



## **The Role of Attorneys General in Addressing Wage Theft and Worker Misclassification**

**Authors: Joshua Diamond, Grace Pak**

**Contributors: Britteny Jenkins, Jonathan Sclarsic**

### **Summary**

State Attorneys General play key roles in protecting workers' rights. Attorneys General have powers and authority to advance and defend workplace protections, including the recovery of lost wages resulting from misclassification and wage theft. Many state Attorneys General have established units focused on workers' rights to combat these illegal business practices and protect workers. Attorneys General who establish such units in their offices will find that these units benefit their constituents, especially those from vulnerable communities.

In addition to these specialized units, state Attorneys General can develop strategic partnerships with local prosecutors and the private bar to enforce existing wage and hour laws. Attorneys General can also engage organized labor and immigrant communities through outreach and the development of relationships to help build a pipeline for enforcement cases. Finally, Attorneys General can utilize their bullypulpit to educate the public and business community on wage and hour laws to foster a culture of compliance.

### **Introduction**

The relationship between employers and employees is premised upon an exchange. Employees provide labor and in exchange they receive a wage, workplace protections, and a social safety net. When an employer misclassifies an employee as an independent contractor, workers lose the benefits of this exchange. Employers stop paying and employees no longer receive the benefits of minimum wages, overtime, Social Security and Medicare taxes, unemployment insurance, worker's compensation benefits, and the protections of federal anti-discrimination laws.<sup>1,2</sup>

Misclassification has been exacerbated by the emergence of the "gig economy." Gig work involves individuals who are viewed as independent contractors working for digital companies such as ride share apps, deliveries for restaurants, or other shopping services. A recent survey of gig workers revealed more than a quarter earned less than either the state or federal minimum wage.<sup>3</sup>

---

<sup>1</sup> MacDonald, K. (2002). (In)dependent contractors: Combatting employee misclassification in Title 26. <https://ecollections.law.fiu.edu/cgi/viewcontent.cgi?article=1511&context=lawreview>

<sup>2</sup> Tierney, J. (2018, January 17). Misclassification. <https://www.stateag.org/policy-areas/labor/labor-resources/2016/11/22/misclassification>

<sup>3</sup> Zipperer B. et al. (2022, June 1). National Survey of Gig Workers Paints A Picture of Poor Working Conditions, Low Pay, Economic Policy Institute. <https://www.epi.org/publication/gig-worker-survey/>

Further, misclassification impacts access to health insurance and other benefits. When an employee is misclassified as an independent contractor, employer premiums for health insurance are not paid, contributions to retirement plans do not occur, and vacation and sick leave are not accrued.<sup>4</sup> By classifying an employee as an independent contractor, the employee will be responsible to pay for the full amount of employment based taxes that go to Social Security and Medicare.<sup>5</sup>

Wage theft is the illegal non-payment or underpayment of wages in violation of wage and hour law, contract law, or criminal law.<sup>6,7</sup> Wage theft takes on many different forms—it can occur when employees are misclassified as independent contractors or exempt from the Fair Labor Standards Act so that minimum wage and/or overtime are not paid. It also includes taking unauthorized deductions from a worker's paycheck or failing to pay for all hours worked.<sup>8</sup> Lost income from wage theft is staggering. Recent estimated losses from minimum wage violations alone are \$15 billion annually.<sup>9</sup>

Wage theft is also an issue of social justice. Wage theft frequently occurs in low-wage industries, and the make-up of the workers are disproportionately women, workers of color, and immigrants.<sup>10</sup> Migrant workers are often victims because unscrupulous employers take advantage of their status with threats of deportation.

State Attorneys General (AGs) play a critical role in combating wage theft and worker misclassification. Through enforcement of wage and hour laws, advocating for policy changes, and public outreach, AGs can bring meaningful relief to those victimized by wage theft and worker misclassification.<sup>11</sup> For example, many of the AG Offices (AGO) have expanded their capacity or launched units and divisions to protect workers. Ten AGOs have dedicated units focusing on workers' rights, including misclassification and wage theft. They are: California, Massachusetts, New York, District of Columbia, Illinois, Michigan,

---

<sup>4</sup> Gilles, S. (2022, March 16). Benefits issues that arise upon misclassification of employees. Foley & Lardner LLP. <https://www.foley.com/en/insights/publications/2022/03/benefits-issues-misclassification-of-employees>

<sup>5</sup> Rhinehart, L. et al. (2021, June 16). Misclassification, the ABC test, and employee status: The California experience and its relevance to current policy debates. Economic Policy Institute. <https://www.epi.org/publication/misclassification-the-abc-test-and-employee-status-the-california-experience-and-its-relevance-to-current-policy-debates/>

<sup>6</sup> Lee, J. et al. (2019, June). Regulating Wage Theft. <https://scholarshare.temple.edu/bitstream/handle/20.500.12613/6755/Lee-JournalArticle-2019-.pdf?sequence=1>

<sup>7</sup> Lee, J. et al. (2019, June). Regulating Wage Theft., 780. <https://scholarshare.temple.edu/bitstream/handle/20.500.12613/6755/Lee-JournalArticle-2019-.pdf?sequence=1>

<sup>8</sup> Lee, J. et al. (2019, June). Regulating Wage Theft., 765. <https://scholarshare.temple.edu/bitstream/handle/20.500.12613/6755/Lee-JournalArticle-2019-.pdf?sequence=1>

<sup>9</sup> Mangundayao, I. et al. (2021, December 20). More Than \$3 Billion in Stolen Wages Recovered For Workers Between 2017 and 2020, Economic Policy Institute. <https://www.epi.org/publication/wage-theft-2021/>

<sup>10</sup> Mangundayao, I. et al. (2021, December 20). More Than \$3 Billion in Stolen Wages Recovered For Workers Between 2017 and 2020, Economic Policy Institute., fn. 1. <https://www.epi.org/publication/wage-theft-2021/>

<sup>11</sup> Mangundayao, I. et al. (2021, December 20). More Than \$3 Billion in Stolen Wages Recovered For Workers Between 2017 and 2020, Economic Policy Institute., fn. 1. <https://www.epi.org/publication/wage-theft-2021/>

Minnesota, New Jersey, Pennsylvania, and Virginia.<sup>12</sup> Hawai'i,<sup>13</sup> Florida,<sup>14</sup> Georgia,<sup>15</sup> Missouri,<sup>16</sup> and Ohio<sup>17</sup> have divisions focused on representing and defending state agencies in lawsuits brought under federal and state employment laws, such as Title VII of the Civil Rights Act of 1964, whistle-blower protections, and the Age Discrimination in Employment Act. Several AGOs, such as Washington, Colorado, Rhode Island, Wisconsin, North Carolina, Connecticut, and Vermont, have dedicated staff in other units, such as public protection divisions, who work to combat wage theft and misclassification of employees.<sup>18</sup> Still others have dedicated or embedded Assistant Attorneys General (AAG) in state labor agencies, who work on misclassification and wage theft cases. Through these labor units and divisions, AGs have been able to protect and enhance workers' rights and ensure fair labor and business practices.

### **The Authority of Attorneys General to Enforce Labor Laws to Address Misclassification and Wage Theft Varies Across the Country.**

AGs' jurisdiction to enforce labor laws and fight wage theft varies. Some AGs, such as MA, IL, and MN have explicit jurisdiction. For example, MA's Attorney General has sole authority to enforce the Commonwealth's wage and hour laws.<sup>19</sup> In IL, the legislature created a unit in the Attorney General's Office with the "power and duty...to intervene, initiate, and enforce all legal proceedings on matters related to payment of wages...."<sup>20</sup> The MN legislature expressly conveyed enforcement authority to both the Department of Labor and the Attorney General.<sup>21</sup> Others rely more on general statutes. For example, states may also rely upon *parents patriae* authority, where they act to protect the well being of their residents.<sup>22</sup> Selected examples of AG enforcement actions regarding worker misclassification and wage theft include:

---

<sup>12</sup> Gerstein, T. (Fall 2020). State and Local Workers' Rights Innovations: New Players, New Laws, New Methods of Enforcement, 65 St. Louis U.L.J., 51-53.

<https://scholarship.law.slu.edu/cgi/viewcontent.cgi?article=2198&context=lj>

<sup>13</sup> Divisions. (n.d.). State of Hawaii Department of the Attorney General. <https://ag.hawaii.gov/about-us/divisions/#labor>.

<sup>14</sup> Employment Litigation Bureau. (n.d.). Office of Attorney General Ashley Moody.

<http://myfloridalegal.com/pages.nsf/main/ebe7335db63c9f368525733800460937>.

<sup>15</sup> Organization of the Office. (n.d.). Office of the Attorney General. <https://law.georgia.gov/about-us/organization-office>.

<sup>16</sup> Labor. (n.d.). Andrew Bailey Missouri Attorney General. <https://ago.mo.gov/civil-division/labor>.

<sup>17</sup> Labor Relations. (n.d.). Ohio Attorney General. <https://www.ohioattorneygeneral.gov/About-AG/Service-Divisions/labor-relations>

<sup>18</sup> Zipperer B. et al. (2022, June 1). National Survey of Gig Workers Paints A Picture of Poor Working Conditions, Low Pay, Economic Policy Institute., 52-53. <https://www.epi.org/publication/gig-worker-survey/>.

<sup>19</sup> Gerstein, T. et al. (2018, May 7). State attorneys general can play key roles in protecting workers' rights. Economic Policy Institute. <https://www.epi.org/publication/state-attorneys-general-can-play-key-roles-in-protecting-workers-rights/>

<sup>20</sup> 15 ILCS 205/6.3. (2019). Illinois General Assembly - Illinois compiled statutes. <https://www.ilga.gov/legislation/ilcs/fulltext.asp?DocName=001502050K6.3>

<sup>21</sup> Sec. 177.45 MN Statutes. (n.d.). (2019). <https://www.revisor.mn.gov/statutes/2019/cite/177.45>

<sup>22</sup> Gerstein, T. (Fall 2020). State and Local Workers' Rights Innovations: New Players, New Laws, New Methods of Enforcement, 65 St. Louis U.L.J., 45, 51-52.

<https://scholarship.law.slu.edu/cgi/viewcontent.cgi?article=2198&context=lj>

- DC AG obtained \$2.25 million (including \$1.5 million in restitution) against DoorDash in 2021 for pocketing tips owed to delivery workers.<sup>23</sup>
- NY, PA, and RI AGs brought criminal charges against construction contractors for wage theft.<sup>24</sup>
- IL AG obtained \$390k settlement against Rivian Automotive for unpaid overtime.<sup>25</sup>
- CA AG obtained guilty verdict for human trafficking and labor related charges arising from an adult residential and child care company.<sup>26</sup>

AGs have also used the power of their office to address worker misclassification and wage theft issues. Public advocacy by AGs to address wage theft and worker misclassification have included:

- Amicus brief (led by IL and joined by 19 additional states) supporting minimum wage protections for federal contractors. *Bradford v. Department of Labor*, Docket No. 22-1023 (10<sup>th</sup> Circuit 2022).<sup>27</sup>
- Letter to the Department of Homeland Security (CA, IL, MA, NY, DE, NJ, MI, MN, NM, WA, and DC) in support of the agency's efforts to "change its worksite enforcement practices to support enforcement of wage protections, workplace safety, labor rights, and other employment laws and standards."<sup>28</sup>
- In 2021, PA and 8 AGs filed a multi-state lawsuit challenging a Trump Administration rule, the Tip Regulations Under the Fair Labor Standards Act, which made it easier for employers to assign non tipped work, such as preparing food and setting tables, to tipped employees. This lawsuit was resolved in November 2021, creating a 20% cap on the amount of non-tipped work tipped workers could complete.<sup>29</sup>

---

<sup>23</sup> AG Racine Reaches \$2.5 Million Agreement with DoorDash for Misrepresenting that Consumer Tips Would Go to Food Delivery Drivers. (2020, November 24). <https://oag.dc.gov/release/ag-racine-reaches-25-million-agreement-doordash>

<sup>24</sup> Three contractors charged with stealing over \$64,000 in wages from 14 workers stemming from school construction work. Three contractors charged with stealing over \$64,000 in wages from 14 workers stemming from school construction work. (2022, September 27). <https://riag.ri.gov/press-releases/three-contractors-charged-stealing-over-64000-wages-14-workers-stemming-school>

<sup>25</sup> IL Attorney General announces settlements with construction subcontractors at Rivian over unpaid overtime wages. (2021, December 21). 25News Now. <https://www.25newsnow.com/2021/12/21/il-attorney-general-announces-settlements-with-construction-subcontractors-rivian-over-unpaid-overtime-wages/>

<sup>26</sup> Attorney General Bonta secures guilty verdict against members of the Gamos family for human trafficking and labor scheme. (2022, June 8). [Press Release]. <https://oag.ca.gov/news/press-releases/attorney-general-bonta-secures-guilty-verdict-against-members-gamos-family-human>

<sup>27</sup> Attorney General Bonta files briefs in support of wage protections for federal contractors. (2022, May 18). [Press Release]. <https://oag.ca.gov/news/press-releases/attorney-general-bonta-files-briefs-support-wage-protections-federal-contractors>

<sup>28</sup> Attorney General Bonta co-leads multistate coalition in support of federal effort to prioritize workplace rights and safety in immigration enforcement. (2021, November 15). [Press Release]. <https://oag.ca.gov/news/press-releases/attorney-general-bonta-co-leads-multistate-coalition-support-federal-effort>

<sup>29</sup> *Pennsylvania et al. v. Walsh*, Case No. 2:21-cv-00258 ER (E.D.Pa.) Joint Stipulation of Dismissal. (2021, November 15). <https://www.attorneygeneral.gov/wp-content/uploads/2021/11/2021-11-16-Tipped-Workers-Stipulation-of-Dismissal.pdf>

**Issues on the Horizon for Attorneys General Include: Collaborations with Local Law Enforcement Agencies and the Private Bar; Addressing the Proliferation of Arbitration Clauses; and Child and Migrant Labor.**

**1. Collaboration with Other Agencies and General Public to Enhance Enforcement.**

The scope of employee misclassification and wage theft can far exceed the resources of an AG office to combat these problems, but many AG offices leverage collaborations between their offices and other stakeholders to strengthen enforcement work. Currently, AGs are collaborating with local prosecutors as force multipliers to criminally prosecuting wage theft. For example, the PA AGO created a joint enforcement task force with the Delaware County DA's Office to combat misclassification of construction workers.<sup>30</sup>

In addition, AGs often engage their communities on these critical issues by educating the public and members of the bar about worker misclassification and wage theft. For example, the MA AGO conducts annual wage theft clinics with legal aid and the private bar to help constituents.<sup>31</sup> The IL AGO conducted public education to inform constituents about wage and hour laws and the role of law enforcement to combat wage theft and misclassification.<sup>32</sup>

**2. Arbitration and Private Attorneys General.**

Labor arbitration agreements are frequently utilized to limit employees' ability to pursue wage theft claims. These arbitration agreements require employees to submit their misclassification claims to private proceedings and waive their rights to collective or class actions.<sup>33</sup> Employers increasingly require these agreements as a condition of employment. This is in part due to the U.S. Supreme Court's decision in *Epic Sys. Corp. v. Lewis*, 138 U.S. 1612 (2018), which effectively allows employers to condition employment on mandatory arbitration and class action waiver agreements. Notably, it has been reported that nearly two-thirds of gig companies use arbitration agreements.<sup>34</sup> Without the ability to seek class or collective actions, it may be difficult for individual employees to afford or find counsel who will bring claims on a contingency basis.

One potential solution to address arbitration clauses and class action waivers is California's Private Attorneys General Act (PAGA). PAGA allows employees to bring actions for civil penalties on behalf of themselves, others, and the State for violations of California's wage and hour laws.<sup>35</sup>

However, it is worth noting that the United States Supreme Court ruled in *Viking River Cruises, Inc. v. Moriana*, 142 S.Ct. 1906 (2022), that the Federal Arbitration Act preempts PAGA. Nevertheless, the Supreme Court left

---

<sup>30</sup> Pennsylvania Labor Day Review 2022 (n.d.). Office of the Pennsylvania Attorney General.

<https://www.attorneygeneral.gov/wp-content/uploads/2022/09/2022-Fair-Labor-Labor-Day-Review.pdf>

<sup>31</sup> Attorney General Maura Healey's Labor Day Report 2022. (n.d.). Office of the Massachusetts Attorney General.

[https://www.mass.gov/doc/labor-day-report-](https://www.mass.gov/doc/labor-day-report-2022/download#:~:text=During%20FY2022%2C%20Fair%20Labor%20continued,restitution%20and%20%24568%2C500%20in%20penalties.)

[2022/download#:~:text=During%20FY2022%2C%20Fair%20Labor%20continued,restitution%20and%20%24568%2C500%20in%20penalties.](https://www.mass.gov/doc/labor-day-report-2022/download#:~:text=During%20FY2022%2C%20Fair%20Labor%20continued,restitution%20and%20%24568%2C500%20in%20penalties.)

<sup>32</sup> 2022 Labor Day Report 2022 (n.d.). Office of the Illinois Attorney General., 22.

[https://illinoisattorneygeneral.gov/Page-Attachments/Labor%20Day%20Report\\_English.pdf](https://illinoisattorneygeneral.gov/Page-Attachments/Labor%20Day%20Report_English.pdf)

<sup>33</sup> 2022 Labor Day Report 2022 (n.d.). Office of the Illinois Attorney General., 22.

[https://illinoisattorneygeneral.gov/Page-Attachments/Labor%20Day%20Report\\_English.pdf](https://illinoisattorneygeneral.gov/Page-Attachments/Labor%20Day%20Report_English.pdf)

<sup>34</sup> Tippet, E. et al. (2018). How Concepcion and Italian Colors Affected Terms of Service Contracts in the Gig Economy, 170 Rutgers U.L. Rev. 459. <http://www.rutgerslawreview.com/wp-content/uploads/2018/09/How-Concepcion-and-Italian-Colors-Affected-Terms-of-Service-Contracts-in-the-Gig-Economy.pdf>

<sup>35</sup> Cal. Labor Code § 2698 et seq.; see also California Department of Industrial Relations, Private Attorneys General Act (PAGA) – Filing. <https://www.dir.ca.gov/Private-Attorneys-General-Act/Private-Attorneys-General-Act.html>

open an issue about whether non-individual claims can proceed, i.e., claims on behalf of others injured by the employer's violations.<sup>36</sup> As Justice Sotomayor explained in her concurring opinion, the question whether an employee could still maintain a representative PAGA claim in court was ultimately a decision of California law. The Justice went on to state, "if this court's understanding of state law is wrong, California courts ...will have the last word."<sup>37</sup> The opportunity to correct the United States Supreme Court on representative claims is currently before the California Supreme Court in the matter of *Adolph v. Uber Technologies (CA Supreme Court)*, Docket No. S-274671. This case will address an individual's ability to bring a PAGA claim on behalf of others despite the existence of an arbitration and waiver agreement.

### 3. Child and Migrant Labor.

Another emerging issue is wage theft that occurs through labor trafficking of children. A recent *New York Times* article reported that migrant children are being exploited in increasing numbers, especially when they arrive in the United States without their parents.<sup>38</sup> This wave of parentless immigration has been increasing.<sup>39</sup> Children find themselves working in dangerous conditions, such as slaughterhouses or construction, and sometimes without sufficient pay to comply with minimum wage, overtime, or other hour limitations.<sup>40</sup>

Efforts by AGs to address this growing problem include the Wisconsin AGO's receipt of a \$1.4 million grant from the Howard Buffett Foundation to conduct victim centered investigations and prosecute labor traffickers.<sup>41</sup>

### **Recommendations**

AGs should consider establishing divisions or units focused on worker's rights to include worker misclassification, wage theft and labor trafficking, where such divisions or units do not already exist. This increased focus on resources is more important than ever given the limitations on access to justice caused by mandatory arbitration clauses that preclude class or collective actions. In some instances, AGs may be the only entities who can effectively seek relief.

Other efforts to assist victims of wage theft could include:

- Strategic partnerships with local prosecutors to criminally prosecute wage theft violations and/or local bar associations to get legal services to those in need to pursue civil claims.<sup>42</sup>

---

<sup>36</sup> *Viking River Cruises, Inc. v. Moriana*, 142 S.Ct. 1906 (2022) Opinion.

[https://www.supremecourt.gov/opinions/21pdf/20-1573\\_8p6h.pdf](https://www.supremecourt.gov/opinions/21pdf/20-1573_8p6h.pdf)

<sup>37</sup> *Viking River Cruises, Inc. v. Moriana*, 142 S.Ct. 1906 (2022) Opinion.

[https://www.supremecourt.gov/opinions/21pdf/20-1573\\_8p6h.pdf](https://www.supremecourt.gov/opinions/21pdf/20-1573_8p6h.pdf)

<sup>38</sup> Dreier, H., & Luce, K. (2023, February 25). Alone and exploited, migrant children work brutal jobs across the U.S. The New York Times. <https://www.nytimes.com/2023/02/25/us/unaccompanied-migrant-child-workers-exploitation.html>.

<sup>39</sup> Rising child migration to the United States. Migration Policy Institute. (2022, December 14).

<https://www.migrationpolicy.org/programs/us-immigration-policy-program/rising-child-migration-united-states>

<sup>40</sup> Rising child migration to the United States. Migration Policy Institute. (2022, December 14).

<https://www.migrationpolicy.org/programs/us-immigration-policy-program/rising-child-migration-united-states>

<sup>41</sup> Despite such trends, Arkansas rolled back requirements to verify the ages of workers under sixteen. See Radde, K. (2023, March 10). Arkansas gov. Sanders signs a law that makes it easier to employ children. NPR. <https://www.npr.org/2023/03/10/1162531885/arkansas-child-labor-law-under-16-years-old-sarah-huckabee-sanders>.

<sup>42</sup> Gerstein, T. (Fall 2020). State and Local Workers' Rights Innovations: New Players, New Laws, New Methods of Enforcement, 65 St. Louis U.L.J., 45, 51-52.

<https://scholarship.law.slu.edu/cgi/viewcontent.cgi?article=2198&context=lj>

- PAGA type legislation pertaining to misclassification of employees.
- Public outreach and development of relationships with immigrant communities and organized labor to create pipeline for enforcement cases.<sup>43</sup>
- Publicize and educate through strategic communications about worker's rights and employer's obligations under prevailing wage and hour laws.<sup>44</sup> Information is often the best way to prevent victimization and help well intentioned businesses comply with the law.

*The Leadership Center for Attorney General Studies is a non-partisan organization dedicated to educating the public about the important role state attorneys general play in addressing pressing issues, enforcing laws, and bringing about change.*

*Josh Diamond is the former Deputy Attorney General for the Vermont Attorney General's Office. He currently practices law with Dinse, P.C., in Burlington, Vermont, and is a Legal Fellow for the Leadership Center for Attorney General Studies.*

*Grace Pak is the Policy Associate Counsel for the Leadership Center for Attorney General Studies and the Progressive State Leaders Committee. Previously, she practiced employment law, focusing on wage and hour class action, Private Attorneys General Act (PAGA) representative suits, and wrongful termination/whistleblower cases.*

*Brittney Jenkins is the former Policy Director for the Leadership Center for Attorneys General Studies and Progressive State Leaders Committee. She is also a former Chief of Staff and Staff Director for the Subcommittee on Environment for the House Committee on Oversight and Reform in the U.S. House of Representatives. She also has several years of litigation experience, focused on commercial and bankruptcy litigation.*

*Jonathan Sclarsic is a former Assistant Attorney General and Director of the Division of Open Government in the Massachusetts Attorney General's Office. He is also a former legislative director in the United States Senate. He currently serves as the Chief Operating Officer and General Counsel for the Leadership Center for Attorney General Studies and the Progressive State Leaders Committee.*

---

<sup>43</sup> Gerstein, T. (Fall 2020). State and Local Workers' Rights Innovations: New Players, New Laws, New Methods of Enforcement, 65 St. Louis U.L.J., 45, 51-52.

<https://scholarship.law.slu.edu/cgi/viewcontent.cgi?article=2198&context=lj>

<sup>44</sup> Gerstein, T. (Fall 2020). State and Local Workers' Rights Innovations: New Players, New Laws, New Methods of Enforcement, 65 St. Louis U.L.J., 45, 51-52.

<https://scholarship.law.slu.edu/cgi/viewcontent.cgi?article=2198&context=lj>.