermarkets work in environments where even the most basic components of U.S. labor law and employer behavior may be disregarded at any time....Although employees frequently work more than forty hours per week, overtime pay premiums are rare; even when employers promise to pay time and a half for overtime, the extra pay appears only episodically....

These individual employment abuses are embedded within a broader pattern of employer retribution. Workers know that if they request overtime, take allotted lunch breaks, or request vacation time to which they are officially entitled, they may be

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<sup>4</sup> Janice Fine and Jennifer Gordon, *Strengthening Labor Standards Enforcement through Partnership and Workers Organization*, 38 *Politics & Society* 552, 554-55 (2010) [hereafter Fine & Gordon]. David Weil singles out one such category of small and insular workplaces to exemplify their imperviousness to regulation – nail salons. "Many of those in the workforce are immigrants and non-English speakers, making complaining unlikely. Yet because employers are small, geographically dispersed, and under tremendous competitive pressure, it is hard to see how the WHD [wage and hour division of the U.S. Department of Labor] might systematically affect behavior". Weil, *supra* n. 3 at 76.

<sup>5</sup> See e.g., *Wal-Mart Settles 63 Lawsuits Over Wages*, N.Y. Times, Dec. 24, 2008, [www.nytimes.com/2008/12/24/business/24walmart.html?\\_r=0&pagewanted=print](http://www.nytimes.com/2008/12/24/business/24walmart.html?_r=0&pagewanted=print); *Wal-Mart Loses Unpaid Overtime Case*, Associated Press, Feb. 11, 2009, [www.cbwnnews.com/2100-201\\_162-533818.html](http://www.cbwnnews.com/2100-201_162-533818.html); *Wal-Mart in \$86 Million Settlement of Wage*, Reuters Bus. & Fin. News, May 12, 2010, [www.reuters.com/assets/print?aid=USTRE64B3MG20100512](http://www.reuters.com/assets/print?aid=USTRE64B3MG20100512).

<sup>6</sup> David Weil, *supra* n. 3 at 84.

<sup>7</sup> *Id.* at 86-87. See e.g., Ben Shapiro, *Organizing Immigrant Supermarket Workers in Brooklyn: A Union-Community Partnership*, in *NEW LABOR IN NEW YORK* Ch. 2 (Ruth Milkman & Ed Ott eds., 2014).

furloughed, dismissed, or reassigned within the workplace.<sup>8</sup>

This depiction has been more finely tuned by Annette Bernhardt, Michael Spiller, and Diana Polson who studied the prevalence of and reasons for wage theft in three major cities.<sup>9</sup> They first addressed the group they identified as being most at risk: frontline workers in low wage occupations. These tended to be more often female (55.6%) than male (44.4%); overwhelmingly minority (96.6%); and, contrary to popular belief, mostly either citizens or documented aliens (61%). Also contrary to popular belief that the problem is mostly of exploited youth, the age distribution was fairly even across quintiles starting at age 18-25 to age 46+. The occupations at risk matched up well with the employing enterprises Weil abstracted from the data of wage and hour violation: cleaning and maintenance (18.5%); construction, installation, and repair (16.5%); food preparation and service (16.2%); home health and child care (14.7%); and sales (11.1%) – to list the industries aggregating into the majority of such employments (77%). The median wage of those at risk (in 2008 dollars) was \$8.15 per hour. In all, this captures the 1.64 million workers in these three cities who were deemed at risk of wage theft. They constitute 15% of the total workforce in these cities and about 31% of the frontline workers in them.

Bernhardt, Spiller, and Polson further estimated the percentage of at-risk workers who actually experienced a violation in the week previous to their survey, to get some notion of the prevalence of the practice. (Those at risk of a particular violation would not in every case be 100% of the at risk population as, for example, workers who work fewer than 40 hours per week would not be at risk of unpaid overtime.) A culling of their data is set out in Table 2.

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<sup>8</sup> Marc Doussard, *supra* n. 1 at 121.

<sup>9</sup> Annette Bernhardt, Michael Spiller and Diane Polson, *All Work and No Pay: Violations of Employment and Labor Laws in Chicago, Los Angeles and New York City*, 91 *Social Forces* 725 (2013).

**Table 2**  
**Wage and Hour Violation Rate in Prior Week (2008)**  
**(Chicago, Los Angeles, New York City)**

<b>Violation</b>	<b>Percent of workers at risk of violation</b>	<b>Percentage of at-risk workers with a violation</b>
Worker was paid below the minimum wage	100.0	25.6
Worker had unpaid or underpaid overtime	24.9	75.3
Worker not paid for off-the-clock work	24.8	70.6
Worker did not receive a paystub	100.0	56.7
Worker was paid late	100.0	4.3
Worker experienced illegal retaliation by employer for most recent complaint or for an organizing effort in the last year	12.0	43.7

Source: Annette Bernhardt, Michael Spiller, Diana Polson, *All Work and No Pay: Violations of Employment and Labor Laws in Chicago, Los Angeles, and New York City*, 91 *Social Forces* 725, Table 2 at 734 (2013).

About two thirds of the at-risk workers surveyed experienced at least one pay-related violation of law the week previous to the survey. Extrapolating these data, Bernhardt, Spiller, and Polson estimate that in any given week, 1.1 million workers in these cities experience a pay-based violation. Inasmuch as the median minimum wage violation came to \$1.52, a not inconsequential sum to a worker at or on the cusp of the minimum wage, they estimate that in these cities wage theft amounts to over \$56 million in lost, that is, stolen wages a year.<sup>10</sup>

That wage theft is so prevalent should not surprise. It has long been the stuff of economic thought that employers will choose to violate minimum wage or other labor law when the benefits of non-compliance outweigh the likelihood of being caught and the cost of

<sup>10</sup> David Weil estimates that “there are about 130 violations for every one [Department of Labor Wage and Hour Division] complaint” though these vary across industries. Weil, *supra* n. 3 at 84. The average back wage per employee in fast food paid by employers as a result of the DOL inspectorate’s intervention was \$197. *Id.* at 47.

compliance.<sup>11</sup> So it is here, as all students of the phenomenon agree.<sup>12</sup> The employer's proclivity to steal is exacerbated by the fragmentation of management and control by franchising and highly competitive outsourcing and by the evaporation of union representation. That coupled with weak enforcement makes the alternative of non-compliance an attractive business model. As the consequence of a refusal to pay according to law – if the employer is found out and charged – is an agreement to pay what it would otherwise have been obligated to pay, there is no reason why the employer would not cheat as the consequence of being caught, economically speaking, would render the employer no worse off than having complied to begin with.

## II. Proposals to Address to Wage Theft

As matters now stand, apart from the possibility of enforcement of wage claims by individual legal action, a chimera for the vast majority of low-wage workers, absent effective class actions,<sup>13</sup> the federal and state governments have assumed the legal obligation to eradicate wage theft primarily by reliance on systems of labor inspection, most often triggered by employee complaint.<sup>14</sup> This system has not proven equal to the task.<sup>15</sup> Part of the problem may

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<sup>11</sup> George Stigler, *The Optimum Enforcement of Laws*, 78 J. Political Economy 526 (1970).

<sup>12</sup> Bernhardt *et. al. supra* n. 9 at 77 (on “the presence of a competitive model in which employers treat legal compliance as a variable to be calibrated in the reduction of labor costs” as explaining the attractiveness of wage theft). This was put by Marc Doussard, on the basis of his study of Chicago, in blunter terms: “With a low ratio of inspectors per establishment and minimal penalties for non-compliance, evading the law is not a covert competitive tactic in service industries – it’s a basic, uncontested business practice on public display.” Doussard *supra* n. 1 at 233. David Weil has placed these employments in the context of a more general resort to what he terms the fissurization of work, the devolution of employment to cohorts of contractors who compete on ever lower wage and workplace standards. David Weil, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* (2014) [hereinafter Weil’s *WORKPLACE*].

<sup>13</sup> Natiya Ruan, *What’s Left to Remedy Wage Theft? How Arbitration Mandates that Bar Class Actions Impact Low Wage Workers*, 2012 Mich. St. L. Rev. 1103, 1115-1124.

<sup>14</sup> David Weil, *Crafting a Progressive Workplace Regulatory Policy: Why Enforcement Matters*, 28 Comp. Lab. L. & Pol’y J. 125 (2007).

<sup>15</sup> See U.S. Gov’t Accountability Office, *DEPARTMENT OF LABOR WAGE AND HUMAN DIVISION NEEDS IMPROVED INVESTIGATIVE PROCESSES AND ABILITY TO SUSPEND STATUTE OF LIMITATIONS TO BETTER PROTECT WORKERS*

be explained by the way the inspectorate is structured and functions.<sup>16</sup> Part is explained by the unwillingness of Congress and a great many states to devote adequate resources to inspection.<sup>17</sup> Part, beyond the scope of this discussion, lies in the laws' weaknesses.<sup>18</sup>

Proposals have been made for the better prioritization of inspection, that is, the devotion of resources to targeted industries and workplaces, and for addressing the responsibilities of companies further up the supply chain – that is, the enlisting of contractors to monitor the behavior of their subcontractors.<sup>19</sup> The latter anticipates proposals for a broader role for public-private partnerships, dealt with below. Apart from proposals directed to the inspectorate alone, however, two strands of reformist thought and experimentation respectively have emerged. The first, which need not be dwelt upon at length, seeks to enlist employers in self-regulation. The second turns elsewhere in civil society, outside the firm and outside of government.

### A. Self-Regulation

The basic idea is to get employer “buy-in” to the laws' obligations. The archetypical example can be found in the corporate experience in the United States with anti-discrimination law, in particular with the initially uncharted sea of the prohibition of sex discrimination. The

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AGAINST WAGE THEFT (June, 2009), and *GAO's Undercover Investigation: Wage Theft of America's Vulnerable Workers: Hearings Before the Committee on Education and Labor*, 111th Cong., 1st sess. (2009).

<sup>16</sup> David Weil has comprehensively reviewed the manner in which the U.S. Department of Labor functions and has made a set of recommendations more systematically to address the problem of wage theft. David Weil, *supra* n. 3.

<sup>17</sup> As of 2010, there was a total of 659.5 state inspectors nationwide devoted to enforcing minimum wage and selected employee-protective laws. Zach Shiller and Sarah DeCarlo, *INVESTIGATING WAGE THEFT: A SURVEY OF THE STATES* (2010). On the efforts California has made *see* State of California, *Report of the Division of Labor Standards Enforcement* (May, 2013). According to one press account, as of the end of July 2013, New York's Labor Department had a backlog of 14,000 wage and hour complaints. Jim Dwyer, *Exhausted Workers Recall Minimal Efforts to Enforce a Minimum Wage Law*, N.Y. Times, Nov. 8, 2013 at A-24.

<sup>18</sup> Eunice Hajunhye Cho, Tia Koonse and Anthony Mischel, *HOLLOW VICTORIES: THE CRISIS IN COLLECTING UNPAID WAGES FOR CALIFORNIA'S WORKERS* (2013) (advocating a wage lien based on experience in under Wisconsin law).

<sup>19</sup> David Weil and Carlos Mallo, *Regulating Labour Standards via Supply Chains: Combining Public/Private Interventions to Improve Workplace Compliance*, 45 *British J. Indus. Rel.* 791 (2007); David Weil, *Public Enforcement/Private Monitoring: Evaluating a New Approach to Regulating the Minimum Wage*, 58 *Indus. & Lab. Rel. Rev.* 238 (2005).

story, told by Frank Dobbin,<sup>20</sup> is of how human resource managers persuaded their companies to adopt practices these managers developed that would foster the integration of women into the firm, as being in the firm's long-term interest, how the courts became persuaded that what the managers devised was what the law required, and how, incidentally, those dual moves worked to enhance the power of human resource managers.

This singular success evidences the ill fit of a self-regulating, “new governance” approach to deal with wage theft. A business model rooted in the economic benefits of non-compliance is impervious to blandishment. Absent an economically powerful “or else” – or something else – there is no incentive to abandon it. (If cheating workers is normative in the particular market the employer may not be able to comply with the law without placing itself at a competitive disadvantage.) That something else could be a more effective system for detecting and remedying violations coupled with more serious penalties. Or it could be rooted in an effective voice for employees in the workplace monitoring employer behavior; that is, unionization, or something union-like. On the latter, Cynthia Estlund, who has explored the idea of self-regulation in detail, has acknowledged that employee representation may well be an ineluctable element of effective intra-mural regulation; but that that element is notably absent in this setting and extremely difficult to achieve.<sup>21</sup>

## B. Private Initiatives

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<sup>20</sup> Frank Dobbin, *INVENTING EQUAL OPPORTUNITY* (2009).

<sup>21</sup> Cynthia Estlund, *REGOVERNING THE WORKPLACE* 148-149 (2010).

A requirement of independent employee representation would sharply raise the perceived cost of opting into the self-regulatory system; the resulting costs might well outweigh the rewards of self-regulation as long as the default regulatory regime entails such a low risk and cost of enforcement. For most U.S. employers most of the time, the expected cost of public enforcement may be too low to justify taking the risk that they associate with independent employee representation. Without a greater background threat of enforcement and sanctions, it will therefore be difficult to induce most employers to take meaningful steps toward independent employee representation within a system of self-regulation.



Private initiatives have been mounted to deal with wage theft.<sup>22</sup> These often involve community-based “worker centers” that counsel workers, mostly immigrants, on their rights and assist them in filing claims.<sup>23</sup> They also involve unions, notably in the construction trades, that have enlisted unionized employers to contribute funds to joint labor-management committees established under the Labor Management Cooperation Act of 1978<sup>24</sup> to reduce wage-cheating by non-unionized competitors. These funds, jointly administered, can be used to hire staff to monitor non-union employers, to serve as a channel to the inspectorate, or to pressure contractors not to deal with wage violating subcontractors. Unions have also cooperated with worker centers; they have the language ability, access to the affected low wage employees, and, critically, the trust of the target community. But, the basic idea driving these various initiatives is to gain better access to affected workers, to educate them about their legal rights, to secure information about the employer’s practices, and to summon the labor inspectorate’s enforcement by filing complaints.

As all students of the problem agree these are second best alternatives to collective representation. A union that represents the workers as their collective bargaining agent is ensconced within the firm; it draws its power from those it represents. It can require the

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<sup>22</sup> These are discussed by Catherine Ruckelshaus, *Labor’s Wage War*, *supra* n. 1 at Pt. II, at greater length, by Fine & Gordon, *supra* n. 4, and by several contributors to *NEW LABOR IN NEW YORK* (Ruth Milkman & Ed Ott eds., 2014).

<sup>23</sup> Steven Greenhouse, *A Union in Spirit: Worker centers bring together immigrants where traditional labor hasn’t. The result? Back pay, rest breaks and self-respect*, N.Y. Times, Aug. 11, 2013 at B-1. See generally, Marc Doussard, *supra* n. 1. According to a letter sent by the chairman of the House Committee on Education and the Workforce and the chairman of House Subcommittee on Health, Employment, Labor and Pensions to the Secretary of Labor on July 23, 2013, there are at least 139 “worker centers” in 32 states. These are “ ‘community-based and community-led organizations that engage in a combination of service, advocacy, and organizing to provide support to low-wage workers.’ ” Gayle Cinquegiani, *House Republicans Ask Perez to Clarify LMRDA Filing Terms for Worker Centers*, DLR No. 148 (August 1, 2013) at A-13. These House leaders claimed that worker centers are labor organizations that should be required to file reports with the Secretary of Labor under the Labor Management Reporting and Disclosure Act (LMRDA), a characterization, and consequence, worker centers reject. The letter can be found at <http://op.bna.com/dlrcases.ns/r?Open=gcii-9a6n2q>.

<sup>24</sup> 20 USC § 175(a).

employer to produce the names and addresses of its employees, their wages, hours, and all other information in the employer's possession that will enable the union to bargain for them and present their grievances for adjustment.<sup>25</sup> The union's agents may have direct access to the worksite, "for reasonable periods at reasonable times" to investigate working conditions.<sup>26</sup> So, too, might a government agency, but, unlike a union, a governmental agency is subject to the fourth amendment: it may be required to secure a warrant to inspect<sup>27</sup> and might be liable for the violation of the target's constitutional rights. Labor-management cooperative committees and worker centers as private actors have neither representational rights nor governmental power. Consequently, they have no legal right of access to the workers or the workplace.<sup>28</sup>

### C. Public-Private Partnership

Janice Fine and Jennifer Gordon have essayed a system of public-private partnership. They propose that public interest groups – worker centers and unions – augment the labor inspectorate by being given a clear role in the detection of violators.<sup>29</sup> One legal possibility is to

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<sup>25</sup> See generally, Robert A. Gorman & Matthew Finkin, LABOR LAW ANALYSIS AND ADVOCACY § 20.5 (2013).

<sup>26</sup> *Id.* § 20.5 at 661 (reviewing authority).

<sup>27</sup> See generally, 5 Wayne LaFave, SEARCH AND SEIZURE § 10.2 (5th ed. 2012). See e.g., *Patel v. City of Los Angeles*, 738 F.3d 1058 (9<sup>th</sup> Cir. 2013) (en banc) (holding unconstitutional a city ordinance allowing warrantless inspection of motel guest records); *Perez v. Blue Mountain Farms*, 961 F.Supp.2d 1164 (E.D. Wash. 2013) (denying the DOL an injunction requiring access by the inspectorate to workers in sheds, as seemingly authorized by the Migrant and Seasonal Agricultural Worker Protection Act, because of fourth amendment constraint).

<sup>28</sup> Fine and Gordon note that joint labor-management monitoring of construction contractors has been hobbled by the power of contractors to refuse access. Fine & Gordon, *supra* n. 4 at 565. The International Transport Workers Federation (ITF), a federation of national maritime unions, has established a set of standards that it insists are applicable whether or not the ship owner is a signatory to a domestic union contract. ITF inspectors routinely come aboard newly arrived ships, particularly those flying flags of convenience, to interview the crew and observe living conditions. See Nathan Lillie, A GLOBAL UNION FOR GLOBAL WORKERS, 70-76 (2006); see also Leon Fink, SWEATSHOPS AT SEA, 188-194 (2011). Absent contractual authorization, it has no legal right to do so. A captain may, figuratively speaking, have the IFT inspector pitched overboard. But the sanction the ITF relies on to secure compliance is sympathetic action by dock workers which, lawful or not, by causing delay, may be more costly than allowing the inspector access and dealing with any problem the inspector presents. The ITF's inspection program is a paradigmatic case of self-help, enabled, however, by a unique condition of strategic workplace situation.

<sup>29</sup> Fine & Gordon, *supra* n. 4 at 559.

“deputize” these groups to inspect.<sup>30</sup> Such would scarcely be radical, they note, pointing to the deputization of humane societies to inspect private premises to assure that animals have adequate food, shelter, and water.<sup>31</sup> They doubt the political, not the legal feasibility of this delegation. But a word on law here is a useful predicate for the proposal to be essayed later on.

The deputization of public police authority to private parties to redress animal cruelty goes back to 1829 and became widely followed.<sup>32</sup> There is no question but that the persons so clothed are constrained by the constitution as any other public authority would be.<sup>33</sup> Thus, the legal aspects of this idea that give pause are the constitutional constraints on entry for inspection and the potential for liability should these be breached.

Fine and Gordon point instead to two insuperable political obstacles. First, opposition from the political right who would see it as an opening wedge for unionization. A far more modest proposal merely to enlist community groups to report wage theft in New York was denounced as “ ‘government-approved vigilantism’ .”<sup>34</sup> Far greater stridency would be expected in response to any proposed deputization.

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<sup>30</sup> *Id.* at 561.

<sup>31</sup> *Citing Hand v. Stray Haven Humane Society*, 799 N.Y.S.2d 628 (App. Div. 2005).

<sup>32</sup> Elizabeth Rumley & Rusty Rumley, *Enforcing Animal Welfare Statutes: In Many States, It's Still the Wild West*, 21 San Joaquin Agric. L. Rev. 21 (2011-2012).

<sup>33</sup> *See e.g.* *Allen v. Penn. Soc. for Prevention of Cruelty to Animals*, 488 F.Supp.2d 450 (M.D. Penn. 2007); *Kaufmann v. Penn Soc. for Prevention of Cruelty to Animals*, 766 F.Supp.2d 555 (E.D. Pa. 2011). *See also* Comment, *Private Police Forces: Legal Powers and Limitations*, 38 U. Chi. L. Rev. 555 (1971).

<sup>34</sup> Fine & Gordon *supra* n. 4 at 572, quoting the criticism that Americans for Limited Government made of New York's “Wage Watch” program. New York's Department of Labor had proposed to enlist community groups in reporting wage theft just as we might expect the community to report other crimes. *See* New York State Dept. of Labor, LABOR DEPARTMENT INITIATIVE EMPOWERS ORDINARY PEOPLE TO JOIN THE FIGHT AGAINST WAGE THEFT, [http://www.labor.ny.gov/pressreleases/2009/Jan26\\_2009.htm](http://www.labor.ny.gov/pressreleases/2009/Jan26_2009.htm). This resulted in the charge of “vigilantism” by opponents.

Second, formal delegation would inevitably break on the shoal of resistance from the inspectorate.<sup>35</sup> More than hostile foot dragging (or loss of “turf”) is involved, for legal deputization would import obligations of training, supervision, and coordination adjunct to the loss of control that might complicate the inspection process.

From what appears, what they propose is simply greater reliance on these private agencies in a more structured and ongoing way, not as delegates of government, but to serve as a community liaison with it. These civil institutions would be doing no more than what they currently do or could do on an *ad hoc* basis, save to do it more systematically. That sort of reliance would not necessarily render the private agency an extension of the state and so would avoid the constitutional limitations that apply were they to be deputized by or acting directly at the behest of public authority.

These various proposals, directed to the inspectorate or to civil bodies, call for more effective means of reaching the workforce from the outside, that is, in a proactive address to an essentially passive workforce. Perhaps because most of these workplaces are small and employ a large proportion of workers vulnerable to exploitation and to retaliation, rather little of this takes up the idea of power flowing to the workers themselves. Indeed, the work setting’s relative imperviousness to unionization rules out, up front, so to speak, the most obvious and effective monitoring system, one that draws its authority not from delegation by the state, but by those most immediately affected. Yet should it not be a larger social goal, transcending adherence to wage and hour law, to clothe these, the marginalized working poor, with agency, with the

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<sup>35</sup> Fine & Gordon, *supra* n. 4 at 569, reporting the strong resistance of the U.S. Department of Labor and the union representing the federal inspectorate to the idea of deputization. They observe in conclusion: “we know that organizational cultures can be major barriers to innovation....[C]hange at the top will never be enough....Our conversations with labor-standards administrators in New York, New Jersey, and California affirm the centrality of the challenge of organizational culture.” *Id.* at 573.

capacity to act on their own behalf?<sup>36</sup> David Weil has argued that the emergence of these community-based organizations “illustrates the importance of building individual and collective resolve to exercise voice as an essential foundation for improving the climate for exercising voice and longer-term efforts to represent workers.”<sup>37</sup> Is our law so impoverished that the choice given employees is: either collective bargaining or nothing?

### III. An Alternative Model: Checkweighmen Law

For as long as there has been wage labor there has been wage theft.<sup>38</sup> In the high middle ages, some English employers could not resist the temptation to pay their workers in the goods they made, debasing payment by fobbing off the shoddy or unmerchantable. In England, this was addressed piecemeal starting in the late 15<sup>th</sup> century and then, after these discrete laws piled on one another, in the Truck Act of 1831<sup>39</sup> requiring that all wages be paid in the coin of the realm. Baron Bramwell addressed the argument that, if required to pay in money, an employer could just as well refuse to pay at all. “The answer,” he opined, is “that such a cheat is too barefaced, and would certainly be successfully resisted; while more or less of inferiority in the quality or value of goods might be endured, or, if contested, would give rise to more doubtful inquiries.”<sup>40</sup> The United States followed suit a half century later in a spate of state wage

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<sup>36</sup> See generally, Joshua Cohen & Joel Rogers, ASSOCIATIONS AND DEMOCRACY (1995).

<sup>37</sup> Weil’s *Workplace*, supra n. 12 at 256.

<sup>38</sup> The most famous strike in Pharonic Egypt was over the accumulation of unpaid wages. William Edgerton, *The Strikes in Ramses III’s Twenty-Ninth Year*, 10 J. Near Eastern Studies 137 (1951). Jewish law required the prompt payment of the wages of day laborers, by sundown. Deut. 24:15; Lev. 10:13. The very Biblical repetition manifests a deep reality.

<sup>39</sup> 1 and 2 Will. IV, Ch. 37. “Truck” being common usage for barter or exchange.

<sup>40</sup> *Archer v. James*, 121 Eng. Rep. 998, 1006 (Exch. Ch. 1859) (referencing Adam Smith’s WEALTH OF NATIONS, book 1, ch. 10 in support of the law).

payment laws requiring regular payment in money, not company scrip or goods, paid at regular intervals and paid out in full on termination of employment.<sup>41</sup>

One industry that was especially prone to wage cheating in the late nineteenth and early twentieth centuries was coal mining, a critical commodity at the time. Miners were commonly paid on a piece rate basis, by the car load or the ton. Indeed, skilled miners often demanded to be paid on that basis, which, in the former case, required the volume of the car to be accounted for accurately and, in the latter, for the coal accurately to be graded and weighed.<sup>42</sup> The opportunity for the company to cheat – to underweigh or misgrade – was palpable. Cheating was universally suspected and commonly practiced.<sup>43</sup>

The legislative response throughout the coal field was the adoption of checkweighman laws. They provided in a couple of short strokes that the miners could, if they wished, select, and pay at their own expense, a weighman to check the scales and be present when the coal was weighed; sometimes they were made coadjutors with the company's weighman. The West Virginia law, first enacted in 1901 and on the books still, is fairly typical save that it extends beyond coal mining and specifies the means of selection:

Where the amount of wages paid to any of the persons employed in any manufacturing, mining, or other enterprise employing labor, depends upon the amount produced by weight or measure, the persons so employed may, at their own cost, station or appoint at each place appointed for the weighing or measuring of the products of their labor a

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<sup>41</sup> G. Patterson, Wage Payment Legislation in the United States (BLS Bull. No. 229) (1918).

<sup>42</sup> On the complexity of payment and the suspicions of the miners *see* Perry Blatz, *DEMOCRATIC MINERS: WORK AND LABOR RELATIONS IN THE ANTRACITE COAL INDUSTRY, 1875-1925* Ch. 7 (1994) and Katherine Harvey, *THE BEST DRESSED MINERS: LIFE AND LABOR IN THE MARYLAND COAL REGION, 1835-1940* Ch. 5 (“Tonnage, Turns, and Off-Takes”) (1969).

<sup>43</sup> Harvey, *id.* at 69, and Blatz, *id.* 148. *See also* Donald Miller and Richard Sharpless, *THE KINGDOM OF COAL: WORK, ENTERPRISE, AND ETHNIC COMMUNITIES IN THE MINE FIELDS* 149 (1985) (writing of the anthracite mines in Pennsylvania in the late nineteenth century). Irving Bernstein describes the “Catastrophe in Coal” in Kentucky in the late 20s and early 30s. Irving Bernstein, *THE LEAN YEARS: THE HISTORY OF THE AMERICAN WORKER 1920-1933*, 361 (1968) (“A common method of cutting wages where miners were paid by the car or the ton was the falsification of weights.”).

checkweighman or measurer, who shall in all cases be appointed by a majority ballot of the workmen employed at the works where he is appointed to act as such checkweighman or measurer.<sup>44</sup>

Table 3 lists the states that had and those that still retain these laws.<sup>45</sup> The full texts are appended at the close of this discussion.

**Table 3**  
**Check Weighman Laws**

State	Provides Explicitly For	
	Election	Access/Inspection
Alabama*		x
Arkansas	x	
Colorado	x	x
Illinois*		x
Indiana		
Kansas		
Kentucky		
Missouri*		x
Ohio		x
Oklahoma		x
Pennsylvania (anthracite)*		
Pennsylvania (bituminous)*	x	x
Tennessee*	x	x

<sup>44</sup> W. Va. Code § 21-5-8 (2014).

<sup>45</sup> I am much indebted to Paul Gatz of the Albert E. Jenner, Jr. Memorial Law Library for assembling these laws.

Texas		
Utah		x
Washington		
West Virginia*	x	
Wyoming		

Asterisk (\*) indicates provision is retained in current law.

A few of these laws were a bit more specific on the issue of the checkweighman’s access, using words such as “full access” (Alabama and Ohio) or explicitly prohibiting employer interference in access (Oklahoma, where interference was a crime, and Kentucky). A few were a bit more specific in the manner of selection: Pennsylvania’s bituminous coal law allows selection by a majority attending a meeting called for that purpose, as does Tennessee; West Virginia required an “election” *simpliciter* – all, apparently, still in effect. Colorado was more specific still: it required a secret ballot at a convenient place near the mouth of the mine and provided for intervention by the state inspector where an election was in dispute.

Some employers resisted compliance.<sup>46</sup> Sometimes the miners declined to exercise that right because they sensed no need or did not care to bear the cost.<sup>47</sup> But, from what appears, the miners thought the measure effective, nor is there reference to widespread employer obstruction. When Congress, following the demise of the National Industrial Recovery Act, stepped in specifically to rationalize the coal industry – an industry suffering in the extreme from massive overproduction, the reduction of wages to penurious levels and, even then, subject to rampant

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<sup>46</sup> Perry Blatz, *DEMOCRATIC MINERS*, *supra* n. 41 at 148; Katherine Harvey, *THE BEST-DRESSED MINERS*, *supra* n. 41 at 329-330. The Supreme Court of Tennessee held that the law was not infringed were a mine owner to close, or threaten to close the mine should the miners exercise their right to select a checkweighman. *State v. Jenkins*, 18 S.W. 249 (Tenn. 1891). This, in anticipation of what the Supreme Court would hold nearly three quarters of a century later, that the closing of an entire plant out of unwillingness to deal with a union was not a violation of the National Labor Relations Act, *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263 (1965), nor to threaten to do so. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

<sup>47</sup> Katherine Harvey, *THE BEST-DRESSED MINERS*, *supra* n. 41 at 69.



wage cheating – it included the right of miners to select a check weighman.<sup>48</sup> In a last gasp before the Court reversed its course on economic regulation, the Act as a whole was held unconstitutional,<sup>49</sup> but, as a practical matter, the issue of short weighting faded away as the mechanization of coal production eliminated tonnage payment.<sup>50</sup>

#### IV. Building on the Historical Foundation

Legislative precedent, particularly if widespread and of long-standing, evidences that what is proposed is concordant with, indeed draws deeply from the wellspring of our political and legal tradition. In this case, we have substantial body of legislation directed to a specific kind of wage theft and which addressed it by giving the workers the power to select a representative, independent of the employer and accountable to them, to see that they were being paid their due. The basic idea, more than a hundred years old and legislated throughout the coal-producing states, can scarcely be considered to be coming from left field, so to speak. The

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<sup>48</sup> Bituminous Coal Conservation Act, 49 Stat. 991 (1935) [the “Guffey Coal Act”]. Code members or district coal boards were directed to have their codes include that

Employees shall have the right of the peaceable assemblage for the discussion of the principles of collective bargaining, shall be entitled to select their own check-weighman to inspect the weighing or measuring of coal, and shall not be required as a condition of employment to live in company houses or to trade at the store of the employer.

*Id.* at 1001, Part III, § (b).

<sup>49</sup> *Carter v. Carter Coal Co.*, 248 U.S. 238 (1936). Robert L. Stern described how the *Carter Coal* case arose. Robert Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 Harv. L. Rev. 643, 664-674 (1946). He recounts a moment of drama in the trial when counsel for the coal company cross-examined Philip Murray, vice president of the United Mine Workers. The Company’s lawyer

challengingly and persistently prodded him [Murray] into giving at least one example, by name and date, of a case in which miners had been cheated through the false weighing of their coal. After some hesitation, Mr. Murray, in a low voice, told of a sixteen-year-old boy who in 1903 had been deprived of 40 per cent of the weight of his coal, of how he protested and was discharged, and how his father and entire family were immediately thrown out of their company-owned house into the street. “The name of the family evicted from their home without notice was Murray. The head of that family’s name was William. His son was Philip. I am the individual that was involved.”

*Id.* at 669 (footnotes omitted).

<sup>50</sup> Morton Baratz, *THE UNION AND THE COAL INDUSTRY* 67 (1955).

question is whether it can be adapted to contemporary circumstances. Attention should accordingly be paid to the law's substance and to its legal and political feasibility.

#### A. The Law's Substance

A modern wage checker law should address four issues foreshadowed in prior law: eligibility for selection as wage checker; the scope of the checker's authority; the manner of selection; and, the means of financing. This can be done explicitly in the law's text or effected by administrative regulation following sufficiently directive statutory guidance. The system's ends by either route are explored in what follows.

*Eligibility.* In the ordinary course one would expect unions to avail themselves of the access to employees that the law affords and would be well positioned, by their experience and available professional resources, to function as the law anticipates. Nevertheless, there is no reason to restrict the scope of employee choice to labor organizations. A wage checker could be defined as "any entity" – an unincorporated association, corporation, or partnership, a law firm, an accounting firm, a legal clinic, or even a single person (as, in fact, most of these laws contemplate) – so long as it is not subject to the control or influence of the employer or any employer-supported group or management consultancy.<sup>51</sup> As a facility, the state could, upon application, list qualified agencies. Such listing would be determinative of the agency's eligibility.

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<sup>51</sup> The Kentucky law hedged the selection of the check weighman thusly:

Provided, the person so employed has the reputation of being an honest, trustworthy, discreet and upright man. The appointment under the provision of this set of each inspector and assistant weigher shall be approved by the judge of the county court of the county wherein the same is made.

Ky. Stats. § 2738q-1 (1922). In *Jaybee Jellico Coal Co. v. Carter*, 208 Ky. 241 (1925), the mine owner objected to the court that the elected checkman was not honest, trustworthy, discreet, and upright, and was sued by the checkman for defamation.

Checkweighmen law, antedating by decades the Labor Act's principle of majority rule, assured that only one agent per each mine could be chosen. This principle, extended to any office, store, outlet, or facility, reduces any accommodative burden on the employer's part.

*Authority.* The authority of the wage checker should be straightforward. The wage checker should be entitled to the names, addresses, telephone or cell phone numbers or other contact information of the employees on whose behalf it functions; and, at its request, to copies of all records retained by the employer that contain information concerning the employees' wages and hours. This is the same information employers are commonly required by law to maintain and that federal law requires the employer to turn over to a union, were one to be in place.

In addition, the checker should be given the authority to enter the premises to inspect records and to conduct inspections of the workforce in a reasonable manner at a reasonable time, including access to the employees in non-work areas on non-work time. Again, this is the same access that federal law provides a union were one to be in place. The experience under the Labor Act underlines both the need for and the practicability of information sharing and access to those whom the agent represents. Union informational and access rights have been in place for decades; they have not worked an undue interference in the operation of the enterprise.

The law should also provide, lest there be any doubt, that the checker is authorized to seek any enforcement necessary for it to function as well as to pursue any legal avenue for redress of any violation of state wage and hour law it believes has occurred or is occurring. The law should also provide that any interference, threat, or coercion by an employer in the exercise

of the employees' rights under the law is actionable, by the state or by private action, and subject to suitably effective remedies and attorney fees.

*Selection.* Selection presents a more difficult question for two reasons. This is not because the law would apply to a myriad of scattered workplaces.<sup>52</sup> It is because, first, that the affected enterprises tend to be small. The employers of those most at risk employ on average 20 or fewer employees. That, alone, is not an insuperable obstacle, however; coal mines at the time could have relatively small complements of miners. But coal miners could readily gather at the mine's mouth, weigh station, an area closely adjacent, or even at the miners' union hall, if one there was. They lived near the mine, often in company housing. Gathering them together to select their checkweighman was not a problem. The urban workers of concern here come and go, often with considerably varying work hours, often having second (or third) jobs and long commutes. Reaching them in order for them to select a wage checker is a far more challenging task.

Second, and closely related, as the little caselaw under these checkweighmen laws evidences, usually the selection of a checkman, an individual person, was done without much ado; the result was rarely contested. It was a simple matter,<sup>53</sup> in a simpler time. The times have become less simple. We have witnessed over the course of the century, both here and abroad, a

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<sup>52</sup> In 1885, the first and second anthracite fields in Pennsylvania contained 112 collieries, most operated as single shafts by individual companies. Report of the [Pennsylvania] Inspector of Mines of the Anthracite and Bituminous Coal Regions of Pennsylvania for the Year 1890 (1891) at Table II and V. These employed a total of 20,904 "inside" workers, man and boy. The mean comes to 187 inside workers per colliery; but these varied from a high of 485 to a low of 18. *Id.*

<sup>53</sup> *Jaybee Jellico Coal Co. v. Carter*, *supra* n.50; *Porter Coal Co. v. Davis*, 165 So. 93 (Ala. 1935), sustaining the constitutionality of the weighman law:

We see no interest which the statute conserves for the coal company in respect to the manner in which the weighman is selected, so long as there is no question about his selection, or his capacity and conduct.

*Id.* at 95.

creeping juridification in labor matters. The term, more in use in Europe than in the United States – *Verrechtlichung* in German, *juridicisme* in French<sup>54</sup> – has at least two meanings. One involves the drenching of civilian society in legal norms. This is not necessarily undesirable. We expect motorists to stop at red lights, citizens to pay their taxes, and employers to pay their employees what they are owed. But another meaning refers to the routinization of recourse to law, and so of the law’s delay and transaction costs.

This, the negative face of juridification, is displayed in the history of the Labor Act. The drafters of the law gave the Labor Board the power to decide whether employees desired union representation in any manner the Board saw fit.<sup>55</sup> The “designation or selection” of a bargaining agent, as section 9 sets it out, was not conceived of as a war for the hearts and minds of the workforce; it was to be a matter course, administratively to be expedited.<sup>56</sup> In 1947, the Republican-controlled Congress overrode President Truman’s veto to mandate an election when the National Labor Relations Board found a question concerning representation to be presented.

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<sup>54</sup> See generally, JURIDIFICATION OF SOCIAL SPHERES: A COMPARATIVE ANALYSIS IN THE AREAS OF LABOR, CORPORATE, ANTITRUST AND SOCIAL WELFARE LAW (Gunther Treubner ed. 1987); Spiros Simitis, *The Juridification of Labor Relations*, 7 Comp. Lab. L. 93 (1985).

<sup>55</sup> In an undated memorandum from Philip Levy, a young lawyer on Senator Wagner’s staff, to Calvert Magruder, General Counsel of the old National Labor Relations Board, engaged in the drafting of the Labor Act, Levy’s section by section critique set out the following with respect to the then-proposed § 9(c):

At the hearings last year there was considerable opposition on the part of some protagonists of the bill, to giving the Board the power to certify representatives in the absence of an election by secret ballot. The argument was made that at some future time the Board might come under the influence of an anti-labor administration or that it will use its power to freeze out independent or progressive groups. Senator Borah particularly objected to this although he later voted to report the Walsh draft, to which the same objection could be made, out of the Committee. We feel that the argument is unsound; *first, it is extremely important that the Board have the power to certify or to determine representation in any manner it sees fit...* [Emphasis added.]

The Board’s discretion to certify a union was retained in § 9(c).

<sup>56</sup> Until 1939, the Board would certify a union as an exclusive bargaining agent on the basis of a majority having signed cards to that effect. See *The Cudahy Packing Co.*, 13 NLRB 526, (1939) (Member Smith dissenting on the change of policy). In 1945, the Board’s rules allowed for an instant election ordered by a Regional Director where “no substantial issue” was present. NLRB Rules and Regulations, n. 2, § 203.3 in 10 Fed. Reg. 14, 499 (1945).

Over time, the role of a Board-run election took on a meaning it was never meant to have and became a focal point for contestation and delay, of juridification.<sup>57</sup>

That history serves as a sobering caution: even as the role of the proposed wage checker and the employer's responsibilities are far more narrowly circumscribed than in the case of collective bargaining representation – all the wage checker does is to assure compliance with wage payment and wage and hour law – resistance to the law by resort to law has to be anticipated. The model of a century ago, of employees assembling at the worksite, selecting a weighman and being done with it even as the weighman went about his, that is, the employees' business without let or hindrance seems quaint, perhaps even surreal today. Nevertheless, expedition ought be an imperative, to be achieved as best any law can in a juridified world. In doing that, the Labor Act's experience is instructive on what not to do.

Echoing the early experience under the Labor Act the law could simply delegate to the state agency the power to determine, "by any means it deems most expedient," whether the employees wish to have a checking agency. What follows is suggestive of how the state might implement that authorization.

If a wage checking agency satisfies the state that a majority of employees in any plant, office, store or the like has chosen it the state would inform the employer to that effect. At that point the question of selection would be resolved. However, this would place a burden on the checking agency to secure that support in an environment where access to the employees, to inform them of their rights and to offer them wage checking representation, is difficult in the extreme.

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<sup>57</sup> See Commission on the Future of Worker-Management Relations, Report and Recommendations Ch. III (Dec. 1994).

Consequently, the administrative regulations could provide that upon notice from a qualified checking agency to the state labor department that the agency is seeking the employees' designation, the department would require the employer to turn over a list of its employees, their addresses, phone or cell phone numbers, work location, shift, and other means of identification, to the state agency which, in turn, would release that information to the proposed wage checking agency.<sup>58</sup> Analogous experience of longstanding under the Labor Act evidences the want of any significant burden on employers.<sup>59</sup> Thereafter, if the checking agency satisfies the state that a majority desire to have it serve, or if the state, by, for example, the conduct of a poll – by mail, telephone, in a meeting, or otherwise – is satisfied that a majority of employees participating desire to have the wage checker, the state would certify to that effect. The critical desiderata are speed and informality. Certification would not be judicially reviewable and, upon its issuance, the wage checker would be authorized to act.<sup>60</sup>

Inasmuch as the individual worker's indication of a desire for a wage checker would not be shared with the employer, the possibility of retaliation for the exercise of that right would be

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<sup>58</sup> *Cf. County of Los Angeles v. Los Angeles County Employee Relations Commission*, 301 P.3d 1102 (Cal. 2013) (union's right to access information about the employees it represents is not precluded by the state's constitutional protection of personal privacy).

<sup>59</sup> It has long been the law that an employer turn over a list of its employees and their addresses within a scheduled date of a union representation election. *Excelsior Underwear*, 156 NLRB 1236 (1966). The petition need only be supported by a minimum of 30% of the group the union seeks to represent. Thus, in a store with 20 workers support from 6 can allow the matter to proceed. A student of low wage workers has pointed out that it is not "unusual for a union to file for an NLRB election primarily to obtain the list with all the workers' contact information; the union then withdraws from the election before it is held and uses the list to plan a longer, sustained organizing campaign." Benjamin Becker, *Taking Aim at Target: West Indian Immigrant Workers Confront the Difficulties of Big Box Organizing*, in *NEW LABOR IN NEW YORK* 25, 30 (Ruth Milkman & Ed Ott eds., 2014). In either event, the disclosure itself imposes a negligible ministerial burden on employers.

<sup>60</sup> This would include the seeking of a court order to compel access were an employer to deny it, or for the submission of required records. Under the Labor Act such employer recalcitrance vis-à-vis a collective bargaining representative would be an unfair labor practice, a refusal to bargain under § 8(a)(5), subject to a cease and desist order by the Board or to injunctive relief under § 10(j). Direct recourse would be more expeditious than the NLRB's procedure. But, to reiterate, the law should make it clear that the representational authority of the agency is not subject to judicial review even by the indirect means of a denial of access.

reduced. This reduces as well the prospect of a dispute over whether employees will select a wage checker and preserves the anonymity of those employees who desire wage checking.

*Finances.* All these laws provided that the checkweighman would be retained by the employees at their expense. The purpose was to assure the checkweighman's independence and also to assure that the employer bore no responsibility for the checkweighman, for his wages or liability for workers compensation for any injury. In actual operation, the check weighmen were usually employed by the mine workers' union.<sup>61</sup> Where miners chose not to have a checkweighman it seems that union politics, anti-union sentiment, or the unwillingness to pay union dues were the main motivators.<sup>62</sup>

Inasmuch as the cohort of workers targeted here are at or not much above the minimum wage, and inasmuch as no collective bargaining agreement with a dues deduction clause is involved, as a practical matter one would not expect these employees actually to bear any financial responsibility. (However, legal fees paid as the result of litigation or settlements secured by the checker could be used to support the agency.) The advantage to labor organizations in these laws is not financial; in fact, they would incur some cost. The advantage is the access to the workforce the law would afford. For a union, it is conceivable that, over time, it could aggregate these small enterprises' working forces – of twenty employees, plus or minus, working in a common occupation or in common enterprises – into larger economically

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<sup>61</sup> *E.g.*, Williams v. United Mine Workers, 172 S.W.2d 202 (Ky. 1943); Movell v. Local No. 7635, UMW, 81 F.Supp. 151 (S.D.W.Va. 1948).

<sup>62</sup> Boris Emmet, *Labor Relations in the Fairmont, West Virginia Bituminous Coal Field*, BLS Report No. 361 at 82-83 (1924); Howard Gittelman, LEGACY OF THE LUDLOW MASSACRE 107-108 (1985).



sustainable groups for the purpose of contract negotiation and contract administration should the relationship ripen from wage and hour checking into collective bargaining.<sup>63</sup>

## B. Legal Feasibility

There should be no doubt of the constitutionality of such a law.<sup>64</sup> The only other conceivable challenge to the capacity of the state to take this approach to wage theft would be predicated on federal preemption. The argument would run thusly: inasmuch as federal law provides for employee representation and gives the administration of the statutory scheme over to a federal administrative agency, the state's entry into the matter of employee representation impermissibly intrudes into a zone of regulation reserved exclusively to federal authority.

The argument claims too much. The Labor Act plays out on a field of employment law occupied primarily by the states; its reach is necessarily partial.<sup>65</sup> When the Labor Act was passed these checkweighmen laws were on the books. Congress echoed them in the Guffey Coal Act of 1935 and nothing in the Labor Act or its legislative history suggests that they were to be eclipsed; in fact, they were never mentioned. Nor was there any reason for notice to have been taken.

The function of a representative for wage checking is to assure compliance with the law. The function of a representative for collective bargaining is to negotiate the terms of a labor agreement. The two are separable.

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<sup>63</sup> See Ben Shapiro, *supra* n. 7.

<sup>64</sup> The challenge of impermissible delegation failed even in an era more open to wrongful delegation than today. *Porter Coal Co. v. Davis* 165 So. 93 (Ala. 1935). To the extent access to property is concerned, there would seem to be little doubt that the state, under whose law the right of property is defined, can afford such rights. *Cf. Fashion Valley Mall, LLC v. NLRB*, 172 P.3d 742 (Cal. 2007).

<sup>65</sup> *Bethlehem Steel Co. v. N.Y. State Labor Relations Board*, 330 U.S. 767, 773 (1947).

The Labor Act provides for the selection of an exclusive representative for the purposes of bargaining about the employees' wages, hours, and working conditions. If a bargaining agent is selected the employer may not act on wages, hours, and working conditions without notifying the union of its desire to do so and, at the union's request, bargain with it and in good faith. Until a lawful impasse is reached, the employer may not implement any change in these matters unless, of course, it has reached an agreement. Further, the terms of a collective agreement can have a substantial impact on the conduct of the business: on a day-to-day basis, in scheduling, assignment, promotion, and pay; in the company's competitiveness, profitability, and share value going forward. So, too, would a cost of disagreement over the contract's terms – a lock out or a strike – have a significant effect on the firm. Consequently, the law allows an employer to address its workers on their decision to collectivize the relationship, so long as it does not threaten reprisal for their having chosen to do so.<sup>66</sup>

The wage checker's function is different. The selection of a wage checker does not collectivize the employment relationship: the checker does not bargain to establish terms and conditions of employment; there is no constraint on managerial flexibility. The checker's function is simply to assure that the workers are being paid what they are legally owed. For this reason the employer should have no greater opportunity to dissuade employees from exercising this statutory right that it would to dissuade them from deciding to consult, or retain, legal counsel, individually or collectively, about their wages and hours.

Should a group action for wages due be brought, such would be an act of concerted activity for mutual aid or protection, but that that is so does not mean that participation in it – or retaliation for having done so – would be preempted by the Labor Act.

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<sup>66</sup> 29 U.S.C. § 158(c).

[C]lass or group actions brought to vindicate a labor protective law or an employer-generated collective good necessarily engenders a form of members-only collective representation, albeit one geared to the vindication of those specific legal claims. It could not seriously be entertained that [the representational function performed in bringing those actions or] a state-mandated judicial mediation adjunct to such litigation must be disallowed on preemption grounds because it necessarily contemplates a different method of worker representation than that provided in the Labor Act.<sup>67</sup>

Under the current state of pre-emption doctrine, the state may not be able to afford relief against retaliation for engagement in concerted activity for mutual aid and protection *simpliciter*, as an end in itself; but, the state can extend protection where those collective efforts are directed to some other specific end protected by state law.<sup>68</sup> This includes state wage and hour and wage payment law. Nothing in the reach or structure of the Labor Act would disallow the state to provide for employees to be represented by law for that purpose.

Nor is a law affording representation for a specific statutory purpose unique in the state's tool kit of labor protective law. A number of states afford individual employees the right to inspect their personnel records, for example, and four expressly allow agents designated by the employee or employees to have access to these records on the employer's premises.<sup>69</sup> That access, which the instant proposal echoes, does not trench on the federal field of collective bargaining representation even though employees may designate a union as their representative. The real question is not whether a state can lawfully extend the weightcheckman precedent, but whether it has the political will to do so.

### C. Political Feasibility

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<sup>67</sup> Matthew Finkin, *Bridging the "Representation Gap,"* 3 U. Pa. J. Lab. & Employment L. 391, 411 (2001).

<sup>68</sup> *Compare* Lake v. Collotype Labels USA, Inc., 72 Cal. Rptr. 3d 440 (Cal. App. 2005) *with* Inter-Modal Rail Employees Ass'n v. Burlington Northern and Santa Fe Ry Co., 87 Cal. Rptr. 2d 60 (Cal. App. 1999).

<sup>69</sup> Illinois, Maine, and Pennsylvania require employee representatives to be given access: 820 ILCS 40/5; Me. Rev. Stats. Ann. tit. 26 § 651; 43 Penn Stats. Ann. § 1322.1. Wisconsin does so in the event the employee is pursuing a grievance. Wis. Stats. § 103.13(3).

In the current and foreseeable political environment, nothing can be done legislatively at the federal level. Consequently, this proposal is directed to the states. Inasmuch as what is proposed would provide a tool that could assist union organizing, state legislatures in the hands of conservative (or reactionary) forces can quickly be put to one side. The “red/blue” distinction is well displayed in state labor law.<sup>70</sup> Even so, the question is whether fertile ground can be found in employee-friendly jurisdictions. It may be well to advert briefly to the key players whose resolution of forces will play the major, perhaps determinative, role in any legislative contest.

The likely players are: (1) unions and supporting public interest groups, including those representing the working poor for whatever influence they might be able to muster by appeal to public sentiment; (2) employers and their associations; and, (3) the state executive and departments of labor.

*Unions.* Unions and allied groups should be keen for this measure. It holds the promise of ameliorating wage theft; and, as an ancillary consequence, it would also afford access to employees unions may wish to organize.

*Employers.* One should expect opposition, “adamant and fierce”<sup>71</sup> from employers, their associations and allies. The adjective might seem hyperbolic. After all, the selection of a wage checker would only challenge the business model of wage cheating employers. Employers who play fair should have no fear that their employees will see a need to exercise this right. At first blush it is not at all obvious why “high-road” employers would make common cause with – and

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<sup>70</sup> Note, for example, the rather stark differences in labor protection between Indiana and Minnesota. Matthew Finkin, *International Governance and Domestic Convergence in Labor Law as Seen From the American Midwest*, 76 Ind. L.J. 143, 158-164 (2001).

<sup>71</sup> Weil’s *Workplace*, *supra* n. 12 at 209.

be publicly identified as supporting – predators of the working poor.<sup>72</sup> In fact, to the extent there is competition between the law-abiding and the law-evading, the former should desire to have their competitors on an even field of play.

But the slate is not clean. Worker centers that educate the working poor and help them perfect their legal rights have become targeted by mainstream business interests – the United States Chamber of Commerce,<sup>73</sup> the National Restaurant Association.<sup>74</sup> They have been subjected to political<sup>75</sup> and well-funded public attack.<sup>76</sup> These mainstream employer organizations fear the erosion of a different business model than that of the wage thieves’: resolutely to maintain “union free” workplaces. The money expended to block a law that could make it easier for unions to organize is minimal compared to what would be spent on wage increases in the event of successful unionization.

Were such laws to be introduced American business have to persuade the public why practical assistance should be denied to those most at risk of having their wages stolen by unscrupulous employers. They would have to attack a legal model, widely enacted a century before and still on the books in several states, which, basically, gives employees the same right to be represented, for legal purposes, that employers have. (No employee has a say on whether her employer joins the Chamber of Commerce or hires a “management consultant.”) The

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<sup>72</sup> Cf. Cynthia Estlund, *Labor Law Reform Again? Reframing Labor Law as a Regulatory Project*, N.Y.U. Law School Public Law & Legal Theory Research Paper Series Working Paper No. 13-85 (Dec. 2013).

<sup>73</sup> See e.g. U.S. Chamber of Commerce, *The New Model of Representation: An Overview of Leading Worker Centers* (released March, 2014).

<sup>74</sup> Steven Greenhouse, *Advocates for Workers Raise the Ire of Business*, N.Y. Times, Jan. 17, 2014 at B-1.

<sup>75</sup> See *supra* n. 23.

<sup>76</sup> See Greenhouse, *supra* n. 74; cf. Stephanie Strom, *Nonprofit Advocate Carves Out For-Profit Niche*, <http://www.nytimes.com/201006/18/us/politics/18berman.html?pagewanted=all>; Elza Gray, *Wage Warrior*, TIME MAGAZINE (March 10, 2014) at p. 38 (on the public attack on the effort to raise the minimum wage). Note the rhetoric of the Employment Policy Institute attacking economists supporting a raise in the minimum wage as “Marxist” and “Marxist-feminist”. *The New York Times*, Feb. 27, 2014 at A9.

ensuing public discourse might not be edifying,<sup>77</sup> but there is something to be said for having labor policy, employee representation, and the rights of the working poor, brought into the public forum.

*The state.* The state executive's interest in collecting taxes lost by wage theft is palpable. It should have an obvious interest in supporting the measure. The closer question is whether the state's bureaucracy can be persuaded, not to delegate its authority to private parties, but to do something it has never done – to certify to the selection of wage checking agencies. This would require retraining or the enlistment of other non-inspectorate groups in the effort, such as the state labor board or mediation agency, if one there were. Once a wage checking representative is in place, the inspectorate should be expected to achieve a working relationship with it just as it has with unions at unionized enterprises. In contrast to deputization, no loss of authority or conflict in roles is involved.

Table 4 sets out the states that either have had or still have checkweighmen laws and the number of state labor inspectors in each, as of 2010, including those devoted specifically to minimum wage violation. It is not obvious that in these, or, in any other state, the inspectorate would be unwilling to assume a new function that would reduce wage theft by both the direct intervention of wage checking agencies and the deterrent effect of their presence.

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A word of caution. The proposal provides only a partial bite on the problem of wage theft for it assumes the presence of a relatively stable and reasonably accessible complement of workers. It cannot reach the fly-by-night, the unregistered contractor who picks up its workforce

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<sup>77</sup> See notes 73-76, *supra*.

from a street corner, or the like. Nevertheless, given the dimension of the problem discussed at the outset, even partial redress is not to be scouted.

**Table 4**  
**Number of Labor Inspectors in States That Had or Have Checkweighman (2010)**

State (State Population)	Total Labor Inspectors	Minimum Wage Inspectors
Alabama (4,779,936)	NA	
Arkansas (2,915,918)	9	
Colorado (5,029,196)	8	
Illinois (12,830,632)	13	
Indiana (6,483,802)	6	4
Kansas (2,053,118)	4	
Kentucky (4,339,367)	18	
Missouri (5,998,927)	7	
Ohio (11,536,504)	9	
Oklahoma (3,751,351)	12	7
Pennsylvania (12,702,379)	31	
Tennessee (6,346,105)	NA	
Texas (25,125, 561)	32	
Utah (2,763,885)	3	
Washington (6,724,540)	19	
West Virginia (1,852,994)	12	
Wyoming (563,626)	6	

Source: Zach Schiller and Sarah DeCarlo, INVESTIGATING WAGE THEFT: A SURVEY OF THE STATES (2010)

## V. A Concluding Thought on Agency

It will not have escaped the reader that although this essay opened with an aspiration for doing more than finding a better way to reach at risk workers in order to facilitate law enforcement, the proposed law might seem to do just that, if, perhaps, in a more structured and sustained way. There may be more than meets the eye, however, for there may be a significant difference between, on the one hand, a more systematic means of soliciting targeted employees to come forward with their wage complaints and, on the other, allowing them to choose a representative to monitor their wage payment as part of an ongoing relationship.<sup>78</sup> To be given that choice is to possess a modicum agency, of control over one's life. To select a wage checker and to engage in it over time may well have carryover effects, particularly, as would be expected, the representative is not a law firm or a law school clinic, but a democratically governed sodality in which these workers participate. That exercise of agency, however modest to begin with, may manifest the possible and stimulate the desire for something more,<sup>79</sup> to be achieved by further collective action or, conceivably, by collective bargaining: better health and safety conditions; a more stable work life, not subject to sudden change in scheduled time; freedom from abuse and retaliation.<sup>80</sup>

The current legal landscape for employee representation in the United States is basically this: either collective representation or, unless the employee has secured counsel to deal with the

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<sup>78</sup> One study of the ITF's inspection system, see *supra* n. 28, is critical of it on the ground that the crews subject to the ITF's inspection did not choose to be represented by it. Herbert Northrup and Peter Scrase, *The International Transport Workers' Federation Flag of Convenience Shipping Campaign: 1983-1995*, 23 *Transp. L. J.* 369 (1996). This model rectifies that situation.

<sup>79</sup> Mark Lender, *JUST THE WORKING LIFE* 75 (1990). On the larger social implications see *supra*, n. 31.

<sup>80</sup> As Marc Doussard argues, these concerns run even deeper than income lost by wage theft. Doussard *supra* n. 1. Given the low profit margins of and the intensity of competition among these small companies, the prospect of significant wage increases is small.



employer in a legal dispute, nothing.<sup>81</sup> These checkweighman laws present us with another model of workplace representation, albeit one geared to the realization of specific public purposes. Even so, it holds promise for creating conditions over time conducive to the broader realization of collective voice.

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<sup>81</sup> Matthew W. Finkin, *Employee Self-Representation and the Law in the United States*, 50 Osgoode Hall L. Rev. 937 (2013).

## Appendix: Checkweighman Laws

Alabama Code § 25-9-342 (2014)

In all coal mines the miners employed and working therein may furnish a check weighman or check measurer who shall at all times have full access to and the right to examine the scales, and to see all measures and weights and accounts kept of same, and shall keep an accurate account of the coal, but not more than the above authorized persons shall have such right of access, examination and inspection of scales, measures and accounts at the same time.

Arkansas Stats. § 9328 (1937)

...The miners engaged in working any mine shall have the privilege, if they so desire, of selecting, by a majority vote, and employing, at their own expense, a check-weighman, who shall in the manner take an oath, and who shall have like rights powers and privileges, in attending and seeing that coal is correctly weighed and who shall be subject to same penalties as the regular weighman, and each of such weighmen shall keep account of all coal weighed at the mines, in a well-bound book kept for that purpose...

Colorado Stats. Ann. § 92-10-22 (1953)

Hereafter at each coal mine, at the option of the majority of miners working on a tonnage basis therein, there shall be employed from among the employees of said mine one or more check weighmen, whose wages shall be paid by the miners therein employed on a tonnage basis.

The election of a check weighman shall be by secret ballot, taken at some convenient place near the mouth of the mine or at the check cabin, under conditions which will insure a free and impartial vote. In the event that the owner of the mine and the employees entitled to vote are unable to agree upon a method, then the matter may be referred to the chief inspector of coal mines, who may prescribe the method and, if requested by the owner or the miners entitled to vote, he or one of his deputies shall supervise the election. Only those miners who produce coal on a tonnage basis and who contribute to the wages of a check weighman shall be entitled to vote. A majority of such miners shall be necessary for a choice. Said check weighman shall run a coal check and shall deduct a sufficient and equal amount from each ton of coal weighed to guarantee him the wages agreed upon between said check weighman and said miners, the said check weighman shall be paid by the owner in the same manner and at the same rate per ton as other employees running coal checks. The duties of such check weighman shall be to see that all coal mined in the mine at which he is employed, is correctly weighed and accredited, and for that purpose every such aforesaid owner shall give to such check weighman access to all scales and weights used for that purpose and to all books wherein the weights of the coal mined by the miners of said mines are recorded. The owner shall provide a convenient and suitable office on the tippel for weighing coal, which said office shall be kept in a comfortable and sanitary condition.

Illinois – 225 ILCS 705/32.03 (2014)

The miners at work in any coal mine may employ a check weighman at their option and at their own expense, whose duty it shall be to balance the scales and see that the coal is properly weighted, and that a correct account of the same is kept, and for this purpose he shall have access at all times to the beam box of the scales, and be afforded every facility for verifying the weights while the weighing is being done. The check weighman so employed by the miners shall be a citizen of the United States, and before entering upon his duties, shall make and subscribe to an oath before some person duly authorized to administer oaths, that he will faithfully discharge his duties as check weighman, and such oath shall be kept conspicuously posted at the place of weighing.

Indiana Code § 22-10-12 (repealed 1987)

Whenever the mining of coal is paid for by weight, the persons employed in mining the same shall have the right of selecting and keeping in the weigh office, or at the place of weighing the coal, a check weighman, who shall have the right to inspect the weighing of the coal so mined by such miners; the miners to select and pay their said check weighman.

Kansas Stats. Ch. 79, § 49-308 (repealed 1977)

The miners employed by or engaged in working for any mine-owner, operator or lessee in this state shall have the privilege, if they so desire, of employing at their own expense a check-weighman, who shall have like rights and privileges in the weighing of coal as the regular weighman, and be subject to the same oath and penalties as the regular weighman.

Kentucky Stats. 352.530 (repealed 1996)

That when a majority of the miners engaged in digging or mining coal at any coal mine in this state, at which as many as twenty men are employed, request the owner or owners or operator or operators of any of said mines to allow said miners to employ, at their own expense, a person to inspect the scales at said mine and see that the coal digged and mined by said miners is properly weighed and accounted for, and do and perform such other duties as will insure that said coal is properly weighed and correctly accounted for, said owner or owners or operator or operators shall permit such person to be employed by said miners making the request: Provided, the person so employed has the reputation of being an honest, trustworthy, discreet and upright man. The appointment under the provision of this act of each inspector and assistant weigher shall be approved by the judge of the county court of the county wherein the same is made.

Missouri Rev. Stats. § 293.420(4) (2014)

Miners employed in any coal mine have the power, if they desire, of employing at their own expense, a check-weighmaster, who shall have the right to be present and observe the weighing of coal by the weighmaster, to examine and test the scales, to inspect the records made by the weighmaster; and to be subject to the same qualifications, oath and penalties as the weighmaster.

Ohio Code § 1565.18 (repealed 1999)

The miners employed at a mine where the earnings of such miners depend on the weight of coal mined, may, at their own cost, designate or appoint a competent person as check

weighman, who, at all proper times, shall have full right of access to and examination of the scales, machinery or apparatus used at such mine to determine the correct weight of coal mined, and whose duty shall be to see the coal weighed and to make a correct record of such weights. Not more than one person, however, on behalf of the miners collectively shall have such right at the same time.

Oklahoma Stats. § 4002 (repealed 1929)

The miners employed by or engaged in working for any mine owner, operator or lessee of any mine in this State, shall have the privilege, if they desire, of employing, at their own expense, a check-weighman, who shall have equal rights, powers and privileges in the weighing of coal with the regular weighman, and shall subscribe to the same oath as regular weighman. Said oath shall be kept conspicuously posted in the weigh office and any regular weigher of coal or person so employed who shall knowingly violate any of the provisions of this or the next preceding section, or any owner, operator or agent of any coal mine in this State who shall forbid or hinder miners employing or using check-weighman, in the discharge of his duties, shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars for each offense or by imprisonment, of not less than thirty days nor more than six months. Whenever the chief mine inspector shall be satisfied that the provisions of this section have been so violated it shall be his duty to prosecute the person guilty thereof.

Pennsylvania Stats. tit. 52, § 1387 (2014) (bituminous coal)

At every bituminous coal mine in this Commonwealth where coal is mined by weight or measure, the miners whose wages are paid on the basis of tonnage mined, whether weighed or measured, or a majority of such miners presently at a meeting called by them for that purpose, shall have the right to employ a competent person as checkweighman or check-measurer, as the case may require, who shall be permitted at all times to be present at the weighing or measurement of coal, also have power to weigh or measure the same, and during the regular working hours to have the privilege to balancing and examination of scales shall be done in such a way and at such time as in no way to interfere with the regular workings of the mine. Such weighman shall be paid such compensation as may be fixed by the miners attending such meeting, which shall be paid by the operator to such checkweighman or checkmeasurer from deductions made from the wages of all miners employed at such mine whose wages are paid on the basis of tonnage, whether weighed or measured, an equal deduction being made from the compensation of such wages per ton or per measure, as directed by the checkweighman or checkmeasurer. Any person, association, copartnership or corporation who, as operator, shall refuse to permit any checkweighman or checkmeasurer, so selected, to weigh and measure coal as provided by this act, or shall fail to refuse to pay the wages of such checkweighman or checkmeasurer as required by this act, or shall interfere with, restrain or coerce employees in the exercise of the right to elect such checkweighman or checkmeasurer, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be sentenced to pay a fine of five hundred dollars (\$500) per day for each day of such refusal or violation.

Pennsylvania Stats., tit. 52, 651 (2014) (anthracite)

...the miners in each mine shall have the right to employ, at their own expense, and keep a weigh master at each of said scales to inspect said scales, and also keep an account of the number of pounds of coal mined by each miner....

Tennessee Code, § 59-11-101(a) (2014)

At every coal or other mine in this state, where coal or other minerals are mined by weight or measure, the miners, or a majority of those present at a meeting called for that purpose, shall have the right to employ a competent person as checkweigher or check measurer, as the case may require, who shall be permitted at all times to be present at the weighing or measuring of coal, and who shall have power to weigh or measure the same, and, during the regular working hours, have the privilege to balance and examine the scales or measure the cars; provided, that all such balancing and examination of scales shall only be done in such way and in such time as in no way to interfere with the regular working of the mines; and such person shall not be considered a trespasser during working hours while attending to the interest of such person's employers, and in no manner shall such person be interfered with or intimidated by any person, agent, or owner, or miner.

Texas Stat. Ann. § 5913 (repealed 1989)

The employees in any mine shall have the right to employ a check weighmen at their own option and their own expense.

Utah Code Ann. § 55-3-3 (1943)

In all coal mines in this state the miners employed and working therein may furnish a competent check-weighman at their own expense, who shall at all proper times have full right of access and examination of such scales, machinery, or apparatus, and of seeing all measures, and weights of coal mined and accounts kept of the same; *provided*, that not more than one person on behalf of the miners collectively shall have such right of access, examination, and inspection of scales, measures, and accounts at the same time, and that such persons shall make no unnecessary interference with the use of such scales, machinery, or apparatus. The agent of the miners as aforesaid shall, before entering upon his duties, make and subscribe to an oath before some officer duly authorized to administer oaths, that he is duly qualified and will faithfully discharge the duties of check-weighman. Such oath shall be kept conspicuously posted at the place of weighing.

Washington Rev. Code § 78.40.723(2) (repealed 1997)

The miners employed by or engaged in working at any coal mine in this state shall have the privilege, if they desire, of employing at their expense a check weighman, whose compensation shall be deducted by the mine operator before paying the wages due the miner, and who shall have like rights, powers and privileges in the weighing of coal as the regular weighman, and be subject to the same oath and penalties as the regular weighman. Said oath or affirmation shall be conspicuously posted in the weigh office.

West Virginia Code § 21-5-8 (2014)

Where the amount of wages paid to any of the persons employed in any manufacturing, mining, or other enterprise employing labor, depends upon the amount produced by weight or measure, the persons so employed may at their own cost, station or appoint at each place appointed for the weighing or measuring of the products of their labor a **checkweighman** or measurer, who shall in all cases be appointed by a majority ballot of the workmen employed at the works where he is appointed to act as such **checkweighman** or measurer.

Wyoming Stats § 57-507 (1945)

The miners employed by or engaged in working for any mine owner, lessee, operator, agent or company in this state shall have the privilege, if they so desire, of employing at their own expense a check weighman, who shall have like rights and privileges in the weighing of coal as the regular weighman and be subject to the same oath and penalties as the regular weighman.