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Wage Theft in West Virginia: Solutions for a Hidden Epidemic

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Summary and Key Findings

Wage theft is one of the most prevalent but under-reported problems confronting working people in the United States. Wage theft is a violation of workers' rights in which an employer fails to pay an employee what that employee is owed. The national scale of wage theft is tremendous. According to the Economic Policy Institute (EPI), the estimated value of wages stolen through violations of federal and state minimum wage laws—just one of several different types of wage theft—alone was \$15 billion in 2015, easily eclipsing the \$12.7 billion stolen through all reported robberies, burglaries, larcenies, and car thefts in the same year.¹

The toolbox available to victimized workers for the recovery of money taken by their employers is remarkably weak, both nationally and on the state level. Lawmakers and regulators in West Virginia, however, can remedy this by eliminating the two-tiered minimum wage system, increasing funding for the Division of Labor for the investigation of wage theft claims, and implementing harsher penalties for employers who commit wage theft.

Wage theft disproportionately affects some of the most vulnerable segments of the workforce. Low-wage workers—those in the worst position to lose money out of their paychecks—are wage theft's biggest victims.² Tipped workers, who tend to be female, younger, and less educated than the rest of the labor market, are one of the most impacted worker groups.³ Wage theft keeps hard-earned money out of the hands of workers for whom every dollar counts.

Key Findings

- From 2008–2017, \$7.7 million in back wages were recovered in more than 15,000 cases of wage theft in West Virginia. Based on national estimates, West Virginia workers likely lost as much as \$90 million to minimum wage violations in 2015.
- Full-service restaurants and building construction were the West Virginia industries whose workers received the greatest amounts in back wages.
- Nationally, female workers are more likely than male workers to experience wage theft, and African American workers suffer wage theft at three times the rate suffered by white workers.
- West Virginia lawmakers can help stop wage theft by eliminating the separate tipped minimum wage, requiring treble damages for violations, and penalizing employers by revoking their ability to do business in or with the state.

What is Wage Theft?

Wage theft occurs when an employer denies an employee compensation to which that employee is entitled, either by law or contract.⁴ There are several forms of wage theft, including minimum wage and overtime violations, employee misclassification, and other forms of non-payment for services provided (see sidebar on following page).

A common form of wage theft is minimum wage violations which occurs when a worker is paid an hourly wage below the minimum required by the relevant jurisdiction. The federal minimum hourly wage was established in 1938 by the Fair Labor Standards Act, which was last amended to raise the minimum wage in 2009.⁵ It is applicable to workers engaged in interstate commerce or employed by hospitals, schools, government agencies, or businesses with sales of at least \$500,000 with at least two employees.⁶ While there are certain exemptions, this coverage includes the vast majority of workers in the United States.⁷ The federal minimum wage is \$7.25 an hour, where it has remained for more than a decade.⁸

The tipped minimum wage is the origin of many minimum wage violations. Under federal law, tipped workers (i.e., workers who take home at least \$30 in tips a month⁹) are paid a wage of \$2.13 an hour. Their tips must boost their take-home pay to at least the equivalent of the regular minimum wage for any two-week period or else their employers must make up the difference.¹⁰ The tipped minimum wage has not risen at the federal level for more than 25 years.¹¹ If a tipped employee is not making the full minimum wage after tips or is losing her tips to an illegal tip pooling scheme, that employee is a victim of wage theft. The relative complexity of the law in this area leaves employees particularly exposed to potential wage theft.

Employees working where state law sets a minimum wage higher than the federal minimum wage are legally entitled to the higher state minimum wage.¹² In West Virginia, an employee at a business employing more than six people¹³ qualifies for the state minimum wage of \$8.75 an hour, and tipped employees have a minimum wage of \$2.62 an hour with the intention that tips cover the difference.¹⁴ If an employer should be paying an employee the state minimum wage but is paying the federal minimum wage, the employee is a victim of wage theft.

An employee has also suffered a minimum wage violation if that employee is forced to work additional hours off the clock. If a worker is paid for forty hours at minimum wage but was actually made to work more than the forty hours reported on the worker's paystub, that worker's effective hourly wage has fallen below the legal minimum requirement. The money owed to the worker for that off-the-clock work is an example of payment lost to wage theft.

Overtime violations are another common form of wage theft. In general, when employees who do not qualify under a limited set of exemptions for executives and skilled professionals work more than forty hours in a seven-day workweek, those employees are owed the regular hourly wage multiplied by 1.5 for every hour worked beyond forty.¹⁵ An employee paid less than the statutory overtime rate for overtime work is a victim of wage theft.

Workers who are victims of wage theft also include employees misclassified as independent contractors or as exempt from overtime or minimum wage requirements. Independent contractors are entitled to weaker legal protections than employees.¹⁶ As a consequence, unscrupulous employers will sometimes classify their workers as independent contractors when the nature of their work should actually classify them as employees.¹⁷ Misclassification cannot only rob workers of the compensation they are entitled to, but deprive them of the ability to bargain collectively. This deprivation takes money and power that should be reserved for workers and unjustly puts it in the pocket of their employers—in other words, it is wage theft.

Other forms of wage theft include off-the-clock violations, illegal deductions, and simple nonpayment of wages. In an off-the-clock violation, an employee is made to work before or after she clocks in or during meal breaks without

What Is Wage Theft?

Wage theft is the failure to pay workers the full wages to which they are legally entitled. Wage theft can take many forms, including but not limited to:

- **Minimum wage violations:** Paying workers less than the legal minimum wage
- **Overtime violations:** Failing to pay nonexempt employees time-and-a-half for hours worked in excess of 40 hours per week
- **Off-the-clock violations:** Asking employees to work off-the-clock before or after their shifts
- **Meal break violations:** Denying workers their legal meal breaks
- **Pay stub and illegal deductions:** Taking illegal deductions from wages or not distributing pay stubs
- **Tipped minimum wage violations:** Confiscating tips from workers or failing to pay tipped workers the difference between their tips and the legal minimum wage
- **Employee misclassification violations:** Misclassifying employees as independent contractors to pay a wage lower than the legal minimum

additional compensation.¹⁸ If an employer’s deductions from an employee’s paycheck (e.g., deductions for employer-provided equipment, shelter, or food) result in that employee making less than minimum wage, those deductions could amount to wage theft.¹⁹ Finally, employees who fail to receive their final paycheck or suffer long periods of time without a paycheck are victims of wage theft as well.²⁰

The effect of wage theft on American workers is extensive regardless of violation. Workers lost an estimated \$15 billion to their employers through wage theft in 2015 through minimum wage violations alone.²¹ A 2009 survey of more than 4,000 low-wage workers found that twenty-six percent were paid below minimum wage. Of workers who worked more than forty hours in a work week, seventy-six percent failed to receive the overtime pay rate. Of workers asked to work off the clock, seventy percent were not paid for the extra hours worked. Overall, the study estimated that the average low-wage worker lost fifteen percent of their earnings to wage theft in a year.²² If these results were generalized for the entire country, low-wage workers lost \$50 billion to wage theft in 2016 alone.²³

Wage theft also tends to disproportionately affect more vulnerable segments of the workforce. In the 2009 survey, employers committed minimum wage violations against female workers at a higher rate than against male workers, and foreign-born workers suffered from these violations at twice the rate of U.S.-born workers, with foreign-born Latinos suffering the highest violation rate of any demographic. Among workers born in the United States, African Americans were three times as likely to be victims of minimum wage violations than white workers.²⁴ Given wage theft’s disproportionate effects on women and people of color, wage theft erects a barrier both to gender equality and racial equity in the American workplace.

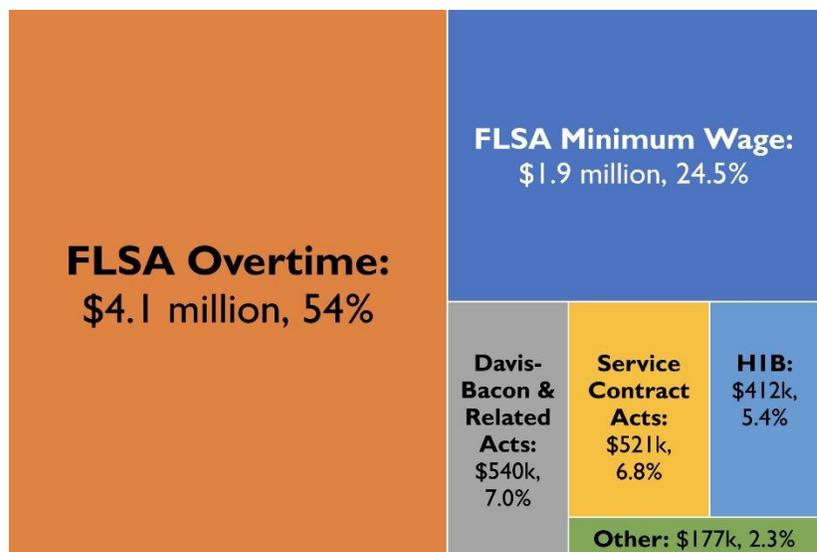
Scale of Wage Theft in West Virginia

Wage theft is not only a significant problem nationally, but also in West Virginia. According to enforcement data from the Wage and Hour Division of the U.S. Department of Labor (DOL), the federal government investigated 15,860 cases of wage theft in West Virginia from 2008 to 2017. In that period, 1,800 employers were investigated for violations against 12,078 employees. Of those employees against whom wage theft was committed, 11,095 received back wages totaling \$7,665,145. The DOL assessed \$334,548 in penalties against the offending employers from 2008 to 2017.

Broken down by violation type, two types of wage theft predominate in the available enforcement data: minimum-wage violations and overtime violations. West Virginia employers paid \$4,139,659 in back wages to workers to remedy overtime violations, and another \$1,875,768 for minimum-wage violations. Both of these types of violations, as well as Special Minimum Wage violations, stem from the Fair Labor Standards Act (FLSA), but wage theft violations can also be covered by the Service Contract Act (SCA), Migrant and Seasonal Agricultural Workers Protection Act (MSPA), Immigration and Nationality Act (H-1B, H-2A), Family and Medical Leave Act (FMLA), Davis–Bacon Act, and Contract Work Hours and Safety Standards Act (CWHSSA). Each of these laws protects the rights of employees in the workplace and can result in acts of wage theft if violated (See Figure 1).

Figure 1

Back Wages Paid by Violation Type in West Virginia, 2008-2017 - \$7.7 Million Total



Source: US Department of Labor, Wage and Hour Division

Note: Other includes Family Medical Leave Act, H-2A, FLSA Special Minimum Wages, Migrant and Seasonal Agriculture Workers Protection Act, and Contract Work Hours and Safety Standards Act

The West Virginia industry where the largest value of wages was stolen for the period was full-service restaurants, in which employers had to pay more than 2,000 employees \$1.3 million in back wages. The second-highest amount of back wages owed was by the building construction industry, whose employers repaid nearly \$557,000 to 132 employees. The most egregious individual wage violator in the period was Gantt’s Excavating and Contracting, Inc., of Martinsburg, which paid worker-victims back wages of \$450,689.

Table I
West Virginia Industries with the Most Wage Theft

Rank	Industry	Violations	Penalties	Employees Affected	Back Wages Agreed to Pay	Employees Agreed to Pay
1	Full-Service Restaurants	3,176	\$112,525	2,304	\$1,303,383	2,208
2	Commercial and Institutional Building Construction	172	\$21,873	132	\$556,995	132
3	Home Care Services	345	\$0	339	\$428,444	326
4	Computer Systems Design and Related Services	8	\$0	7	\$410,542	7
5	Security Guards and Patrol Services	739	\$848	654	\$286,460	654

Source: U.S. Department of Labor, Wage and Hour Division

The West Virginia Division of Labor’s Wage and Hour Division also performs enforcement functions with regard to wage theft. Workers can notify the state DOL about an incident of wage theft by filing a request for assistance (RFA) detailing the offense and the amount claimed. Between 2008–2017, the state DOL received 9,038 RFAs involving 5,633 employees and collected \$9,480,125 on workers’ behalf.

These numbers should only be considered the tip of the wage-theft iceberg in West Virginia. They represent the wage theft reported by workers and investigated by regulators, which is small subset of all the wage theft committed against workers that may be intimidated into silence or kept in the dark completely.²⁵ If the estimated \$15 billion stolen by employers through minimum wage violations were distributed evenly according to each state’s share of low-wage workers, we could conclude that in 2015 alone, the 0.6% of American workers making at or below minimum wage who work in West Virginia lost approximately \$90 million to wage theft.²⁶ The \$1.88 million recovered for these workers over a decade by the Department of Labor most likely pales in comparison to the actual scale of the problem.

Wage Theft in Construction in West Virginia

The construction industry is a source of a significant amount of wage theft nationally and in West Virginia. Wage theft has been called the predominant business model in the industry because unscrupulous contractors often skirt the law to obtain the slightest advantage over competitors.²⁷ Construction companies that commit wage theft often pay workers in cash to avoid paying taxes or leaving a record of low wages. They often prey on a disproportionately undocumented workforce that can be intimidated more easily into accepting illegal work arrangements. And they rely on lax oversight in the selection of contractors for state projects, sometimes permitting known criminals to keep taking in taxpayer money of which the workers rarely see their fair share.²⁸

In West Virginia, state contractors have committed wage theft, pled guilty to the charges against them, and moved on to receive more state contracts. One such contractor, VHP Enterprises of Tarpon Springs, Florida, received a bridge-painting contract in Braxton County in 2012. Its owners, Nomiki and Michael Vavlas, failed to report or underreported at least \$146,000 in wages, and pled guilty to the fraud charges in connection to this withholding.²⁹ In 2016, International Rigging Group—owned also by the Vavlas family—was awarded another larger bridge-painting contract by the Division of Highways despite having been found guilty of fraud on a prior state project.³⁰

Legislators in West Virginia are in a particularly advantageous position to challenge wage theft in the construction sector, with a higher percentage of workers employed than in any other state.³¹ Lawmakers can protect these workers from the depredations of employers like the Vavlas family's businesses so that taxpayer money goes to West Virginia's construction workers and not contractors known to engage in wage theft.

Solutions to Curbing Wage Theft in West Virginia

States have adopted a number of approaches to holding employers that commit wage theft accountable. Such actions have included efforts both to prevent wage theft and to enforce the laws against employers that commit wage theft. While West Virginia has already implemented certain policies to fight wage theft, state lawmakers should look to measures taken in other states to model an effective strategy for combatting wage theft in the Mountain State.

Eliminate the Separate Tipped Minimum Wage: Under current law, West Virginia permits employers of tipped workers to apply a tip credit (the difference between what the employer pays and the regular minimum wage) of seventy percent, which yields a tipped minimum wage of \$2.62 an hour.³² As shown in Section III, full-service restaurants were responsible for the plurality of back wages owed to employee-victims of wage theft in West Virginia from 2008–2017. Nationally, tipped workers are concentrated in restaurants, with the majority employed as restaurant servers and bartenders.³³ Eliminating the tipped minimum wage would help employers ensure their own compliance with the law and improve employees' ability to know when their rights are being violated. The tip credit is opaque and convoluted; workers are expected to record every tip they receive, combine it with their base pay, and calculate whether their take-home pay in a two-week period is at least equivalent to the minimum wage. The difficulty of maintaining this kind of recordkeeping is compounded when servers' often erratic and inconsistent hours are factored into the calculation. And even if a given server realizes she is being underpaid, the power imbalance between a low-wage worker and her boss is so great that an actual confrontation over wages is unlikely to occur and perhaps even less likely to succeed. On the employer's end, the process of ensuring compliance is just as likely to result in wage theft because the convoluted recordkeeping required by the tip credit can cause even honest employers to let minimum wage violations slide and employees fall through the cracks.³⁴ So far, eight states have eliminated the tipped minimum wage.³⁵

Make Violators Pay: Lawmakers must also provide the resources to remedy wage theft after it is committed. The West Virginia Division of Labor (WVDOL) should be empowered to seek treble damages for wage theft cases. While the WVDOL already has sixteen labor inspectors in its Wage and Hour Section³⁶ (far more than neighboring Ohio, which has only five investigators for a population more than six times West Virginia's³⁷), its power to enforce the law would be strengthened by the authority not only to recover workers' wages on its own volition, but by forcing employers who commit wage theft to pay back triple what they owe in damages. Treble damages would impose serious financial consequences to help deter wage theft.

Enact Real Consequences for Wage Theft Offenders: Employers who commit wage theft and owe their workers money should lose their ability to do business in West Virginia through the revocation of state licensure and denial of state contracts. State agencies can be instructed to pursue wage theft as an enforcement priority as well. As has happened in Minnesota, the state Attorney General's office can establish an internal unit dedicated to pursuing criminal charges (wage theft already being a criminal offense in West Virginia) against obstinate employers.³⁸ Agencies that issue occupational and business licenses can be enlisted as well by instructing the various agency heads either to suspend or revoke licenses from businesses until confirmed instances of wage theft have been resolved.³⁹ It would be a significant blow, for example, to a restaurant that serves alcohol for its owners to have their liquor license suspended until they have remunerated employees whose wages they have stolen. Road construction contractors would also feel greater pressure to comply with West Virginia's wage and hour laws if they knew that a wage theft conviction would cost them future state contracts.

Wage theft is a tremendous problem for West Virginia workers, especially those in low-wage jobs. The actual scale of wage theft in West Virginia is likely far greater than what is known through investigations into reported violations. The sheer quantity of money being stolen from West Virginia workers demands a robust and aggressive response from legislators into preventing wage theft and punishing offending employers.

¹ David Cooper and Teresa Kroeger, “Employers Steal Billions from Workers’ Paychecks Each Year,” *Economic Policy Institute*, May 10, 2017, at 28. Retrieved from <https://www.epi.org/files/pdf/125116.pdf>

² *Ibid.*, 8.

³ Sylvia A. Allegretto and David Cooper, “Twenty-Three Years and Still Waiting for Change: Why It’s Time to Give Tipped Workers the Regular Minimum Wage,” *Economic Policy Institute*, July 10, 2014, at 8–9. Retrieved from <https://www.epi.org/files/2014/EPI-CWED-BP379.pdf>

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⁵ “Fact Sheet #14: Coverage Under the Fair Labor Standards Act (FLSA),” *U.S. Department of Labor, Wage and Hour Division*, July 2009, at 1. Retrieved from <https://www.dol.gov/whd/regs/compliance/whdfs14.pdf>

⁶ *Ibid.*

⁷ Cooper & Kroeger, 32–33.

⁸ Lydia DePillis, “The Minimum Wage Hasn’t Gone Up in Nearly 10 Years. That’s a New Record,” *CNN*, June 14, 2019. Retrieved from <https://www.cnn.com/2019/06/14/economy/federal-minimum-wage-raise/index.html>

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¹¹ *Ibid.*

¹² W. Va. Code § 21-5C-2(a) (2019).

¹³ W. Va. Code § 21-5C-1(e) (2019).

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¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ Cooper & Kroeger, 28.

²² Annette Bernhardt et al., “Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America’s Cities,” 2009, at 2–5. Retrieved from <https://www.nelp.org/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf>

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²⁴ Bernhardt et al., 48.

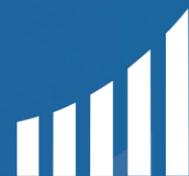
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