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COMMITTEE ON EDUCATION AND THE WORKFORCE, DEMOCRATS



# ON THE WRIST

HOW IT **PAYS** FOR UNSCRUPULOUS EMPLOYERS  
TO TAKE ADVANTAGE OF WORKERS

# **TABLE OF CONTENTS**

- 3 INTRODUCTION**
- 6 TABLE OF CIVIL MONETARY PENALTIES**
- 7 PENALTIES FOR ILLEGALLY EMPLOYING KIDS**
- 11 PENALTIES FOR STEALING WORKERS' WAGES**
- 13 PENALTIES FOR VIOLATING WORKERS' RIGHTS TO ORGANIZE**
- 16 PENALTIES FOR UNSAFE WORKPLACES**
- 19 PENALTIES FOR FAILING TO PROVIDE ESSENTIAL MENTAL HEALTH AND SUBSTANCE USE DISORDER BENEFITS**
- 22 CONCLUSION**

# A SLAP ON THE WRIST

## HOW IT FOR UNSCRUPULOUS EMPLOYERS TO TAKE ADVANTAGE OF WORKERS

### INTRODUCTION

Our nation's labor and employment laws are a covenant with workers. They secure the most basic promises of work for over 167 million people in the United States labor force<sup>1</sup>—the rights to earned wages, a safe workplace, and to organize and collectively bargain, among others.

But what happens when these laws are broken?

In such cases when an employer violates a worker protection law, they can be subject to a civil monetary penalty. These penalties—levied by federal agencies—are calculated based on various factors, such as the type and severity of the violation, the size of the employer, and the minimum and maximum allowable penalty, among other considerations. This tool aims to not only enforce compliance with the law, but also to deter future violations. However, civil monetary penalties are only effective when the assessed amount imposes enough of a cost on an unscrupulous business to make adhering to the law cheaper than violating it.

Regrettably, civil monetary penalties for labor and employment laws are egregiously low, to the point that if an employer is caught committing a labor violation the penalty amounts to the “cost of doing business” rather than a deterrent.<sup>2</sup> Under federal law, bosses stealing from their workers' paychecks can be liable for a lower amount than was originally taken.<sup>3</sup> The situation is more dire for workers seeking to unionize due to the absence of monetary penalties on employers who illegally interfere or retaliate.<sup>4</sup> It likely costs more for a business to become an annual member of the U.S. Chamber of Commerce (\$300-\$2,500)<sup>5</sup> than it would if they were to illegally fire a worker for union activity.

Corporations that break the law are paying next to nothing in penalties for endangering workers' lives and livelihoods.<sup>6</sup> For instance, when a worker is killed on the job, the maximum penalty is a little over \$160,000 but, in practice, the median penalty that's been assessed is approximately \$14,000.<sup>7</sup> For some context, according to a 2023 executive benefits survey, the median car allowance for CEOs was \$15,000.<sup>8</sup> It should not be the case that the median penalty assessed on a workplace where a worker is tragically killed is less than the monetary perk that certain CEOs are provided to drive their cars.

# A SLAP ON THE WRIST

## HOW IT FOR UNSCRUPULOUS EMPLOYERS TO TAKE ADVANTAGE OF WORKERS

The highest punishment for an unscrupulous business illegally hiring children for long hours and dangerous jobs is a mere \$15,629.<sup>9</sup> Yet, this is far less than the civil monetary penalties that can be assessed for defective consumer products. In that case, the maximum is up to \$120,000 per individual violation and over \$17 million for a series of related violations.<sup>10</sup> It is not right that the penalty for illegally hiring children for dangerous jobs is just a fraction of what can be assessed for the unsafe toys with which kids may play.

Lamentably, the instances cited earlier are not the only examples of penalties for violations of labor law falling far short than those in other statutes. There are numerous examples of non-labor and employment laws authorizing higher penalties than the ones that uphold basic worker protections, such as:

- Under the *Clean Air Act*, a polluter could be assessed over \$450,000 in penalties for poisoning the air; however, the maximum for intentionally or repeatedly poisoning a worker is \$161,323.<sup>11</sup>
- It would take approximately 41 child labor violations at the maximum level (\$15,629) to match the current cap on penalties under the *South Pacific Tuna Act*—\$639,908.<sup>12</sup>
- Under the *Preventing Illegal Radio Abuse Through Enforcement Act*, the Federal Communications Commission can penalize pirate radio broadcasters up to \$119,555 per day per violation, up to a maximum of nearly \$2.4 million.<sup>13</sup> However, the inflation-adjusted penalty for repeated or willful minimum wage and overtime violations is just \$2,451; and for cheating workers out of their tips, the maximum inflated-adjusted penalty is \$1,373.<sup>14</sup> It seems fair to ask whether the monetary penalty for stealing workers' wages and tips should be exponentially less than the one for stealing radio.
- A violation of the *Sponge Act (1914)*, which imposes certain prohibitions on catching commercial sponges from the waters of the Gulf of Mexico or the Straits of Florida, incurs a peak penalty of \$2,103.<sup>15</sup> Meanwhile, a group health plan or health insurance company that refuses to appropriately cover mental health care and treatment for substance use disorder faces no monetary penalty.

# A SLAP ON THE WRIST

## HOW IT PAYS! FOR UNSCRUPULOUS EMPLOYERS TO TAKE ADVANTAGE OF WORKERS

Federal labor and employment laws, including laws that safeguard affordable health care, are not mere suggestions, rather they are guaranteed protections for workers and children. Unfortunately, civil monetary penalties for worker protection violations are significantly weak and too low to deter violations. Without appropriate penalties, unscrupulous employers have no incentive to follow the law and workers face the brunt of the harm and damage.

This report highlights several laws with weak or nonexistent civil monetary penalties and underscores the urgency to strengthen each law's penalty regime. To ensure that America meets its obligation to workers and their families, it is imperative that Congress acts to responsibly raise civil monetary penalties to secure workers' rights and prevent violations.

# A SLAP ON THE WRIST

HOW IT  FOR UNSCRUPULOUS EMPLOYERS TO TAKE ADVANTAGE OF WORKERS

LOW CIVIL MONETARY PENALTIES FAIL TO DELIVER FOR WORKERS AND CHILDREN AND ARE STUCK IN THE PAST					
Type of Violation	Applicable Law	Maximum Civil Monetary Penalty as of 2024	Year of the Last Increase in Statute*	U.S. President at the Time of the Last Increase in Statute	Price of a First-Class Stamp at the Time of the Last Increase in Statute
Child Labor Violation	<i>Fair Labor Standards Act</i>	\$15,629	2008	George W. Bush	42¢
Child Labor Violation that Causes Death or Serious Injury	<i>Fair Labor Standards Act</i>	\$71,031	2008	George W. Bush	42¢
Repeated or Willful Minimum Wage or Overtime Violation	<i>Fair Labor Standards Act</i>	\$2,451	2008	George W. Bush	42¢
Tip Violation	<i>Fair Labor Standards Act</i>	\$1,373	2018	Donald J. Trump	50¢
Violation of Rights to Organize and Collectively Bargain	<i>National Labor Relations Act</i>	\$0	1935	Franklin D. Roosevelt	3¢
Serious Safety and Health Violation	<i>Occupational Safety and Health Act</i>	\$16,131	1990	George H. W. Bush	25¢
Repeat or Willful Safety and Health Violation	<i>Occupational Safety and Health Act</i>	\$161,323	1990	George H. W. Bush	25¢
Other Safety and Health Violation	<i>Occupational Safety and Health Act</i>	\$16,131	1990	George H. W. Bush	25¢
Parity in Mental Health and Substance Use Disorder Benefits Violation	<i>Mental Health Parity Act/Mental Health Parity and Addiction Equity Act</i>	\$0	1996/2008	Bill Clinton/George W. Bush	32¢/42¢

\*Not accounting for inflation adjustments



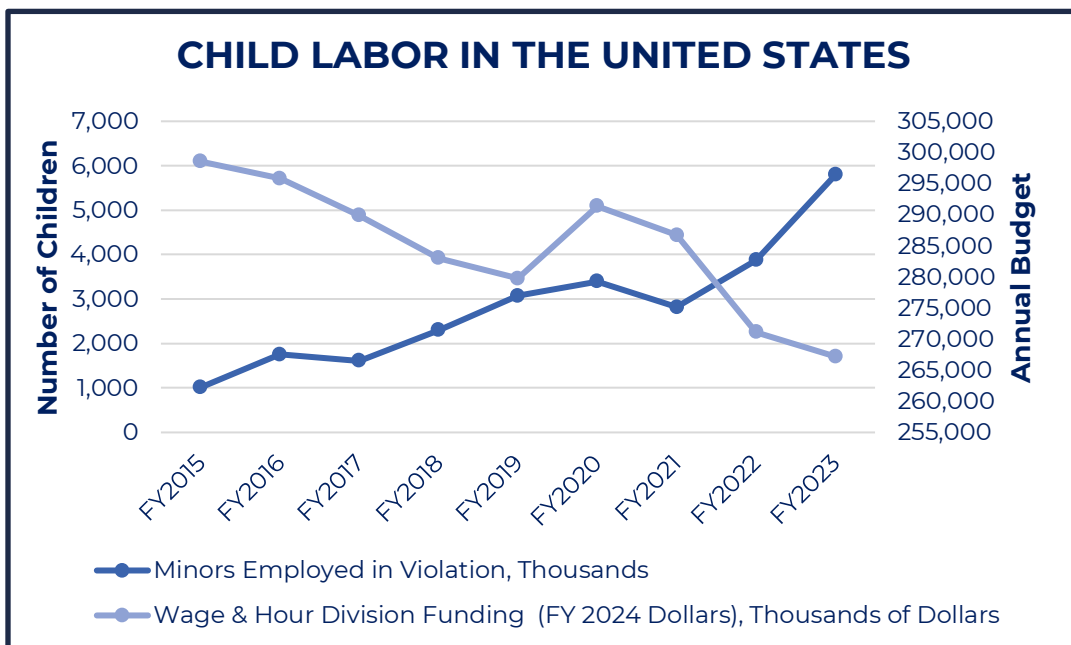
# A SLAP ON THE WRIST

## HOW IT **PAYS!** FOR UNSCRUPULOUS EMPLOYERS TO TAKE ADVANTAGE OF WORKERS

### PENALTIES FOR ILLEGALLY EMPLOYING KIDS

The scourge of child labor that Congress sought to eliminate more than 85 years ago with the passage of the *Fair Labor Standards Act of 1938* (FLSA) is on the rise in the 21<sup>st</sup> Century. The FLSA establishes national labor standards, including protections for children in the workforce, and provides that penalties be assessed on employers who violate the law.<sup>16</sup> Protections for most child workers include limiting the working hours of children, limiting the sorts of job duties that children can perform, and specifying that children cannot work during school hours during the months when school is in session.<sup>17</sup> According to the most recently available enforcement data from the Department of Labor’s Wage and Hour Division, the agency with primary responsibility for enforcing the FLSA, the number of children involved in child labor violations has skyrocketed by 472 percent from 1,012 in Fiscal Year (FY) 2015 to 5,792 in FY 2023—and these are solely the cases that have been detected by an increasingly resource-strapped and understaffed Wage and Hour Division.<sup>18</sup>

Recent high-profile exposés of companies illegally employing and overworking children in dangerous jobs have unveiled the horrific reality behind child labor statistics with story after story of young children working under hazardous conditions, staffing overnight shifts, handling dangerous chemicals, and forgoing school.<sup>19</sup>



# A SLAP ON THE WRIST

## HOW IT FOR UNSCRUPULOUS EMPLOYERS TO TAKE ADVANTAGE OF WORKERS

- A *New York Times* investigation discovered instances where children were made to “stitch ‘Made in America’ tags into J. Crew shirts[,] ... bake dinner rolls sold at Walmart and Target, process milk used in Ben & Jerry’s ice cream and help debone chicken sold at Whole Foods.”<sup>20</sup>
- In Alabama, a subsidiary of the Hyundai Motor Company was found employing dozens of children in its metal stamping plant that produced car parts for the automaker.<sup>21</sup> The plant has been repeatedly cited by the Occupational Safety and Health Administration for numerous safety and health violations, including crush and amputation hazards.<sup>22</sup>
- Across 16 McDonald’s franchise stores in Louisiana and Texas, federal investigators uncovered numerous child labor violations with over 80 children under the age of 16 operating dangerous machinery and working long and late hours.<sup>23</sup>
- In Kentucky, an 11- and 13-year-old were employed for months in a distribution center to operate forklifts and pick up warehouse orders.<sup>24</sup>
- Hundreds of children, as young as 10 years old, increasingly populate the roofing workforce—often working long hours and at least 30 feet off the ground without fall protection or safety training.<sup>25</sup>
- Packers Sanitation Services Inc., a third-party staffing firm that primarily provides labor contracts for sanitation services, was found to have illegally employed over 100 children between the ages of 13 and 17 years old during school hours and on overnight shifts. Across eight states, children were hired to handle toxic cleaning chemicals and sanitize dangerous meat processing equipment, such as “back saws, brisket saws[,] and head splitters.”<sup>26</sup>

“This shadow work force extends across industries in every state” with some children, as young as 12 years old, working in slaughterhouses, factories, and lumberyards.<sup>27</sup> The illegal use of child workers is not an issue with one unscrupulous employer, sector, or region of the country, it is a national crisis.

The resurgence of child labor has placed the health and safety of children at serious risk. Young workers face higher rates of occupational injury compared to their adult counterparts.<sup>28</sup> Between 2012 to 2018, approximately “3.2 million nonfatal, job-related

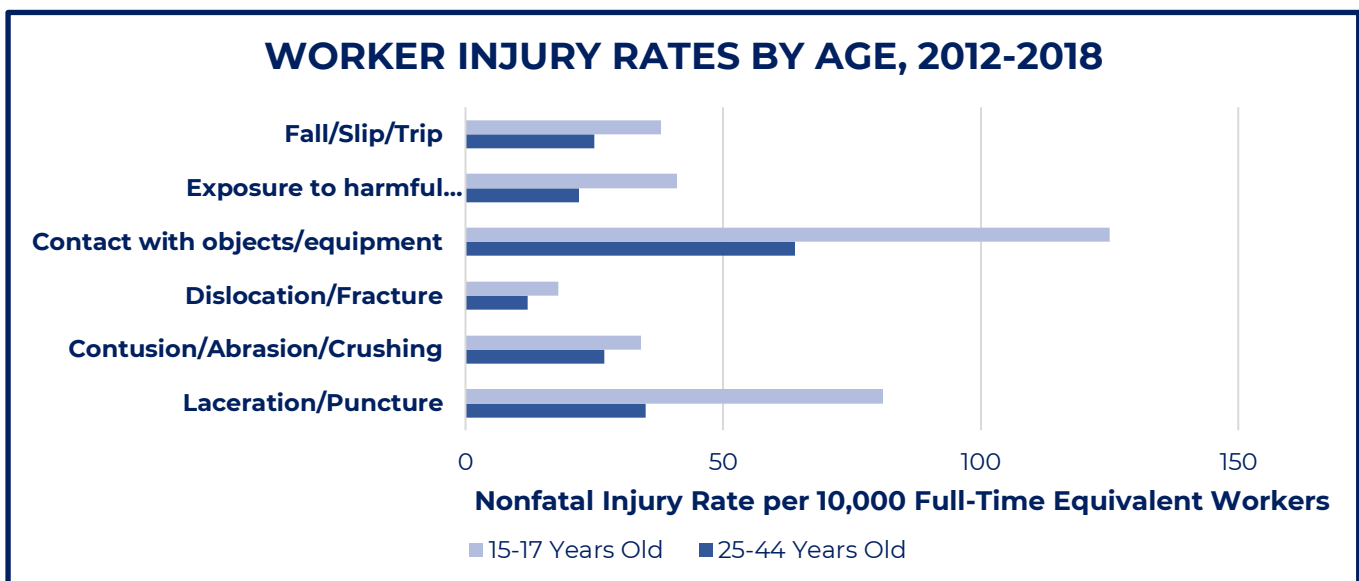


# A SLAP ON THE WRIST

## HOW IT **PAYS!** FOR UNSCRUPULOUS EMPLOYERS TO TAKE ADVANTAGE OF WORKERS

injuries to young workers were treated in hospital emergency departments.”<sup>29</sup> The National Institute for Occupational Safety and Health found that young workers had to seek emergency medical care for on-the-job injuries at a rate up to 2.3 times higher than older adult workers.<sup>30</sup> According to a news investigation, the number of workers under the age of 18 suffering from workplace injuries and illnesses has nearly doubled over the last decade.<sup>31</sup> Children in workplaces are not suffering from mere cuts and scrapes, their welfare and lives are at stake:

- At a Perdue Farms poultry plant in Virginia, a 14-year-old child, tasked with cleaning and sanitizing the chicken slaughterhouse on an overnight shift, had his arm caught on an assembly belt with “hard plastic teeth...tearing open his forearm down to the bone.” The child spent two weeks in the hospital and had three separate surgeries.<sup>32</sup>
- In Florida, a 15-year-old, on his first shift, suffered “second-degree burns on 20 to 30 percent of his body” after falling from a roof and onto hot tar.<sup>33</sup>
- In Mississippi, at another poultry facility, a 16-year-old boy was killed while sanitizing a meat processing machine that entangled the child. The death was the third instance of a fatal injury at the plant in under three years.<sup>34</sup>
- In June 2023, a 16-year-old employed at a landfill facility was killed at work after being crushed between a tractor and its trailer.<sup>35</sup>



# A SLAP ON THE WRIST

## HOW IT FOR UNSCRUPULOUS EMPLOYERS TO TAKE ADVANTAGE OF WORKERS

In addition to the health and safety risks in workplaces, children working excessive hours, beyond the allowable limits under federal requirements, can hamper their schooling and development. According to one study, high school students who worked 20 or more hours in a week while enrolled in school were found to have worse academic and behavioral outcomes, as well as a higher incidence of substance abuse, relative to students working under 20 hours.<sup>36</sup>

Civil penalties for child labor violations are, according to the Department of Labor itself, “not high enough to be an effective deterrent” against exploitive and oppressive child labor.<sup>37</sup>

Currently, the maximum penalty for violating federal standards on child labor is \$15,629 per violation, with violations resulting in serious injury or death incurring a maximum of \$71,131.<sup>38</sup> Recent enforcement actions against child labor illustrate the inadequacies of existing penalties, even for the most egregious violations:

- In Utah, a federal investigation discovered 22 14- and 15-year-old children working up to 46-hour work weeks and starting shifts after midnight at a restaurant supply company. The employer was assessed a penalty under \$17,000—equivalent to an average penalty of approximately \$754 per child.<sup>39</sup>
- At a Tennessee McDonald’s, the franchise operator was assessed \$3,258 in penalties for hiring a 15-year-old worker “who suffered hot oil burns while using a deep fryer.”<sup>40</sup>
- In violation of federal child labor restrictions on acceptable occupations, a Georgia contractor employed a 16- and 17-year-old to work near the storage and transportation of explosives. The employer assigned the teenagers to bore and enclose holes for dynamite placement. The Wage and Hour Division imposed \$5,592 in civil penalties.<sup>41</sup>
- In Ohio at a lathe mill, a 15-year-old child was illegally hired to operate a sawmill and subsequently injured after being “entangled in the gears of a powered wood processing machine.” The employer was cited a little over \$22,000 for the violation.<sup>42</sup>

Unscrupulous employers effectively have no incentive to adhere to the law as they can exploit children and place them in harm’s way and, if caught, face a fine that is not commensurate with the violation.

# A SLAP ON THE WRIST

## HOW IT FOR UNSCRUPULOUS EMPLOYERS TO TAKE ADVANTAGE OF WORKERS

### PENALTIES FOR STEALING WORKERS' WAGES

The FLSA also created the nation's first minimum wage and maximum workweek.<sup>43</sup> Today, the FLSA continues to uphold a basic promise of work—the right to wages workers have earned.

Unfortunately, the practice of low-road employers failing to pay workers the full amount of wages and withholding earned benefits to which they are entitled—known as wage theft—is rampant across the country.<sup>44</sup> Wage theft occurs in various ways, including paying workers less than the legal minimum wage, failing to pay for hours in excess of a 40-hour work week (overtime), making employees work off-the-clock, taking illegal deductions from wages, and confiscating tips.<sup>45</sup> While the FLSA provides a national wage floor, workers across the country can be legally owed varying wages depending on the location of their workplace as the FLSA does not supersede state or local laws that offer greater protection.<sup>46</sup> Under the FLSA, wage theft occurs when employers fail to compensate their workers with at least the federal minimum wage of \$7.25 per hour and premium pay for overtime hours.<sup>47</sup> In some states, the state wage law explicitly recognizes workers' right to all wages earned even if it is above the applicable minimum wage.<sup>48</sup>

To be clear, unscrupulous employers are not simply skimming pennies from workers' hard-earned paychecks, in multiple instances they are stealing thousands and even millions of dollars in violation of federal law:

- In South Carolina, federal investigators recovered nearly \$392,000 in back pay and liquidated damages for 31 workers after discovering two supermarkets and a restaurant, connected to one individual, failed to pay the federal minimum wage to tipped and non-tipped workers and earned overtime pay.<sup>49</sup>
- In May 2023, a federal jury found an employer guilty of stealing \$22 million from over 7,500 workers by failing to compensate workers for hours actually worked and overtime.<sup>50</sup> This case is the largest verdict ever secured by the Department of Labor under the FLSA.
- In Florida, an employer was ordered to pay back over \$450,000 after federal investigators found the business had illegally exempted 75 grocery store workers from earning overtime pay for additional hours.<sup>51</sup>

# A SLAP ON THE WRIST

## HOW IT FOR UNSCRUPULOUS EMPLOYERS TO TAKE ADVANTAGE OF WORKERS

- In September 2023, the Department of Labor obtained a court order to compel the owners and operators of 14 Subway restaurants in the San Francisco area to repay 184 workers \$475,000 in stolen wages. Workers were denied minimum wage, overtime, and tips.<sup>52</sup>

Overall, wage theft is a multi-billion dollar problem. Each year, employers steal at least \$15 billion from workers' paychecks in minimum wage violations alone,<sup>53</sup> with all forms of wage theft possibly exceeding \$50 billion annually in stolen compensation.<sup>54</sup>

To put this in perspective, according to the most recently available data from the Federal Bureau of Investigation, robberies accounted for an estimated \$482 million in losses in 2019 and \$598 million in losses in 2018.<sup>55</sup> If you combined the losses from robberies from both of those years, it would still be roughly 50 times less than the total wage theft losses in one year. Dollar-for-dollar, wage theft is larger than all forms of property crime combined.<sup>56</sup>

The theft of pay workers are legally entitled to—both under federal and state laws—disproportionately harms lower paid and vulnerable segments of the labor force.<sup>57</sup> Victims of minimum wage violations are over three times as likely to be in poverty,<sup>58</sup> and those same violations also push working families into poverty and lead to an increase in the use of public assistance programs.<sup>59</sup> Even though wage theft under the FLSA is a portion of the cumulative estimates from across the country, it remains a significant threat to workers' livelihoods.

The FLSA provides the Department of Labor's Wage and Hour Division with two enforcement tools for wage violations: 1) backpay and liquidated damages and 2) civil monetary penalties.<sup>60</sup> Unfortunately, both provisions are simply inadequate at addressing and deterring wage theft. Currently, employers found liable for unpaid wages, tips, and overtime are required to pay workers back the stolen wages, as well as pay an "equal amount as liquidated damages."<sup>61</sup> However, under the FLSA, workers suffering from minimum wage violations are unable to recover the total amount of stolen wages, and instead are only entitled to the difference between their actual pay and the federal minimum wage and an equal amount in damages.<sup>62</sup>

On top of backpay and damages, the Wage and Hour Division can impose civil monetary penalties on law-breaking employers to serve as an additional disincentive. However, the current penalty levels are far too low to be a meaningful deterrent. In fact, meager penalties for wage theft remain a decades-old problem. In 1981, the General Accounting Office concluded "many employers appear to have willfully violated the [FLSA] and that current

# A SLAP ON THE WRIST

## HOW IT FOR UNSCRUPULOUS EMPLOYERS TO TAKE ADVANTAGE OF WORKERS

enforcement actions have not resulted in penalties that would deter these violations.”<sup>63</sup> Today, the inflation-adjusted ceiling on civil monetary penalties is just \$2,451 for repeated or willful minimum wage and overtime violations.<sup>64</sup> Even though Congress amended the FLSA in 2018 to include protections against tip theft and authorize a civil monetary penalty equivalent to minimum wage and overtime violations,<sup>65</sup> the maximum penalty, accounting for inflation, for stealing workers’ tips is only \$1,373.<sup>66</sup> According to Jenn Round, a fellow at the Center for Innovation in Worker Organization at Rutgers University, “some companies are doing a cost-benefit analysis and realize it’s cheaper to violate the law, even if you get caught.”<sup>67</sup>

The limitations on civil monetary penalties mean that unscrupulous employers who steal workers’ wages are charged low penalties that are nowhere close to the original stolen amount. For example, in one instance, federal investigators discovered extensive wage theft by a security provider and recovered nearly \$550,000 in stolen wages for 778 workers.<sup>68</sup> However, the employer was solely fined \$50,000, amounting to, on average, roughly \$64 in penalties for each affected worker.<sup>69</sup> In another occurrence, multiple restaurants were ordered to provide \$283,061 in back pay and tips for failing to pay the federal minimum wage and overtime, as well as allowing managers and the owners to collect from the tip pool, while only incurring a penalty of \$11,419.<sup>70</sup> The rampant scope of wage theft in the United States, as well as the harm and burden, especially on low wage and vulnerable workers, underscores the urgency to raise penalties and secure a bedrock worker right.

### **PENALTIES FOR VIOLATING WORKERS’ RIGHTS TO ORGANIZE**

In 1935, President Roosevelt signed the *National Labor Relations Act* (NLRA) into law. The landmark legislation guaranteed private sector workers the right to organize and collectively bargain over pay, benefits, and working conditions with their employer.<sup>71</sup>

There is a clear advantage for workers who belong to a union. The average median union worker is paid approximately 20 percent more than the median nonunion worker.<sup>72</sup> In the private sector, union workers are 26 percent more likely to be offered health insurance through work, 12 to 15 percent more likely to have paid leave, and 53 percent more likely to have defined-benefit pension plans.<sup>73</sup> In addition to other direct benefits, unionization has spillover effects on nonunion workplaces by raising the floor on labor standards, and thus compelling nonunion employers to adjust to remain competitive with respect to worker recruitment and retention.<sup>74</sup>

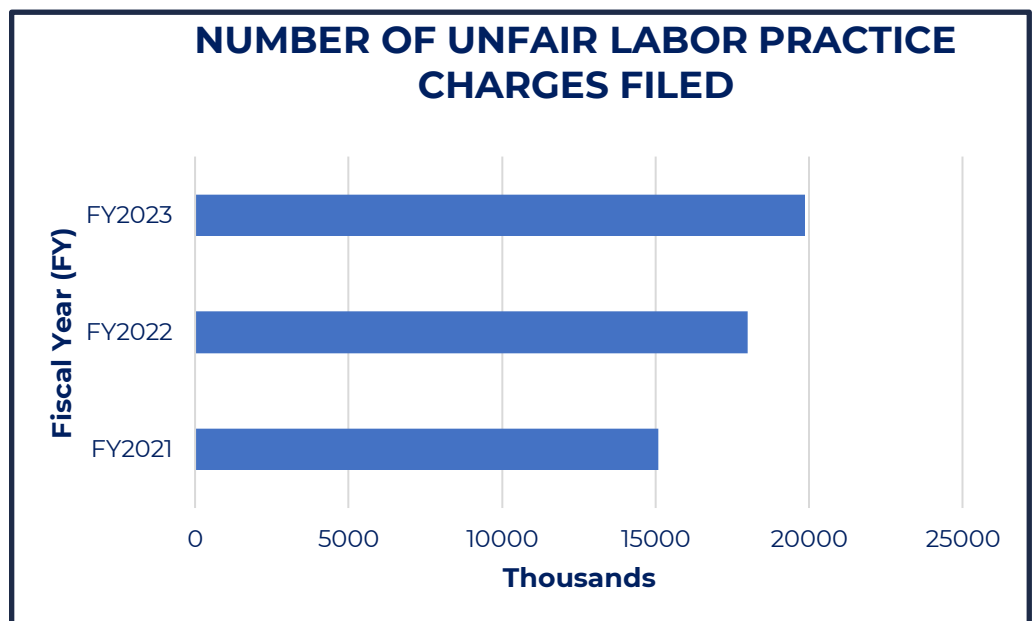
# A SLAP ON THE WRIST

## HOW IT **PAYS!** FOR UNSCRUPULOUS EMPLOYERS TO TAKE ADVANTAGE OF WORKERS

In recent years, there has been a surge in workers organizing to improve their working conditions, such as workplace safety protections, as well as access to health care and paid leave.<sup>75</sup> The National Labor Relations Board, the federal agency tasked with enforcing the NLRA, reported a 3 percent increase in election petitions for union representation for FY 2023 compared to the year before, and the highest number of petitions since FY 2015.<sup>76</sup> This uptick builds upon the dramatic increase seen in FY 2022 where the agency recorded a 53 percent increase in petitions over FY 2021.<sup>77</sup> In 2023, the number of workers represented by unions rose by 191,000, bringing the overall number to 16.2 million.<sup>78</sup> In addition to the rise in worker organizing, public support for labor unions remains strong at 67 percent approval.<sup>79</sup>

While the momentum and popularity of unionization is growing, union density is not making the same strides. For decades, union membership in the United States has been on the decline after peaking in the 1950s when over one-third of the workforce belonged to a union.<sup>80</sup> In 2023, only ten percent of America's workers were members of a union.<sup>81</sup>

For decades, unscrupulous employers have taken advantage of weaknesses in the NLRA to thwart workers' organizing efforts. In 2016 and 2017, employers were accused of breaking the law in 41.5 percent of all private sector union elections.<sup>82</sup> During the same period, employers were charged with illegally terminating organizing workers across 1-in-5 elections.<sup>83</sup> The anti-union attacks have only grown in recent years. In FY 2023, the National Labor Relations Board reported a 10 percent uptick in unfair labor practice charges compared to the 17,988 charges filed the year before, building upon the 19 percent increase between FY 2021 and FY 2022.<sup>84</sup>





# A SLAP ON THE WRIST

## HOW IT **PAYS!** FOR UNSCRUPULOUS EMPLOYERS TO TAKE ADVANTAGE OF WORKERS

According to an analysis of worker organizing drives, between 2016 and 2021, 87 percent of employers conducted anti-union campaigns that consisted of “threats, interrogation, promises of improvement, and surveillance.”<sup>85</sup> In fact, 75 percent of employers forced workers to attend captive audience meetings to listen to anti-union speech by management, 62 percent held supervisor one-on-one meetings with workers to threaten or interrogate them about their union activity, and nearly 40 percent threatened workers with full or partial workplace closures.<sup>86</sup>

With the emergence of the “union-avoidance” industry, employers have also embraced the practice of hiring professional anti-union firms and consultants to combat unionization.<sup>87</sup> Employers spend approximately \$433 million each year on anti-union consultants to guide employer campaigns against workers’ independent decision to unionize, which is likely an underestimate due to underreporting by employers.<sup>88</sup> Some consultants have been found to be paid \$350 an hour or \$2,500 or more a day for their services.<sup>89</sup> In fact, the e-commerce giant, Amazon, reportedly spent \$20,000 per week for each anti-union consultant.<sup>90</sup>

Unscrupulous employers can get away with doing these things and violating workers’ rights because the NLRA lacks basic enforcement tools, such as the ability to assess civil monetary penalties, to deter violations, or unfair labor practices. Under current National Labor Relations Board precedent, when an employer is found to have, for example, unlawfully fired an employee for protected union activity, the employer is required to reinstate the employee; post a notice of employees’ rights under the NLRA; and pay the employee back wages, as well as potentially provide compensation for other documented harms suffered due to the employer’s unfair labor practice, minus what the worker earned if they had gotten another job in the meantime.<sup>91</sup> While the goal of such “make-whole” remedies is to restore a worker to the pay and benefit level they had at the time of the employer’s unfair labor practice, they impose no additional cost on the employer for violating the law. Rather, an employer ends up responsible only for paying what they would have paid if they had not unlawfully discriminated against the employee. Firing workers for protected union activity is essentially “cost-free” and remains extremely effective in stopping an organizing drive, sending a chilling effect throughout the labor force. Additionally, for other serious violations, such as illegal threats to close the workplace if the union prevails, employers are merely subjected to a cease-and-desist order and directed to post a notice in the workplace. Again, this remedy is often imposed years later, once all appeals are exhausted.

# A SLAP ON THE WRIST

## HOW IT **PAYS!** FOR UNSCRUPULOUS EMPLOYERS TO TAKE ADVANTAGE OF WORKERS

To effectively deter NLRA violations by employers, it is imperative that the National Labor Relations Board be able to impose civil monetary penalties based on relevant factors, such as the seriousness of the violation, employer's past actions, and size of the firm. Without civil monetary penalties, employers can act with impunity and face no additional cost for violating workers' rights. Workers will bear the brunt of the costs of such unlawful actions by losing their job or being denied the benefits of union membership.

### **PENALTIES FOR UNSAFE WORKPLACES**

In 1970, President Nixon signed the landmark *Occupational Safety and Health Act* (OSH Act) into law, providing the federal government the authority to produce and enforce health and safety standards to protect the well-being of our nation's workers from various occupational hazards and diseases.<sup>92</sup> The historic legislation empowered the creation of the Occupational Safety and Health Administration (OSHA) to carry out the vital task of assuring "safe and healthful working conditions for working men and women."<sup>93</sup> The OSH Act provides workers, at a high level, the legal right to be safe and whole at work and for employers to guarantee that right.<sup>94</sup> Under the law's framework, along with enforcement by OSHA, workers can raise concerns about hazards without facing retaliation, obtain training to remain safe and healthy, decline dangerous tasks, as well as be protected overall, among other rights.<sup>95</sup>

Since 1970, OSHA's efforts have significantly reduced workplace deaths, injuries, and illnesses. When OSHA was first authorized in 1970, 38 workers were killed on the job every day.<sup>96</sup> Decades later, that figure has fallen to 14 deaths per day in a workforce double the size.<sup>97</sup> Workplace injuries and illnesses have also declined from 10.9 per 100 workers in 1972 to less than 3.3 per 100 workers in 2013.<sup>98</sup> Several studies found that inspections and penalties reduce injury rates without harming employment, sales, or firm survival.<sup>99</sup>

However, contrary to the objectives of the OSH Act, too many workers continue to be exposed to hazardous conditions. In 2022 alone, over 3.5 million workers were injured or sickened through their job—which is an underestimate due to gaps in data collection and reporting.<sup>100</sup> Each year, approximately 120,000 workers die because of occupational diseases.<sup>101</sup> The total economic burden of occupational harm in the U.S. was roughly \$250 billion in 2007<sup>102</sup> (\$377 billion in 2024 dollars). Much of this burden falls on low-wage workers, pushing them into poverty.<sup>103</sup> Not only are the hazards to workers currently at untenable levels, but workplace deaths are also on the rise. Between 2018 to 2022, over 25,000 workers suffered *fatal* injuries on the job.<sup>104</sup> In 2022, 5,486 workers were killed at

# A SLAP ON THE WRIST

## HOW IT FOR UNSCRUPULOUS EMPLOYERS TO TAKE ADVANTAGE OF WORKERS

work—a 15 percent increase from 2020.<sup>105</sup> The fatal occupational injury rate, or the number of worker deaths per 100,000 full-time employees, saw an uptick to 3.7 in 2022, which is the highest annual rate since 2008.<sup>106</sup>

According to an expert who testified before the Committee on Education and Labor, “the primary flaw in our worker safety laws is not the rules we impose but the lack of consequences for breaking those rules.”<sup>107</sup>

Currently, when an employer violates a workplace health and safety standard, the OSH Act provides for civil monetary penalties to “encourag[e] compliance and deter[] violations.”<sup>108</sup> When proposing penalties, OSHA is required to consider four factors: 1) “the gravity of the violation; [2)] the size of the employer’s business; [3)] the good faith efforts of the employer; and [4)] the employer’s history of previous violations.”<sup>109</sup> However, as noted in a 1992 report on OSHA penalties by the General Accounting Office, OSHA and the Occupational Safety and Health Review Commission, the independent federal agency responsible for resolving OSH Act-related disputes,<sup>110</sup> are not required to consider the economic benefit of noncompliance that an employer may receive for ignoring worker health and safety requirements.<sup>111</sup> Additionally, OSHA is restricted to a narrow range within which it can calculate penalties for violations. In 2024, the minimum penalty for a *serious* violation—when there exists “a substantial probability that death or serious physical harm could result”<sup>112</sup>—is \$1,190 and the maximum is \$16,131.<sup>113</sup> Employers who intentionally endanger workers, repeatedly fail to adhere to regulations, or engage in both acts only face a minimum penalty of \$11,524 for each violation.<sup>114</sup>

After a citation with a preliminary monetary penalty is issued, it can be further diminished due to a loophole in the OSH Act that fails to require employers to correct or eliminate occupational hazards while contesting OSHA citations.<sup>115</sup> The process to resolve employer contestations can play out over many months or years.<sup>116</sup> This elongated process has forced OSHA to often lower penalties on employers in agreed settlements to compel timely compliance and abatement of workplace hazards.<sup>117</sup> Otherwise, employers can file objections over citations to drag the timeline out and evade accountability, while workplace hazards persist or worsen.

As a result, civil monetary penalties for OSHA violations are often exceedingly low. According to an analysis of OSHA enforcement data, in FY 2023, the average penalty issued for a serious violation was \$4,597.<sup>118</sup> The median civil monetary penalty imposed on employers for a preventable worker death was \$14,063.<sup>119</sup>

# A SLAP ON THE WRIST

## HOW IT **PAYS!** FOR UNSCRUPULOUS EMPLOYERS TO TAKE ADVANTAGE OF WORKERS

In instances where workers are seriously harmed, OSHA penalties pale in comparison to the damage caused. For example, in Ohio, a devastating explosion at a foundry killed one and injured 15 others due to the failure of the employer to adhere to the well-known and required lockout/tag out procedures.<sup>120</sup> Even though 16 workers were harmed with one being killed, OSHA proposed a mere \$62,500 in fines against the employer.<sup>121</sup> In February 2022, the failure by a roofing contractor to utilize mandated fall protection resulted in a 15-year-old worker falling from the top of a two-story home and suffering “severe head and spinal injuries, and spend[ing] six days in a hospital.” While the employer was assessed for child labor violations separately, they were only cited \$8,702 in penalties by OSHA for worker health and safety violations.<sup>122</sup>

At the beginning of 2023, a 28-year-old farmworker, on his first day, was exposed to a heat index of approximately 90 degrees and died while harvesting vegetables due to the heat. OSHA found that the employer failed to protect the worker from heat exposure and proposed \$15,625 in penalties for the worker’s death.<sup>123</sup> In comparison, the penalty was higher than the average penalty for heat-related deaths. Between 2017 and 2022, OSHA’s average penalty on employers for failing to protect workers from fatal heat-related illness was approximately \$8,500, with some worker deaths yielding just a \$2,000 penalty.<sup>124</sup> While an appropriate monetary value cannot be assigned to a person’s life, the civil monetary penalties under the OSH Act are significantly less than the \$10 to \$12 million some federal agencies have developed as estimates for the value of a statistical life when conducting regulatory cost-benefit analysis and calculating risk reduction.<sup>125</sup>

The OSH Act “places responsibility on employers to protect workers from hazards and to comply with the law.”<sup>126</sup> However, without a significant deterrent, unscrupulous employers will continue to ignore health and safety regulations and endanger the lives of their employees.

# A SLAP ON THE WRIST

HOW IT  **PAYS!** FOR UNSCRUPULOUS EMPLOYERS TO TAKE ADVANTAGE OF WORKERS

## **PENALTIES FOR FAILING TO PROVIDE ESSENTIAL MENTAL HEALTH AND SUBSTANCE USE DISORDER BENEFITS**

In 1974, Congress enacted the *Employee Retirement Income Security Act* (ERISA), an expansive law that established base standards to safeguard the security of workers' job-based benefits, including employer-sponsored health coverage.<sup>127</sup> Since ERISA's enactment, the landscape of employer-provided health plans has significantly transformed, with nearly 165 million people today receiving coverage through a job-based group health plan in the United States.<sup>128</sup> To ensure the Department of Labor is able to fulfill its statutory duty of ensuring the security of employee benefits, Congress has repeatedly amended ERISA to address new and emerging issues that undermine access to health benefits for working people.<sup>129</sup> While substantive progress has been made in ensuring access to comprehensive coverage, through landmark reforms such as the *Patient Protection and Affordable Care Act* (ACA),<sup>130</sup> barriers remain for workers and their families—particularly with respect to coverage of behavioral health care.

Currently, there is a substantial unmet need for high-quality behavioral health care in the United States. According to the Substance Abuse and Mental Health Services Administration (SAMHSA), in 2022, approximately 23.1 percent of adults, or about 59.3 million people, had a mental illness and 48.7 million people aged 12 or over had a substance use disorder.<sup>131</sup> However, only about half of adults with mental illness received health services to treat their condition and only a quarter of individuals with a substance use disorder received the necessary treatment.<sup>132</sup> SAMHSA found that cost is a commonly cited barrier to care, including for a majority of individuals experiencing mental illness.<sup>133</sup>

Access to behavioral health care is critical to overall health and wellness. Mental illnesses are closely linked to physical health problems, such as diabetes, stroke, and heart disease, while, conversely, chronic physical illnesses can increase the risk of mental illnesses.<sup>134</sup> Individuals living with serious mental illness experience dramatically higher mortality rates than the overall population—dying as much as 25 years earlier overall—usually as a result of treatable conditions.<sup>135</sup> The COVID-19 pandemic further underscored the importance of equitable access to quality behavioral health care services. During the pandemic, the number of individuals reporting symptoms of depression or anxiety increased, with young adults being disproportionately impacted.<sup>136</sup>



# A SLAP ON THE WRIST

## HOW IT FOR UNSCRUPULOUS EMPLOYERS TO TAKE ADVANTAGE OF WORKERS

Advocates and policymakers have long sought to protect workers covered by job-based plans from the discriminatory treatment of behavioral health by group health plans and insurers by improving parity in coverage. Parity refers to the principle that coverage of mental health and substance use disorder (MH/SUD) services be no more restrictive than coverage of medical and surgical health services—reducing barriers and excessive out-of-pocket costs for working families when they obtain MH/SUD services. In short, parity ensures that MH/SUD is treated similarly to other kinds of health care services. Congress has taken several steps to improve parity, beginning in 1996 with the bipartisan *Mental Health Parity Act*,<sup>137</sup> which provided that annual or lifetime dollar limits for mental health care could not be more restrictive than those imposed on medical and surgical services.

In 2008, Congress took further action to bolster coverage by enacting the bipartisan *Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008* (MHPAEA).<sup>138</sup> MHPAEA greatly expanded parity protections by prohibiting large group health plans and issuers that provide MH/SUD benefits from imposing financial requirements or treatment limitations that are more restrictive than the predominant financial requirements or treatment limitations applied to substantially all covered medical and surgical benefits. The requirements of MHPAEA and its implementing regulations extended parity to SUD services and apply to both quantitative and non-quantitative treatment limitations, such as step therapy, prior authorization, network design, and other barriers to care.<sup>139</sup> The ACA further strengthened behavioral health coverage by requiring small employer plans to cover treatment of MH/SUD as an Essential Health Benefit and by applying parity to coverage purchased in the individual market.

Despite historic legislative progress to strengthen coverage of behavioral health care, enforcement agencies continue to face challenges in making parity a reality and workers struggle to access affordable MH/SUD care. The Employee Benefits Security Administration (EBSA) within the Department of Labor is the primary federal enforcement agency of MHPAEA's requirements with respect to private sector group health plans.<sup>140</sup> Its enforcement powers include the authority to make investigations, audit plans, and mandate the submission of reports, books, and records,<sup>141</sup> as well as the authority to enjoin acts or practices that violate the statute or to obtain other appropriate equitable relief with respect to violations.<sup>142</sup>

EBSA has several limitations that undermine the agency's ability to enforce parity violations. On top of a base budget that has remained generally flat for the last decade while operating costs have increased and staffing has declined,<sup>143</sup> EBSA faces statutory



# A SLAP ON THE WRIST

## HOW IT FOR UNSCRUPULOUS EMPLOYERS TO TAKE ADVANTAGE OF WORKERS

limitations that prevent it from assessing monetary penalties or bringing enforcement actions directly against insurers for parity violations.<sup>144</sup> Without the authority to assess appropriate penalties for noncompliance, group health plans and insurers have little incentive to comply and appropriately cover workers' MH/SUD treatment costs. In a 2022 report to Congress, the Departments of Labor, Health and Human Services, and the Treasury (Tri-Departments) found widespread violations of MHPAEA by health plans, including impermissible limits on treatments for autism and opioid use disorder.<sup>145</sup> Forty percent of plans and health insurance issuers requested deadline extensions in response to EBSA's enforcement activities, leading the agency to conclude "that many plans and issuers were deficient in their statutory obligation."<sup>146</sup> In the 2023 follow-up report, the Tri-Departments again documented significant noncompliance, which presents a substantial barrier to workers' access to behavioral care.<sup>147</sup> EBSA observed that in some cases plans and issuers provide only information needed to document a parity analysis while not providing information sufficient to determine compliance with MHPAEA's substantive requirements.<sup>148</sup> The agency found efforts to improve compliance helped facilitate access to benefits by removing prior authorization requirements and other barriers to accessing MH/SUD services.<sup>149</sup>

The Tri-Departments' 2022 report, supported by its 2023 report, also made several legislative recommendations that would eliminate barriers to accessing mental health benefits and enhance enforcement of the law. Among other recommendations, the Departments recommend Congress: (1) establish civil monetary penalties for MHPAEA violations and (2) expressly provide authority to DOL to enforce the requirements against health insurance issuers and service providers for group health plans. In 2017, under President Donald Trump, the President's Commission on Combatting Drug Addiction and the Opioid Crisis, a bipartisan group chaired by then-Governor Chris Christie (R-NJ), similarly recommended that DOL be granted enforcement authority against issuers and the authority to impose monetary penalties for parity violations.<sup>150</sup> The Commission determined that existing enforcement powers were inadequate and that DOL's ability to assess civil monetary penalties "would encourage private insurance companies, and employers, to satisfy their legal obligations under MHPAEA."<sup>151</sup>

Given that the United States is in the midst of a mental health crisis, and with overdose deaths on the rise in recent years,<sup>152</sup> it is more important than ever to ensure America's working families can afford the health care they need. While MHPAEA has greatly improved coverage of MH/SUD benefits for workers and their families, compliance continues to be an issue. Without meaningful parity in coverage of mental health care and

# A SLAP ON THE WRIST

## HOW IT **PAYS!** FOR UNSCRUPULOUS EMPLOYERS TO TAKE ADVANTAGE OF WORKERS

treatment for substance use, hundreds, if not thousands of Americans will not seek the necessary treatments due to cost. Congress empowered the federal government to enforce the law, but the current tools lack teeth. Thus, to ensure the objectives of parity are achieved and that millions of people have equal access to critical behavioral health care, the Department of Labor must be given additional tools and explicit authority to levy monetary penalties to deter violations.

### CONCLUSION

America's labor and employment laws defend workers from harm and exploitation. They protect our children by keeping them away from sawblades and slaughterhouses where they can be maimed or killed. Our country's laws grant workers the freedom to organize and collectively bargain without the fear of retaliation. They also safeguard the wages and benefits that workers have rightfully earned through their labor.

Unfortunately, unscrupulous employers are emboldened to violate these foundational worker rights and protections because of the weak civil monetary penalties assessed in response. Under some labor and employment laws, workers are worse off as employers face no monetary penalty and can break the law cost-free. Monetary penalties are supposed to serve as a deterrent and hold employers accountable for labor violations. However, today, they have simply become a "cost of doing business." Penalties for killing a worker or child, stealing workers' hard-earned pay, or denying the proper coverage of workers' mental health care pale in comparison to other laws. This must be addressed. The proper balance must be restored so workers are sufficiently protected, and the laws successfully fulfill their purpose.

Congress must act to responsibly raise civil monetary penalties for labor violations. Worker rights and protections are not mere suggestions. To ensure workers and children are protected, the cost of violating the law should not amount to a slap on the wrist.

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<sup>2</sup> Celine McNicholas et al., *Civil monetary penalties for labor violations are woefully insufficient to protect workers*, Econ Pol Inst. (Jul. 15, 2021), <https://www.epi.org/blog/civil->

# A SLAP ON THE WRIST

## HOW IT FOR UNSCRUPULOUS EMPLOYERS TO TAKE ADVANTAGE OF WORKERS

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<sup>3</sup> Daniel J. Galvin, *Deterring Wage Theft: Alt-Labor, State Politics, and the Policy Determinants of Minimum Wage Compliance*, 14 *Perspectives on Politics* 324, 338 (2016); See also McNicholas et al., *supra* note 2; 29 C.F.R. § 578.3(a).

<sup>4</sup> McNicholas et al., *supra* note 2.

<sup>5</sup> *Chamber of Commerce Membership*, U.S. Chmbr of Com., <https://www.uschamber.com/join/chamber-of-commerce-membership> (last viewed Mar. 29, 2024).

<sup>6</sup> McNicholas et al., *supra* note 2.

<sup>7</sup> *OSHA Penalties*, Occup Sfty and H Admin., <https://www.osha.gov/penalties> (last viewed Mar. 29, 2024); Rebecca L. Reindel & Ayusha Shrestha, AFL-CIO, *Death on the Job: The Toll of Neglect* 4 (2024), <https://aflcio.org/sites/default/files/2024-04/2411%20DOTJ%202024%20DIG%20NB%20REV.pdf>.

<sup>8</sup> *2023 Executive Benefits Survey*, Goldman Sachs Ayco 6 (Nov. 30, 2023), <https://www.ayco.com/content/dam/ayco/pdfs/us/en/goldman-sachs-ayco-executive-benefits-survey-2023.pdf?sa=n&rd=n>.

<sup>9</sup> See 29 C.F.R § 579.1(a)(1).

<sup>10</sup> *Civil Penalties; Notice of Adjusted Maximum Amounts*, 86 Fed. Reg. 68244, (Dec. 13, 2021) (<https://www.federalregister.gov/documents/2021/12/01/2021-26082/civil-penalties-notice-of-adjusted-maximum-amounts>).

<sup>11</sup> *Civil Monetary Penalty Inflation Adjustment*, 88 Fed. Reg. 89309 (Dec. 27, 2023) (codified at 40 C.F.R. pt. 19); *OSHA Penalties*, Occup Sfty and H Admin., <https://www.osha.gov/penalties> (last viewed Mar. 29, 2024).

<sup>12</sup> See 29 C.F.R § 579.1(a)(1); *Civil Monetary Penalty Adjustments for Inflation*, 88 Fed. Reg. 89300 (Dec. 27, 2023) (codified at 15 C.F.R. pt. 6).

<sup>13</sup> *Annual Adjustment of Civil Monetary Penalties To Reflect Inflation*, 89 Fed. Reg. 2148, 2150 (Jan. 1, 2024) (codified 47 C.F.R. pt. 1).

<sup>14</sup> See 29 C.F.R. § 578.3(a).

<sup>15</sup> See 15 C.F.R. § 6.3(f)(4).

<sup>16</sup> See generally 29 U.S.C. §§ 201-216.

<sup>17</sup> *Id.*

# A SLAP ON THE WRIST

## HOW IT FOR UNSCRUPULOUS EMPLOYERS TO TAKE ADVANTAGE OF WORKERS

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<sup>19</sup> A New Child Labor Crisis in America, N.Y. Times (Mar. 9, 2023), <https://www.nytimes.com/2023/03/09/podcasts/the-daily/migrant-child-labor-america.html>; David J. Neal, *A Restaurant's Florida Franchisees Illegally Used Child Labor and Owed Workers \$24,000*, Miami Herald (Mar. 8, 2023), <https://www.miamiherald.com/news/business/article272835475.html>; *How Child Labor Violations Have Quadrupled Since 2015*, 1A: NPR (Mar. 6, 2023), <https://www.npr.org/2023/03/06/1161486299/how-child-labor-violations-have-quadrupled-since-2015>; Nandita Bose & Mica Rosenberg, *U.S. to Crack Down on Child Labor Amid Massive Uptick*, Reuters (Feb. 27, 2023), <https://www.reuters.com/business/us-crack-down-child-labor-amid-massive-uptick-2023-02-27/>; Hannah Dreier, *Alone and Exploited, Migrant Children Work Brutal Jobs Across the U.S.*, N.Y. Times (Feb. 25, 2023), <https://www.nytimes.com/2023/02/25/us/unaccompanied-migrant-child-workers-exploitation.html>; Terri Gerstein, *Child Labor Has Made a Comeback*, Slate (Nov. 16, 2022), <https://slate.com/business/2022/11/packers-sanitation-child-labor-department-hyundai-chipotle.html>.

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<sup>21</sup> Joshua Schneyer et al., *Exclusive: Hyundai subsidiary has used child labor at Alabama Factory*, Reuters (Jul. 22, 2022), <https://www.reuters.com/world/us/exclusive-hyundai-subsidiary-has-used-child-labor-alabama-factory-2022-07-22/>.

<sup>22</sup> *Id.*

<sup>23</sup> Press Release, U.S. Dep't of Lab., Department of Labor Finds Louisiana, Texas McDonald's Franchisees Allowed Minors to Work Longer, Later than Law Permits, Operate Dangerous Equipment (Jul. 25, 2023), <https://www.dol.gov/newsroom/releases/whd/whd20230725-0>.

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# A SLAP ON THE WRIST

## HOW IT FOR UNSCRUPULOUS EMPLOYERS TO TAKE ADVANTAGE OF WORKERS

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<sup>27</sup> Dreier, *supra* note 19.

<sup>28</sup> Rebecca J. Guerin et al., Ctrs for Disease Cnt'l & Prevention, *Nonfatal Occupational Injuries to Younger Workers—United States, 2012-2018*, 69 Morb & Mortal Wkly Rep. 1204-1209 (Sept. 4, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6935a3-H.pdf>.

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

<sup>31</sup> Patrick Terpstra & Rosie Cima, *More kids are getting hurt in American workplaces*, Scripps News (Jan. 10, 2024), <https://scrippsnews.com/stories/more-kids-are-getting-hurt-in-american-workplaces/>.

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<sup>38</sup> See 29 C.F.R. § 579.1(a)(1).



# A SLAP ON THE WRIST

## HOW IT FOR UNSCRUPULOUS EMPLOYERS TO TAKE ADVANTAGE OF WORKERS

<sup>39</sup> Press Release, U.S. Dep't of Lab., US Department of Labor Finds Salt Lake City Restaurant Supply Company Illegally Employed 22 Minor-Aged Workers Beyond Hours Allowed (Mar. 28, 2023), <https://www.dol.gov/newsroom/releases/whd/whd20230328-0>.

<sup>40</sup> Press Release, U.S. Dep't of Lab., Department of Labor Finds Tennessee McDonald's Franchisee Endangered Minor Who Suffered Deep Fryer Burn, Assesses \$3K Civil Penalty (Mar. 23, 2023), <https://www.dol.gov/newsroom/releases/whd/whd20230323-0>.

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<sup>42</sup> Press Release, U.S. Dep't of Lab., Ohio Lathe Mill Pays \$22K in Child Labor Penalties After 15-Year-Old Suffers Injury While Working in a Sawmill (Apr. 5, 2023), <https://www.dol.gov/newsroom/releases/whd/whd20230405-0>.

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# A SLAP ON THE WRIST

## HOW IT FOR UNSCRUPULOUS EMPLOYERS TO TAKE ADVANTAGE OF WORKERS

<sup>51</sup> Press Release, U.S. Dep't of Lab., US Department of Labor Recovers \$901K in Back Wages, Damages for 75 Grocery Store Workers Denied Overtime Pay by Employer (Jan. 24, 2024), <https://www.dol.gov/newsroom/releases/whd/whd20240124>.

<sup>52</sup> Press Release, U.S. Dep't of Lab., Court Orders Operators of 14 Bay Area Subway Locations To Pay Employees Nearly \$1M in Wages, Damages; Sell or Shut Down Their Businesses (Sept. 29, 2023), <https://www.dol.gov/newsroom/releases/whd/whd20230929>.

<sup>53</sup> Cooper & Kroeger, *supra* note 45.

<sup>54</sup> Celine McNicholas et al., Econ Pol'y Inst., *Two billion dollars in stolen wages were recovered for workers in 2015 and 2016—and that's just a drop in the bucket* 3 (2017), <https://files.epi.org/pdf/138995.pdf>.

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<sup>58</sup> *Id.* at 14.

<sup>59</sup> Eastern Rsch Grp, Inc., *The Social and Economic Effects of Wage Violations: Estimates for California and New York* (2014), <https://www.dol.gov/sites/dolgov/files/OASP/legacy/files/WageViolationsReportDecember2014.pdf>.

<sup>60</sup> 29 U.S.C. § 216(b); 29 U.S.C. § 216(e)(2).

<sup>61</sup> 29 U.S.C. § 216(b).

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<sup>65</sup> Consolidated Appropriations Act, 2018, Pub. L. No. 115-141 § 1201 (2018).

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# A SLAP ON THE WRIST

## HOW IT FOR UNSCRUPULOUS EMPLOYERS TO TAKE ADVANTAGE OF WORKERS

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<sup>68</sup> Press Release, U.S. Dep't of Lab., Break Failures: Global Security Provider To Pay Nearly \$1.1M in Back Wages, Damages to 778 Workers After Wrongly Deducting Meal Breaks Not Taken (Oct. 20, 2023), <https://www.dol.gov/newsroom/releases/whd/whd20231020>.

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# A SLAP ON THE WRIST

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# A SLAP ON THE WRIST

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# A SLAP ON THE WRIST

## HOW IT FOR UNSCRUPULOUS EMPLOYERS TO TAKE ADVANTAGE OF WORKERS

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# A SLAP ON THE WRIST

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