PART TWO: APPLICATION—COMMUNITY INTEGRATION AND IMMIGRANT DAY LABORERS IN NORTH CAROLINA

Part Two applies the principles of community integration to a discrete group, the day laborer population in Carrboro and Chapel Hill, North Carolina. Although the day laborer population is not comprised solely of immigrant workers, as a subpopulation of day laborers they are more vulnerable to exploitation. Through meetings with interested organizations, local leaders, and members of the day laborer population, the IHRP clinic identified legal issues relevant to the integration of the immigrant day laborer population into the Carrboro/Chapel Hill community. This Part provides an analysis of those issues and the ways in which the municipalities of Carrboro and Chapel Hill may respond to the needs of day laborers. Section I introduces the day laborer population, the hardships they commonly face generally with a particular focus on immigrant workers, and municipal reactions to their presence in communities. Section I also introduces day labor issues in Carrboro and Chapel Hill. Section II discusses the particular ways to defend the rights of day laborers including an overview of the now rescinded “Carrboro ordinance” affecting day laborer rights, and wage theft remedies including civil and criminal processes. Section III analyzes the legal questions pertaining to the development of a workers’ center and section IV examines recent developments to establish a workers’ center in Carrboro.

Almost ninety-eight percent of day laborers are male, and a majority are immigrants from Mexico or Central America.
I. Immigrant Day Laborers in the United States: Who They Are and the Problems They Face

A. Who are Day Laborers?

Close to 117,600 workers seek employment as day laborers every day in the United States. Day laborers are workers who solicit temporary employment at formal and informal hiring sites throughout the United States. Employers, usually construction contractors or homeowners, visit these sites and negotiate with day laborers over employment terms, including job tasks, wages, and hours. Employers typically hire day laborers to work in construction, landscaping, painting, roofing, or drywall installation. The majority of day laborers seek employment at informal hiring sites, such as in front of business and home improvement stores or on street corners. About one-fifth of the day laborer population looks for employment at formal day-labor worker centers. Almost ninety-eight percent of day laborers are male, and a majority are immigrants from Mexico or Central America. Day labor provides immigrants who have recently arrived to the United States with a source of income and allows them to form relationships with other workers and

---

3 VALENZUELA, JR. ET AL., supra note 1, at 1, 9; Pritchard, supra note 2, at 373.
4 VALENZUELA, JR. ET AL., supra note 1, at ii.
5 See, e.g., id. at 4; Pritchard, supra note 2, at 373. The National Day Labor Survey found that 79% of day laborers solicit work at informal hiring sites. VALENZUELA, JR. ET AL., supra note 1, at 4.
6 VALENZUELA, JR. ET AL., supra note 1, at 4.
7 Id. at 17.
employers and to gain skills.\textsuperscript{8} Day labor is also a source of income for unemployed workers while they look for permanent employment.\textsuperscript{9} The day labor market is one that is constantly changing, due to the nature of the work and fluctuations in the number of workers seeking employment in the market each day.\textsuperscript{10} Day laborers are at-will employees, with no guarantees of continued employment when they are hired.\textsuperscript{11} Even when day laborers are able to obtain extended employment with an employer, they face a number of challenges, including low wages, hazardous work, and exploitation by employers.\textsuperscript{12}

\textbf{B. Immigrant Day Laborers and Community Integration}

\textbf{1. Hardships Experienced by Day Laborers}

Day laborers are a population that would especially benefit from municipal community integration efforts. These workers often find themselves marginalized in their communities and lack the financial and social resources that many other community members take for granted. The incomes of day laborers are often unpredictable and vary seasonally.\textsuperscript{13} Scholars who have studied day laborers’ wages found that their income fluctuated between “good months” and” bad months.” One report found that “even in cases where day laborers have many more good months than bad months, it will be unlikely that their annual earnings will exceed $15,000, keeping most workers in this market at or below the federal poverty threshold.”\textsuperscript{14} Because of their economic situation, day laborers are more willing to work dangerous jobs than other workers.\textsuperscript{15} As a

\textsuperscript{8} Id. at 20.
\textsuperscript{9} Id. at 20.
\textsuperscript{10} See Id. at 6.
\textsuperscript{11} Id.
\textsuperscript{12} Pritchard, supra note 2, at 373.
\textsuperscript{13} VALENZUELA, JR. ET AL., supra note 1, at 9-12, 20.
\textsuperscript{14} Id. at 12.
\textsuperscript{15} Id.
result, they suffer from high rates of on-the-job injuries. When they are injured, they often do not seek medical care, usually because they are denied workers’ compensation coverage by employers and cannot afford to pay the costs on their own. In addition to the problem of poverty-level wages, day laborers face other hardships related to the nature of their employment.

Given the informal and unpredictable nature of their employment, day laborers are especially vulnerable to exploitation by employers. Day laborers report that wage theft is commonplace. Day laborers are also frequently the victims of workplace abuses. They are denied breaks, forced to work longer than agreed, and some have been threatened or even assaulted by employers. As noted above, undocumented immigrants make up a large segment of the day laborer population, and these workers are even more likely to be exploited by employers. Employers often openly violate the rights of undocumented day labors because undocumented immigrants are not likely to seek recourse. While day laborers generally are hesitant to report employment violations because of their economic situations, undocumented

---

16 Id.
17 Id. at 13 (finding, based on survey results, that just 6% of day laborers had their medical expenses covered by their employer’s workers’ compensation insurance).
18 Id. at 14-15.
19 Id. at 14 (“Wage theft is just one type of employer abuse endured by day laborers. During the two months prior to being surveyed, 44 percent of day laborers were denied food, water and breaks; 32 percent worked more hours than agreed to with the employer; 28 percent were insulted or threatened by the employer; and 27 percent were abandoned at the worksite by an employer. Finally, 18 percent of day laborers were subjected to violence by their employer during this time period.”).
20 Id. at 17, 22.
21 Id. at 22.
immigrants are even less likely to report violations, both because they may not know how to
report them, or because they fear their immigration status being exposed. Employers often
threaten to turn workers over to immigration officials when they attempt to exercise their
rights. Municipalities are in a position to improve the welfare of day laborers. Unfortunately,
some municipalities have exacerbated the hardships faced by day laborers through initiatives that
seek to drive day laborer populations out of their communities. In contrast, there are other
towns and cities that affirmatively seek to integrate day laborers into the community and improve
their quality of life, to the benefit of local economies.

2. Municipal Responses to Day Laborers
   a. Hostile Responses

Some municipalities, fueled by anti-immigrant sentiment, have passed ordinances that
seek to limit or completely prohibit day laborers from congregating in public spaces. Such
ordinances include anti-solicitation ordinances that prohibit day laborers from soliciting
employment on public property. Other ordinances sanction employers that hire undocumented
workers. These ordinances that seek to limit the activities of day laborers are often a reflection
of tension within the city over undocumented immigration. Monica Varsanyi, who studied
such ordinances in the Phoenix, Arizona area, refers to such policies as “immigration policing
‘through the back door.’” The day laborer population is targeted because it is “often the most

22 Id. at 22, Pritchard, supra note 2, at 384.
23 VALENZUELA, JR. ET AL., supra note 1, at 22.
24 See infra Section I.B.2.a.
25 See infra Section I.B.2.b.
26 For further discussion of anti-solicitation ordinances and the constitutionality of such ordinances, see Pritchard,
supra note 2, at 386-92 and Johnson, supra note Error! Bookmark not defined., at 681-682.
27 See Pritchard, supra note 2, at 392-94.
28 See Monica W. Varsanyi, Immigration Policing Through the Backdoor: City Ordinances, the “Right to the City,”
29 Id.
visible manifestation of ‘illegal immigration’ at the local scale. . . [and] a ready focal point for local frustrations over unauthorized immigration…” 30 In passing these ordinances, cities hope to encourage day laborers, many who have recently immigrated to the United States, to move elsewhere, rather than recognize their rights as residents and encourage their integration into the local community. 31

b. Progressive Responses

Other municipalities have recognized that day laborers are residents of their communities who are in need of more protection, and these municipalities have worked to improve day laborers’ quality of life. One way in which cities have addressed the day labor issue is by establishing or supporting the establishment of formal worker centers. 32 Day labor worker centers are often established through alliances between community organizations and local governments. 33 The worker centers provide a safe place for day laborers to seek work, as well as a place where labor standards can be monitored and workers, particularly immigrant workers, can be informed of their rights. 34 Experts on the day labor situation in the United States have called worker centers the “most comprehensive response to the workplace abuses that day laborers endure.” 35 Cities have also addressed the frequent employment abuses faced by day laborers by increasing the civil penalties for wage theft, passing criminal wage theft ordinances, and strengthening the enforcement of existing employment laws. 36

30 Id. at 32.
31 Id. at 30.
32 See infra Section C.2. for an overview of day labor worker centers and an analysis of worker centers in the context of the IHRP project.
33 VALENZUELA, JR. ET AL., supra note 1, at 6-7.
34 Id. at 7-8, 22-23.
35 Id. at 23.
36 See NATIONAL EMPLOYMENT LAW PROJECT, WINNING WAGE JUSTICE: AN ADVOCATE’S GUIDE TO STATE AND CITY POLICIES TO FIGHT WAGE THEFT (2011 (providing recommendations for advocates working to protect low-
C. The Immigrant Day Laborer Situation in Carrboro and Chapel Hill, North Carolina

There is a specific need for advocacy on behalf of the day laborer population in Chapel Hill and Carrboro, North Carolina. Dozens of day laborers have solicited employment on a certain corner in Carrboro for years. The corner is across from the Abbey Court apartment complex, a neighborhood where many immigrants and day laborers live. The corner is an informal hiring site that is known throughout the community, among both workers and employers. Many of the employers who hire workers at the site transport the day laborers to work sites in Chapel Hill. Recently, in response to complaints by some members of the community, the Carrboro Board of Alderman passed an anti-lingering ordinance that prohibited loitering at the corner between 11:00 A.M. and 5:00 A.M.\footnote{\textbf{CARRBORO, N.C., TOWN CODE} § 5-20 (2007). See Section III for a discussion of the ordinance’s background and an analysis of the constitutionality of the ordinance.} In passing the ordinance, the Board of Alderman cited problems that neighbors and police viewed as related to the congregation of day laborers on the corner, such as littering, public consumption of alcohol, and public urination.\footnote{\textsection 5-20(a)(3).} A task force of community groups and leaders formed in response to the ordinance and other violations of the day laborers’ rights.
The goal of the task force is to address concerns about the welfare of the day laborers who solicit employment in Carrboro. The task force has focused on the actions of employers in the area and the responses of the municipalities to the situation. Members of the task force include Orange County Justice United in Community Effort (“Justice United”), the Carrboro and Chapel Hill Human Rights Center, El Centro Hispano, the Southern Coalition for Social Justice, Durham Technical Community College, the mayors of both Carrboro and Chapel Hill, and the Chapel Hill Chamber of Commerce. The task force has met to discuss such issues as the creation of a workers center, the passage of a wage-theft ordinance, and the elimination of the anti-lingering ordinance. The task force is a classic community integration model, with representatives from the government, concerned community groups, and the day laborer population working together to address the needs of day laborers and to integrate day laborers into the Carrboro and Chapel Hill community. The IHRP Clinic has joined this task force to further the community integration goals of the groups involved through legal research and advocacy.

II. Defending the Rights of Day Laborers: Challenges and Legal Solutions

---

39 Justice United is an organization of faith-based groups that focuses on social justice issues in Orange County, North Carolina. See Orange County Justice United in Community Effort: About, ORANGE COUNTY JUSTICE UNITED IN COMMUNITY EFFORT, http://ocjusticeunited.org/Orange_County_Justice_United_in_Community_Effort:About (last visited May 1, 2011).

40 The Carrboro and Chapel Hill Human Rights Center is an organization based in the Abbey Court apartment complex that advocates on behalf of members of the Abbey Court community and organizes community members in the promotion of human rights. See About the HRC, THE CARRBORO AND CHAPEL HILL HUMAN RIGHTS CENTER, http://www.humanrightscities.org/about_us.html (last visited May 1, 2011).

41 El Centro Hispano is a nonprofit organization that offers services and programs to the Latino community through its offices in Durham and Carrboro, North Carolina. See Mission, EL CENTRO HISPANO, .http://www.elcentronc.org/ingles/Mission.html (last visited May 1, 2011).

42 The Southern Coalition for Social Justice is a nonprofit organization that “promotes justice by empowering minority and low-income communities to defend and advance their political, social and economic rights.” See About SCSJ, SOUTHERN COALITION FOR SOCIAL JUSTICE, http://www.southerncaliforniacoalition.org/about (last visited May 1, 2011).
In order to successfully develop Integrated Communities, municipal leaders and individuals must be willing to defend the civil and human rights of the immigrants living in the community. Laws like the Carrboro Ordinance, described below and now rescinded, are examples of measures that marginalize and harm the immigrant community. Community integration requires municipalities and advocates to actively defend the rights of immigrants as well as to enact affirmative ordinances and policies that promote integration. By identifying priority issues for the immigrant community (day laborers being one of the most important groups), municipalities and immigrant advocates can demonstrate their commitment to working toward community integration.

The two issues highlighted in this section describe some of the most pressing problems facing integrated communities: day labor laws and wage theft.

A. The Carrboro Ordinance and the Legal Challenges

1. Background

In November 2007, the Carrboro Board of Alderman passed an “anti-lingering” ordinance targeting the corner of Davie Road and Jones Ferry Road, outside of the Abbey Court Apartment complex. The ordinance was aimed at preventing day laborers and others from congregating at the corner, which is known to be an unofficial pickup area for employers seeking to hire day laborers. The ordinance effectively prevents day laborers from seeking employment at the corner between 11:00 a.m. and 5:00 a.m. The ordinance states

Except as provided herein, no person may stand, sit, recline, linger, or otherwise remain within the area designated in subsection (d) between the hours of 11:00 a.m. and 5:00 a.m. This prohibition shall not apply to persons occupying motor vehicles, riding on bicycles, walking, or otherwise moving through such area,
while such persons are actually engaged in the process of moving from a point outside such area, through such area, to another point outside such area.43

The ordinance was passed in response to complaints by neighbors and police that the gathering of people at the corner was contributing to a number of problems. The problems are listed in section (a)(3) of the ordinance and include littering, public consumption of alcohol, public urination and defecation, and trespassing.44 The town found these problems to be “threats to the public health, safety, and welfare”45 and believed they “would be greatly reduced or eliminated”46 through compliance with the ordinance. The town also found that these problems were less prevalent in the morning and instituted the time restraint because “these problems tend to occur after 11:00 a.m. when individuals who are not looking for work gather in this area.”47

In September 2007, while the Board of Alderman was considering the ordinance, the Town, through legal counsel, solicited input from the American Civil Liberties Union (ACLU).48 After reviewing the proposed ordinance, the ACLU of North Carolina urged the Board to revise the ordinance, stating that it would likely be found unconstitutional.”49 The Board of Alderman held a public hearing concerning the ordinance on October 23, 2007. At the hearing, one Alderman Coleman asked for further legal review with regard to the

There is a specific need for advocacy on behalf of the day laborer population in Chapel Hill and Carrboro, North Carolina.

---

44 § 5-20(a)(3).
45 § 5-20(b).
46 § 5-20(a)(3).
47 § 5-20(a)(2).
48 Letter from Michael Brough, Town Attorney for Carrboro, N.C., to Katy Parker, Legal Director for ACLU of N.C. (Sept. 19, 2007).
concerns raised in the ACLU’s letter. On November 20, 2007, at a meeting of the Board of Aldermen, Carrboro’s town counsel stated that he believed the ordinance was “legally defensible.” The Board of Aldermen passed the ordinance with a vote of four to one at the meeting, despite the advice given by the ACLU and the statements of Mark Dorosin, senior managing attorney for the UNC Center for Civil Rights and a professor at UNC School of Law, that the ordinance was suspect and bad public policy. Only one Alderman opposed the ordinance because he believed it unfairly targeted immigrants. But on November 22, 2011 the Carrboro Board of Aldermen voted unanimously to rescind the law. One board member noted that, “[f]or a community that has focused on progressive thinking and action, we must do better than this ordinance.” The repeal came after the board received a letter from the Southern Coalition for Social Justice with support from various groups and individuals, and informed by research conducted by the IHRP clinic, informing them that the law was “overbroad and vague” and therefore in violation of the U.S. Constitution. Although some citizens still support the ordinance, many agree that the repeal is “a start to a better future for our community.”

2. The Basis for the Legal Challenges to the Carrboro Ordinance

52 Id.
55 See id.
56 Id.
Although the ordinance was repealed, it is useful to demonstrate the reasons for its unconstitutionality, particularly in the event that a similar ordinance were to be considered by another municipality in North Carolina.

The anti-lingering ordinance was vulnerable to a challenge that it was unconstitutionally vague, in violation of the Due Process Clause of the Fourteenth Amendment.58 A law is impermissibly vague if “it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests.”59 When considering whether a law is unconstitutionally vague, courts will consider whether the ordinance provides fair notice of prohibited conduct and whether the ordinance encourages arbitrary or discriminatory enforcement by the police.60 The Carrboro ordinance failed to provide fair notice to the residents of Carrboro and also failed to establish sufficient standards for police enforcement. For these reasons, the ordinance would have likely been found to be invalid on its face if challenged and was therefore repealed by the Board of Aldermen.

a. Fair Notice Requirement

The first question is whether the ordinance provides fair notice to the public. In determining whether a law provides fair notice, courts consider whether an ordinary person

58 See Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) (“It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.”); Giaccio v. Pennsylvania, 382 U.S. 399, 402-03 (1966) (“It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits . . . .”).
60 See, e.g., Morales, 527 U.S. at 56 (“Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement.”); Kolender, 461 U.S. at 357 (“As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”).
would understand what conduct is prohibited. Specifically, with regard to the Carrboro ordinance, the question was whether a person of ordinary intelligence would understand how to comply with the ordinance. The prohibited conduct was set out in section (c) of the ordinance: “no person may stand, sit, recline, linger, or otherwise remain within the area designated in subsection (d) between the hours of 11:00 a.m. and 5:00 a.m.” The ordinance did not apply to “persons occupying motor vehicles, riding on bicycles, walking, or otherwise moving through such area, while such persons are actually engaged in the process of moving from a point outside such area, through such area, to another point outside such area.” While a person of ordinary intelligence would understand what it means to “stand, sit, recline, linger, or otherwise remain within the area,” the meaning of the provision that reads “engaged in the process of moving” cannot be readily ascertained so as to advise an individual if her conduct is in violation of the ordinance. An ordinary person who believes they are “actually engaged in the process of moving” but pausing in the area to rest or for other reasons could be considered in violation of the ordinance. Also, based on the language of the ordinance, it was not clear whether a person waiting at one of the bus stops within the area covered by the ordinance would fall under the exception as a person “otherwise moving through such area” or as a person lingering in violation of the ordinance. For these reasons, the ordinance is subject to a constitutional challenge for

61 See, e.g. Morales, 527 U.S. at 58 (“[T]he purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law.”); Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982) (quoting Grayned, 408 U.S. at 108 (“[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.”)).
63 Id.
vagueness on its face by failing to provide fair notice of prohibited conduct in accordance with the Due Process Clause of the Fourteenth Amendment.64

b. Ordinance Encourages Discriminatory/Arbitrary Enforcement

The second consideration for vagueness is whether a law authorizes or encourages discriminatory or arbitrary enforcement.65 In determining whether a law encourages arbitrary or discriminatory enforcement, courts consider how much discretion is given to the police.66 In Grayned v. City of Rockford,67 the Supreme Court held that “if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.”68 The Supreme Court has held that loitering ordinances are unconstitutional when they do not establish clear standards for the police, thus allowing police total discretion.69 The Carrboro ordinance gave complete discretion to police. It provided minimal guidance for the police in determining whether someone is remaining in the area in violation of the ordinance. It left it to the police to decide whether someone is "lingering" at the corner or is "engaged in the process of moving.” Given the ordinance's background, it was likely that officers would have been more likely to find that men who appear to be day laborers are unlawfully remaining in the

64 See, e.g. Papachristou v. City of Jacksonville, 405 U.S. 156, 162, 165-68 (1972) (finding vagrancy ordinance to be unconstitutionally vague); Giaccio v. Pennsylvania, 382 U.S. 399, 402-403 (1966) ("It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits . . . "); State v. Mello, __ N.C. App. __, 684 S.E.2d 477, 482 (2009) (finding loitering ordinance “fails to define what type of conduct violates this provision, and leaves ordinary persons uncertain on how to adhere to the law”).
65 Supra note 387.
66 See, e.g., Morales, 527 U.S. at 61-64 (upholding the Supreme Court of Illinois’ finding that the loitering ordinance afforded too much discretion to the police); Kolender v. Lawson, 461 U.S. 352, 360-61 (1983) (finding police had full discretion in determining whether a citizen had complied with an identification requirement); Papachristou, 405 U.S. at 169-171 (1972) (finding vagrancy statute unconstitutional).
68 Id. at 108.
69 See, e.g., Morales, 527 U.S. at 64; Kolender, 461 U.S. at 360-61.
area. Because the majority of day laborers who solicit employment in the area are Latino males, the ordinance likely encouraged discriminatory enforcement against them.

Additionally, because the ordinance did not require any proof of criminal intent, it authorized arbitrary enforcement. Under the ordinance, Carrboro police could have found anyone remaining in the designated area to be in violation of the ordinance, regardless of whether he or she is engaged in otherwise innocent or protected conduct. There was no requirement for the police act because they believed someone was acting with a certain unlawful purpose. State courts have “uniformly invalidated” loitering ordinances that do not include a mens rea requirement because such ordinances authorize arbitrary deprivations of liberty without due process.

3. Ordinance was Void for Overbreadth

A court would have likely found Carrboro’s ordinance to be overbroad. The Supreme Court held in Grayned that a law may be “‘overbroad’ if in its reach it prohibits constitutionally protected conduct.” Recently, the North Carolina Court of Appeals found a Winston Salem, North Carolina, loitering ordinance that made it “unlawful for a person to remain or wander about in a public place under circumstances manifesting the purpose to engage in a violation of the North Carolina Controlled Substances Act” to be overbroad. In State v. Mello, the Court of Appeals held that, “[a] law is impermissibly overbroad if it deters a substantial amount of

70 See Morales, 527 U.S. at 58.
71 See Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982) (“Finally, perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply.”).
72 Morales, 527 U.S. at 58.
constitutionally protected conduct while purporting to criminalize unprotected activities.”75 The Court of Appeals also held that “[l]egislative enactments that encompass a substantial amount of constitutionally protected activity will be invalidated even if the statute has a legitimate application.”76 The Carrboro ordinance would likely have been invalidated under this analysis because of the extent to which it prohibits conduct that is protected under both the First and Fourteenth Amendments. Similar to the ordinance found unconstitutional in Mello, the Carrboro ordinance “does not require proof of specific criminal intent” and “criminaliz[es] constitutionally permissible conduct.”77 Because there is no mens rea requirement, “anyone who engages in the conduct listed in [the ordinance] is deemed to possess the requisite intent to engage in [the prohibited] activity, regardless of his or her actual purpose.”78

The Carrboro anti-lingering ordinance had “a sufficiently substantial impact on conduct protected by the First Amendment”79 It prohibited any form of assembly, association, or expression that would involve sitting, standing, or lingering in the designated area between 11:00 A.M. and 5:00 A.M. In addition to infringing on First Amendment rights, the ordinance interfered with Fourteenth Amendment liberties. In City of Chi. v. Morales, the Supreme Court reiterated that loitering for innocent purposes is a protected liberty under the Fourteenth Amendment.80 Additionally, the Court of Appeals of North Carolina has held that “[m]ere presence in a public place cannot constitute a crime.”81 More recently, the Ninth Circuit Court of Appeals in Comite de Jornaleros v. City of Redondo Beach,82 the U.S. District Court

75 Mello, 684 S.E.2d at 479-80 (citing Hoffman, 455 U.S. at 494).
76 Id. at 480 (citing Houston v. Hill, 482 U.S. 451, 459 (1987)).
77 Id. at 480-81.
78 Id.
80 Id. at 53.
82 657 F.3d 936 (9th Cir. 2011); cert. den. ___S.Ct. __, 2012 WL 538394 (Mem) U.S.,2012, February 21, 2012
Northern District of Alabama in *U.S. v. State of Alabama*,\(^83\) and the U.S. District Court for the District of Arizona in *Friendly House, et al. v. Michael B. Whiting, et al.*,\(^84\) determined that these types of ordinances violated the First Amendment of the U.S. Constitution. These cases and the legal arguments described above demonstrate that the Carrboro ordinance “sweep[s] unnecessarily broadly into areas of protected freedoms”\(^85\) by outlawing any extended presence in the area between 11:00 A.M. and 5:00 A.M.

### 4. Conclusion

A court would likely have found the Carrboro anti-lingering ordinance to be invalid on its face if it had been challenged before it was repealed. The law was unconstitutionally vague in that failed to provide fair notice and gives too much discretion to police to determine whether a person is acting in violation of the ordinance. There is no *mens rea* requirement, allowing for liberty deprivations without due process. The Carrboro ordinance was also overbroad, unconstitutionally interfering with both First and Fourteenth Amendment rights.

#### B. Wage Theft and the Day Laborer Population

Day laborers, and in particular immigrant day laborers, have been found to be vulnerable to exploitation and abuse. Their employment rights are often violated by employers, particularly in the form of wage theft.\(^86\) The National Day Labor Survey (“the Survey”) found that nearly half of all day laborers had recently been completely denied payment for work performed and nearly half had recently been underpaid by employers.\(^87\) The authors of a report on the circumstances of day laborers, *On the Corner: Day Labor in the United States*, analyzed the

\(^{83}\) 813 F. Supp 2d. 1282 (N.D. Ala. 2011).
\(^{85}\) *Id.*
\(^{86}\) Pritchard, *supra* note 2, at 384.
\(^{87}\) VALENZUELA, JR. ET AL., *supra* note 1, at 14 (time period was two months prior to being surveyed).
survey and concluded that “wage theft is a routine aspect of day-labor work.”88 In this report, Abel Valenzuela, an expert on day labor in the United States and the Director of UCLA’s Center for the Study of Urban Poverty, together with his coauthors, note the instability and insecurity of the work of day laborers, as well as the vulnerability of the day laborer population. They found that:

a significant segment of the employer base feels free to blatantly disregard U.S. labor laws and workers’ rights. Yet these employers are able to continually hire day laborers because workers are in dire need of employment and because many day laborers believe that avenues for the enforcement of labor and employment laws are effectively closed to them. This belief is reinforced by the general climate of hostility that exists towards day laborers in many parts of the country.89 Day laborers often do not take action against employers who fail to compensate them for their work for a number of reasons. Day laborers may be unaware of their right to claim wages; limited English proficiency may create a barrier to obtaining relief; workers may fear that their undocumented status will be discovered; and cultural norms may make some day laborers hesitant to report employers because of the stigma attached to being victimized at their workplace.90 Subsection A of this Section discusses the civil remedies available to day laborers who are victims of wage theft and issues day laborers face in exercising their rights. Subsection B of this Section discusses potential criminal law protections against wage theft.

1. Civil Remedies for Day Laborers
   a. The Fair Labor Standards Act (FLSA)

88 Id.
89 Id.
90 See Pritchard, supra note 2, at 384.
The Fair Labor Standards Act\textsuperscript{91} (FLSA) establishes federal minimum wage and overtime standards. The United States Department of Labor (USDOL) enforces the FLSA “without regard to whether an employee is documented or undocumented.”\textsuperscript{92} The USDOL requires employers who are subject to the FLSA to “pay day laborers at least the applicable minimum wage for all hours worked regardless of whether the worker is paid by the hour, the day, or at a piece rate.”\textsuperscript{93} The USDOL has emphasized that “[e]mployers must pay day laborers for all work performed whether or not the employer approves the work in advance.”\textsuperscript{94}

Although the majority of U.S. employees are covered by the FLSA, many day laborers remain outside the purview of the statute.\textsuperscript{95} Most employees working for small construction companies that employ a large percentage of day laborers are not covered by the FLSA.\textsuperscript{96} A USDOL factsheet states that “[a] business in the construction industry must have two or more employees and have an annual gross sales volume of $500,000 or more to be subject to the FLSA.”\textsuperscript{97} Although a day laborer’s employer may not be subject to the FLSA, a day laborer

\textsuperscript{91} The Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (2011). Employees covered by FLSA must be paid a minimum of $7.25 per hour and must be paid at least one and a half times their normal pay rates for overtime hours.


\textsuperscript{94} Id.

\textsuperscript{95} See WAGE AND HOUR DIV, U.S. DEP’T OF LABOR, HANDY REFERENCE GUIDE TO THE FAIR LABOR STANDARDS ACT, 2-3 (2010), http://www.dol.gov/whd/regs/compliance/wh1282.pdf [hereinafter REFERENCE GUIDE]. Generally, employees of businesses with over $500,000 gross sales per year or individual employees whose work is linked to interstate commerce are covered by FLSA. Id.


\textsuperscript{97} Id. at 1. See also 29 U.S.C. § 203(s)(1)(a) (2011) (definition of “Enterprise engaged in commerce or in the production of goods for commerce”).
who works for a small construction company is individually covered by the FLSA if his work is related to interstate commerce.98

Many day laborers are hired by homeowners to complete tasks in and around their homes.99 These workers may fall under the FLSA category of domestic service workers. Day laborers who work in domestic service are covered “if they receive at least $1,700 in 2009 in cash wages from one employer in a calendar year, or if they work a total of more than eight hours a week for one or more employers.”100 Domestic service, defined in the Code of Federal Regulations, “refers to services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed.”101 Domestic services workers include “employees such as cooks, waiters, butlers, valets, maids, housekeepers, governesses, nurses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs of automobiles for family use.”102 In summary, if a day laborer is hired directly by a private homeowner to do domestic service work, and the work meets either the wage or

---

98 FACT SHEET #1, supra note 96, at 1 (“Any person who works on or otherwise handles goods that are moving in interstate commerce or who works on the expansion of existing facilities of commerce is individually subject to the protection of the FLSA and the current minimum wage and overtime pay requirements, regardless of the sales volume of the employer.”).
99 See VALENZUELA, JR. ET AL., supra note 1, at 9.
101 29 CFR § 552.3 (2011).
102 Id.
hour requirements under the FLSA for domestic service, he or she is covered under the FLSA.103 Day laborers who are employed by landscaping companies are not considered domestic service workers under the FLSA.104

The FLSA is enforced by the USDOL’s Wage and Hour Division (WHD).105 Employees may file a complaint with the WHD or file a private suit in federal court in order to recover back pay and liquidated damages from employers.106 Employees are entitled to liquidated damages equal to the amount of back pay recovered.107 There is a two year statute of limitations for recovering back pay, unless there is a willful violation by an employer.108 In cases of willful violations, the statute of limitations is three years.109

b. North Carolina Law

The North Carolina Wage and Hour Act (WHA)110 establishes minimum wage and overtime requirements111 for employers and requires employers to “pay every employee all wages and tips accruing to the employee on the regular payday.”112 It also requires employers to notify employees “at the time of hiring, of the promised wages and the day and place for


104 29 CFR § 552.107 (2011) (“Persons who mow lawns and perform other yard work in a neighborhood community generally provide their own equipment, set their own work schedule and occasionally hire other individuals. Such persons will be recognized as independent contractors who are not covered by the Act as domestic service employees. On the other hand, gardeners and yardmen employed primarily by one household are not usually independent contractors.”).


106 See REFERENCE GUIDE, supra note 95, at 17. (“(1) WHD may supervise payment of back wages. (2) The Secretary of Labor may bring suit for back wages and an equal amount as liquidated damages. (3) An employee may file a private suit for back pay and an equal amount as liquidated damages, plus attorney’s fees and court costs. (4) The Secretary of Labor may obtain an injunction to restrain any person from violating the FLSA, including the unlawful withholding of proper minimum wage and overtime pay.”). See also 29 U.S.C. § 216(b)-(c).

107 See REFERENCE GUIDE, supra note 95, at 17. See also 29 U.S.C. § 216(b)-(c).

108 See REFERENCE GUIDE, supra note 95, at 17.

109 Id.


111 § 95-25.3 (minimum wage), § 95-25.4 (overtime).

112 § 95-25.6.
payment” and establishes other wage notification requirements. The WHA applies to all North Carolina businesses that are not subject to the FLSA. The wage payment provisions “cover all employees in North Carolina except those employed in federal, state or local government.” Because many day laborers are not employed by enterprises that may not be covered under the FLSA, the WHA is an important source of recourse for day laborers in North Carolina seeking to claim unpaid wages.

Employers who violate the WHA are liable to employees “in the amount of their unpaid minimum wages, their unpaid overtime compensation, or their unpaid amounts due under [the wage payment provisions], as the case may be, plus interest.” Unlike the FLSA, which only allows employees to claim unpaid minimum wages and unpaid overtime, the WHA allows employees to recover “promised wages.” Promised wages include the forms of compensation listed under N.C. Gen. Stat. § 95-25.2(16): “sick pay, vacation pay, severance pay, commissions, bonuses, and other amounts promised when the employer has a policy or a practice of making

---

113 § 95-25.1(1).
114 § 95-25.1.
115 WAGE AND HOUR BUREAU, N.C. DEP’T OF LABOR, WAGE AND HOUR PACKET iii (2010), http://www.nclabor.com/wh/Wage_Hour_Act_Packet.pdf [hereinafter WAGE AND HOUR PACKET]; 13 N.C. ADMIN. CODE 12 .0501(a) (2011) (“G.S. 95-25.14(a)(1) provides an exemption from the minimum wage, overtime, youth employment and related record keeping requirements of the Wage and Hour Act for any person employed in an "enterprise" as defined by the F.L.S.A. Persons who are not employed by an "enterprise", but who are subject to the F.L.S.A. because they are engaged in commerce or in the production of goods for commerce are subject to both the F.L.S.A. and the Wage and Hour Act, unless otherwise exempted.”).
116 WAGE AND HOUR PACKET, supra note 115, at iii.
118 N.C. GEN. STAT. § 95-25.22(a) (2011).
such payments.” As under the FLSA, employees are entitled to recover “liquidated damages in an amount equal to the amount found to be due.”

Employees who wish to recover unpaid wages from an employer may file a complaint with the North Carolina Department of Labor’s Wage and Hour Bureau (WHB) or may file a private action in court. An employee may not file a complaint with the North Carolina Department of Labor (NCDOL) if he or she has already pursued the matter in court, or if his claim is less than fifty dollars. An employee may pursue an action in court after filing a complaint with the NCDOL if the NCDOL is not able resolve his complaint.

c. The Employee/ Independent Contractor Distinction

In order to be covered by either the FLSA or the WHA, a day laborer must be considered an “employee” under the statutes. It is in the interest of an employer to classify a worker as an independent contractor rather than an employee because independent contractors receive fewer protections under law. The North Carolina legislature incorporated the language of the FLSA in the WHA. Both the FLSA and the WHA define employee as “any individual employed by an employer,” and define employ as “to suffer or permit to work.” Under the North Carolina Administrative Code, the NCDOL must defer to federal interpretations in interpreting the

122 § 95-25.2(a)(1).
124 Id.
125 Id.
128 29 U.S.C. § 203(g); N.C. GEN. STAT § 95-25.2 (3).
WHA.129 Courts therefore conduct the same analysis in determining whether an employment relationship exists under either the FLSA or the WHA.130

The Supreme Court has developed a multifactor test that considers “economic realities” in determining whether a worker is an employer or an employee under the FLSA and other federal employment statutes.131 Generally, courts consider the following factors in determining whether an employment relationship exists:

(1) the extent to which the services in question are an integral part of the "employer's" business; (2) the amount of the "employee's" investment in facilities and equipment; (3) the nature and degree of control retained or exercised by the "employer"; (4) the "employee's" opportunities for profit or loss; (5) the amount of initiative, skill, judgment or foresight required for the success of the claimed independent enterprise; and (6) the permanency and duration of the relationship.132

Each day laborer’s employment experience is unique from another, but most work under the direction and control of their employers and complete work that is “an integral part of the employer’s business.” They often work for an hourly rate, and they do not have an opportunity to make a profit or loss. Some are unskilled and many work for the same employer for an extended period of time.133 For these reasons, the economic realities test will usually weigh in favor of classifying day laborers as employees under the FLSA and

129 13 N.C. ADMIN. CODE 12 .0103(2011) ("Where the legislature has adopted the language or terminology of the Fair Labor Standards Act (F.L.S.A.) for the purpose of facilitating and simplifying compliance by employers with both the federal and state labor laws, or has incorporated a federal act by reference, the Department of Labor will look to the judicial and administrative interpretations and rulings established under the federal law as a guide for interpreting the North Carolina law. Such federal interpretations will therefore be considered persuasive and will carry great weight as a guide to the meaning of the North Carolina provisions and will be controlling for enforcement purposes.").
130 See Employment Relationship, supra note 452.
133 See VALENZUELA, JR. ET AL., supra note 1, at 9.
the WHA. It would be more difficult for a day laborer who has specialized skills and provides his own tools to argue that he is an employee rather than an independent contractor.

d. Current Avenues for Claiming Wages

i. North Carolina Department of Labor

The Wage and Hour Bureau (WHB) of the NCDOL takes wage complaint information through its call center. Jim Taylor, director of the WHB, has acknowledged that day laborers may qualify for relief as employees under the WHA, that the Department of Labor considers the immigration status of complainants irrelevant, and that the lack of status is not a bar to enforcing rights under the statute. Despite the stated policies of the NCDOL toward immigrant complainants, limited resources and staff prevent the NCDOL from responding adequately to the claims of day laborers. Since 2003, the NCDOL has received an average of around 95,000 calls per year. In 2010, the WHB opened 5,647 cases and recovered wages from 2,248 workers without litigation. Although not everyone who initially contacts the WHB concerning an employment issue qualifies for relief under WHA, the statistics in the NCDOL’s 2010 Annual Report show that an employee’s chance of having his or her wage dispute resolved by the

---

134See, e.g., Employment Relationship, supra note 126 (outlining the factors considered by the Supreme Court in determining whether an employment relationship exists under the FLSA).
135Id.
136The number for the call center is 1-800-NC-LABOR (1-800-625-2267). See How to File a Wage Complaint, supra note 123.
137Julian March, Group asks Carrboro aldermen to criminalize ‘wage theft,’ THE CHAPEL HILL NEWS, Jan.24, 2010, http://www.chapelhillnews.com/2010/01/24/54798/group-asks-carrboro-aldermen-to.html (“[Taylor] said a temporary worker may be considered an employee if the supervisor takes them to a job site, tells them when to arrive and leave, and what jobs to work on.”).
139Id. at 14-15.
NCDOL is very slim.\(^{140}\) Compared to other North Carolina residents, day laborers are even less likely to receive relief from the NCDOL because of the informal nature of the relationship between day laborers and their employers. It is more difficult for day laborers to be able to provide employer contact information to the WHB, and day laborers are less likely to have documentation of promises made by employers.

Five individuals collect information in the WHB call center, and only two of these individuals speak Spanish.\(^{141}\) While the NCDOL website provides extensive resources in Spanish about workplace safety and health, there is only one document in Spanish related to the WHB that summarizes the WHB and the WHA.\(^{142}\) The document has not been updated with the current minimum wage.\(^{143}\) There is no mention of the right to file a complaint in the WHB document, and there are no Spanish resources on the website describing the procedure for filing a wage and hour complaint. Many day laborers have recently immigrated to North Carolina and are not familiar with their employment rights. Without access to resources that explain their employment rights in Spanish or their native language, Spanish-speaking day laborers will not know that they can take action to claim unpaid wages.

---

\(^{140}\) Id.

\(^{141}\) Id. at 14.


\(^{143}\) The current minimum wage in North Carolina is $7.25. The Spanish document lists $6.55.
ii. Federal Remedies: U.S. Department of Labor or Suit

Workers protected by the FLSA may file an administrative complaint with the U.S. Department of Labor’s (US DOL) Wage and Hour Division or file a private suit in federal court to recover back pay and liquidated damages from employers. The US DOL sets out guidance for federal enforcement under FLSA and notes that all employees of certain businesses whose “workers engaged in interstate commerce, producing goods for interstate commerce, or handling, selling, or otherwise working on goods or materials that have been moved in or produced for such commerce by any person, are covered by the FLSA.” The Act also includes recordkeeping regulations that mandate employers to keep records on wages, hours, and other specified items.

iii. Small Claims Court

Day laborers who choose to file a private action against an employer for unpaid wages will likely do so pro se in small claims court. Small claims courts are generally less formal than District Courts and Superior Courts. Small claims courts in North Carolina handle civil disputes involving less than five thousand dollars, and cases are decided by magistrates. Forms and procedures for small claims courts are uniform throughout the state. Complaint forms are only available in English. The Wake County Small Claims Court website states that “[t]he Clerk's Office may not instruct you

\[^{144}\text{See Handy Reference Guide to the Fair Labor Standards Act, 17 (2010). A worker may not file suit, however, if she has accepted back wages under the supervision of the Wage and Hour Division, or if the Secretary of Labor has already filed a lawsuit to recover such wages. Id. http://www.dol.gov/whd/regs/compliance/hrg.htm}\]

\[^{145}\text{Id.}\]

\[^{146}\text{Civil Division: Small Claims Court, WAKE COUNTY CLERK OF COURT, http://web.co.wake.nc.us/courts/smallclaims.html (last visited May 1, 2011).}\]

\[^{147}\text{Id.}\]

\[^{148}\text{See How to File a Wage Complaint, supra note 123.}\]
on how to fill out these forms,"\textsuperscript{149} and the Mecklenburg County Small Claims Court website directs visitors who want additional information about small claims court to the Legal Aid of North Carolina’s “Guide to Small Claims Court.”\textsuperscript{150} Legal Aid’s guide is available in Spanish, and it gives directions in Spanish for filling out the English complaint forms.\textsuperscript{151} The North Carolina Bar Association published a bulletin in both English and Spanish that outlines how to file for unpaid wages in small claims court and also outlines the court procedures.\textsuperscript{152} There is only a limited amount of guidance available for English speakers to assist them in filing a complaint and pursuing an action in small claims court, and even less information is available for Spanish speakers.

Even if a day laborer is able to inform himself of small claims procedures, the nature of the day labor employment relationship can hinder his ability to properly file a complaint. Often, day laborers do not know their employers’ full names or addresses. They must know this information in order to file a complaint.\textsuperscript{153} Day laborers who work for businesses must know whether or not they are employed by a

\textsuperscript{149} Civil Division: Small Claims Court, supra note 146.
registered corporation. If a day laborer is suing a registered corporation, he must know the correct name of the corporate entity as required by the complaint form. In order to fill out the complaint form and summons, a day laborer may have to contact the Secretary of State or a Register of Deeds in order to obtain necessary information.

A day laborer who is able to successfully file a complaint faces even more obstacles in obtaining unpaid wages. Small claims courts do not provide interpreters. If a day laborer seeks unpaid wages in small claims court but does not speak English, he will have to provide his own interpreter or go through the trial without one. If he is able to argue his case and obtains a judgment in his favor, his employer may refuse to pay it. Day laborers are often unaware of how to enforce judgments and as a result, they may leave small claims court without receiving the wages they are owed, even if they receive a judgment in their favor.

e. Making Wage Theft Remedies More Accessible to Day Laborers

The day laborer population is one that is hesitant to come forward and challenge employer abuses. Without access to information about their rights under state and federal law and the steps to take in asserting their rights, day laborers will continue to be exploited by employers. Because the majority of day laborers are Latino, this group would benefit from greater access to Spanish language resources on how to claim unpaid wages. A large portion of residents in North Carolina would also benefit from the publication of such information in

---

154 Id.
155 Id.
157 Id.
Spanish. The Hispanic population in North Carolina continues to grow and is currently estimated at around 800,000 people, or eleven percent of the state’s population. Both day laborers and members of the Hispanic community who are limited English proficient should be informed of their rights as employees in the U.S. and have the same opportunity to file complaints with the WHB or pursue actions in small claims court without language preventing access to these channels.

The absence of interpreters in small claims courts prevents day laborers from adequately representing themselves and presenting their full cases to the court. The interpreter issue is a problem throughout the North Carolina civil court system. North Carolina does not recognize the right to a court interpreter in civil cases. The IRHP Clinic recently published a report on the problems surrounding the inadequate provision of interpreters in North Carolina courts. The report found that North Carolina’s interpreter program failed to meet national standards, did not provide limited English proficient individuals with meaningful access to courts, and raised constitutional concerns. It also found that North Carolina’s court interpretation system violated Title VI of the 1964 Civil Rights Act. Without interpreters available to limited English proficient individuals, the court system will not reach an ideal level efficiency or provide limited English proficient individuals equal access to justice.

159 IMMIGRATION AND HUMAN RIGHTS POLICY CLINIC, UNC SCHOOL OF LAW, AN ANALYSIS OF THE SYSTEMIC PROBLEMS REGARDING FOREIGN LANGUAGE INTERPRETATION IN THE NORTH CAROLINA COURT SYSTEM AND POTENTIAL SOLUTIONS (2010).
160 See id.
161 See id.
f. What Municipalities Can Do to Help Day Laborers With Civil Claims For Wages

Municipalities can help improve the conditions of day laborers through both legislative initiatives and community outreach programs that focus on the wage theft problem. Municipalities may deter employers from committing wage theft with harsher civil penalties, the criminalization of wage theft, or stronger enforcement of already existing laws. Municipalities may bring deficiencies in the claims process to the attention of state employment agencies, lobbying on behalf of their residents and highlighting the injustices suffered by day laborers. Municipalities have the ability to make information about employment rights and wage theft remedies more accessible to the day laborer community by forming alliances with local organizations that provide services to immigrants and low-income workers. Also, as discussed below in Section V, a municipality may support the day laborer community through the creation of a day labor worker center. Worker centers promote employer accountability and provide a place for advocacy and education.

2. Criminalizing Wage Theft in North Carolina

Nonpayment of wages is stealing, and as discussed in the previous Subsection, nearly half of all day laborers have been victimized by wage theft. In the context of the community

---

integration project, one solution that coalition members and IHRC have considered is the possibility of criminalizing wage theft. While at the municipal level, within the framework of North Carolina municipal law, criminalizing wage theft does present some challenges, it is an important solution to consider. This Subsection explores the research question: Can and Should Wage Theft be criminalized in North Carolina? First, this Subsection considers arguments for and against criminalization of wage theft. Second, this Subsection examines existing state legislation which could possibly be used to apply criminal charges to employers who commit wage theft. Finally, this Subsection takes an analytical look at the possibility of criminalizing wage theft in North Carolina municipalities by enacting a municipal ordinance, and also briefly considers other alternatives for criminalizing or heightening punishment of wage theft at the municipal and state levels.

a. Advantages and Considerations to Criminalizing Wage Theft

While criminalizing wage theft does have some drawbacks that should be considered, on the whole, criminalization of wage theft can have benefits for day laborers, government, and the community. The National Employment Law Project [NELP] resource for advocates discussed in Section II suggests a variety of strategies which may be used to combat wage theft. In its discussion on laws criminalizing wage theft, NELP emphasizes that criminalizing wage theft can help to change employer behavior. It can also raise public awareness of wage theft as a serious problem. Enforcement of wage theft laws can be accomplished through partnerships with law enforcement officers who come to realize through carrying out their law enforcement

---

163 See ABEL VALENZUELA, JR. ET AL, supra note 1, at 14 (finding that 49% of day laborers reported at least one instance of unpaid wages and 48% reported at least one instance of being underpaid from the agreed upon wages).
164 See generally, NELP GUIDE, supra note 36.
165 NELP GUIDE, supra note 36.
duties that punishing dishonest employers is part of their responsibility to protect the community.\footnote{Id. at 34-35.} Finally, it can be a source of revenue for governments.\footnote{Id. at 35.} Not only can violators be assessed fines,\footnote{Id. at 34.} but also, criminalizing wage theft can help to curb employment tax avoidance.\footnote{Id. at 35.} A study in New York found that bringing employers into compliance with wage laws would bring $427 million of revenue to the state for this reason.\footnote{Id. (citing Amy Traub and Andrew Friedman, “Workers Deserved to be Paid,” Albany Times Union, April 5, 2010, available at http://www.drummajorinstitute.org/library/article.php?ID=7387, accessed December 10, 2010).}

As NELP points out, there are other considerations and implications in pursuit of criminalizing or heightening the criminal penalties for wage theft. For example, law enforcement officers and prosecutors must be willing participants in the effort.\footnote{NELP GUIDE, supra note 36, at 34-35.} Furthermore, criminalizing wage theft does not give workers a way to recover wages or other damages from the employer, and workers are not in the position to bring criminal actions against employers; that decision is left to prosecutors.\footnote{Id.} Finally, not all legislators are ready to accept that wage theft is a crime so encouraging legislators at either the state or local level to enact criminalizing legislation can present difficulty if this is the case.\footnote{Id.}

b. Existing North Carolina Legislation that could potentially criminalize wage theft

While North Carolina law does not expressly criminalize wage theft, the North Carolina Wage and Hour Act does impose criminal penalties for certain egregious employer action, and
the North Carolina false pretenses statute can also be interpreted to criminalize the behavior which constitutes wage theft.

In its guide, NELP offers suggestions for waging a campaign to criminalize wage theft that function at the state level and do not necessarily apply to municipalities.\textsuperscript{174} According to NELP, North Carolina is among the 33 states which already “have criminal penalties for unpaid wages in their state wage and hour laws.”\textsuperscript{175} However, in North Carolina, the general “unpaid wages” recovery provision does not include criminal provisions. As discussed in the preceding Subsection, the North Carolina Wage and Hour Act is codified at N.C. General Statute Section 95, Article 2A.\textsuperscript{176} Under Section 95-25.22, entitled Recovery of Unpaid Wages, employers who violate N.C. Wage and Hour laws related to minimum wage, overtime, and wage payment are “liable to the employee . . . in the amount” unpaid, plus interest.\textsuperscript{177} Additionally “liquidated damages” may be recovered in some instances where the employer fails to demonstrate that violation was in good faith,\textsuperscript{178} and attorneys’ fees may also be awarded.\textsuperscript{179}

In the preceding paragraph of the Act, Section 95-25.21, entitled “Illegal Acts,” it is a Class 2 misdemeanor for “any person to interfere unduly with, hinder, or delay the Commissioner or any authorized representative in the performance of official duties or refuse to give the Commissioner or his authorized representative any information required for the enforcement” of the N.C. Wage and Hour laws.\textsuperscript{180} Moreover, it is also a Class 2 misdemeanor for “any person to make any statement or report, or keep or file any record pursuant to this

\begin{itemize}
\item \textsuperscript{174} \textit{Id.} at 34.
\item \textsuperscript{175} NELP GUIDE, \textit{supra} note 36, at 35.
\item \textsuperscript{176} N.C. GEN. STAT. § 95-25.
\item \textsuperscript{177} § 95-25.22(a).
\item \textsuperscript{178} § 95-25.22(a1).
\item \textsuperscript{179} § 95-25.22(d).
\item \textsuperscript{180} § 95-95.21(a), (c).
\end{itemize}
Article or regulations issued thereunder, knowing such statement, report, or record to be false in a material respect."\(^{181}\) Thus, while failure to pay wages in violation of the N.C. Wage and Hour laws is not a crime, affirmative acts of deception, such as keeping false records of employees’ hours, could be a criminal act. Failure to keep records, however, is not expressly included in the language of this statute.

Another statute under which criminal sanctions in North Carolina could theoretically apply in the circumstances of wage theft is N.C. General Statute 14-100, which prohibits obtaining property by false pretenses.\(^{182}\) Under this statute, persons who:

> knowingly and designedly by means of any kind of false pretense whatsoever, whether the false pretense is of a past or subsisting fact or of a future fulfillment or event, obtain or attempt to obtain from any person within this State any money, goods, property, services, chose in action, or other thing of value with intent to cheat or defraud any person of such . . . thing of value . . . shall be guilty of a felony.\(^{183}\)

The elements of this crime are “(1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another.”\(^{184}\) Of these, it appears that the most difficult element to prove would be the intent of the employer in the case of wage theft to deceive the employee. First, in the case of wage theft, applying this statute, the employer must know the offer of payment being made to the prospective to be false at the time this representation is made, and further, the statement must be communicated with actual intent to deceive the worker.\(^{185}\) This intent can be inferred through circumstantial evidence,\(^{186}\) including the conduct of

---

\(^{181}\) § 95-95.21 (b), (c).

\(^{182}\) N.C. GEN. STAT. § 14-100.

\(^{183}\) § 14-100(a).


\(^{185}\) See, e.g., Parker, 354 N.C. 268, 553 S.E.2d 885.

the accused, events surrounding the alleged criminal activity. Nevertheless, the standard is high. For example, in the N.C. appellate case *State v. Bennett*, an insurance agent who was not licensed to sell insurance for a particular company, who took payment for the policy, then had a co-worker who was licensed to sell this particular insurance process the policy payment, lacked the requisite intent for her actions to rise to the level of a crime under the false representations statute. By this standard, it seems that if an employer did have the intent to pay a day laborer eventually, even if not at the agreed upon time or in the agreed upon manner, that employer would likewise lack the requisite intent.

In the context of wage theft, demonstrating an employer’s pattern of failure to pay day laborers could be a way to establish necessary intent. Evidence that the defendant has committed other crimes, or crimes not charged, but chargeable, is admissible when that evidence “tends to establish a common plan or scheme embracing the commission of a series of crimes so related to each other that proof of one or more tends to prove the crime charged and to connect the accused with its commission.” For example, in a case against defendants who offered to sell wholesale items to a convenience store at substantially below the regular cost, evidence from other storeowners that the defendants had behaved similarly was admissible to show criminal intent. Likewise, multiple day laborers could testify as to a particular employer’s failure to pay workers to this end.

One North Carolina case which actually involves false pretense in the context of employment is *State v. Hines*. In this case, Ralph Hines, employee of the Wilson Bonding Company and the State Treasurer of the North Carolina Association of Professional Bondsmen, offered a position to Karen Etheridge under the false pretenses

---

187 Id.
188 Id.
189 *State v. Wilburn*, 57 N.C. App, 40, 45, 290 S.E.2d 782, 785 (1982).
190 Id.
that Etheridge was to be employed by the state of North Carolina. Hines also wrote a check to Ethridge to pay for services she had performed, and this check was returned for insufficient funds; however, the false pretenses of the state employment, rather than the check which bounced, formed the basis for the criminal charges under the false pretense statute. Still, *State v. Hines* demonstrates that it is possible to prosecute someone under N.C.G.S. 14-100 for false statements regarding another person’s employment to obtain valuable services from that person.

In sum, it does seem possible to apply the false pretense statute to prosecute individuals who hire workers, receive benefits from these workers, and then refuse to pay them, for obtaining this service by false pretenses. However the heightened requirement for intent may make this statute challenging to prove in the case of day laborers and wage theft.

c. **Enacting Legislation Criminalizing Wage Theft**

Municipal ordinances that include criminal sanctions with respect to wage theft are not without precedent. NELP’s guide cites recent efforts by advocates in New Orleans to pass local legislation which would require police to issue summons against employers in wage theft cases and provide protection to workers against retaliation. In discussing the current general trend to attack wage theft problem at the local level, NELP’s guide suggests considering a number of issues:

Some questions that coalitions should consider in exploring the feasibility of a local wage theft ordinance campaign include: Have cities in my state historically had the legal authority to enact ordinances that punish theft? Is there a risk that

\[192\text{Id.}\]
\[193\text{Id.}\]
\[194\text{NELP GUIDE, supra note 36, at 35-36.}\]
the state legislature might attempt to step in and block an ordinance if one were enacted? What level of staffing does the city government have, and could it realistically implement a new law that gave it authority to punish wage theft?195

In the context of a criminal wage theft ordinance, the answers to these questions for North Carolina municipalities shed light on the challenges to enacting a municipal ordinance as a solution for day laborers who are victims of wage theft. This determination requires reflection on the legal analysis explored in Part One of this project concerning the extent and nature of municipal authority in North Carolina to enact local ordinances.196 As discussed in Part One of this project, municipalities in North Carolina do not have unlimited ordinance-making powers, but they do have power to act that arguably exceeds that of traditional Dillon’s Rule states.197

Under N.C. General Statute Section 160A-174(a), municipalities in North Carolina are granted a general ordinance making power.198 This statute states: “[a] city may by ordinance define, prohibit, regulate, or abate acts, omissions, or conditions detrimental to the health, safety or welfare of its citizens and the peace and dignity of the city, and may define and abate nuisances.”199 However, Section 160A-174(b) provides certain exceptions, including that municipalities are prohibited from making an ordinance if “(5) The ordinance purports to regulate a field for which a state or federal statute clearly shows a legislative intent to provide a complete and integrated regulatory scheme

195 Id. at 15.
196 See supra Part I. See also Bluestein, supra note 20, and Bluestein, supra note 12.
197 See supra Part I, Section I.
198 N.C. GEN. STAT. § 160A-174(a).
199 § 160A-174.
to the exclusion of local regulation,”^200 or if “(6) The elements of an offense defined by a city ordinance are identical to the elements of an offense defined State or federal law.”^201

It seems reasonable that the passing an ordinance criminalizing wage theft would “define, prohibit, regulate, or abate acts, omissions, or conditions, detrimental to the health, safety or welfare” of a municipality’s citizens, consistent with Section 160A-174(a).^202 As discussed previously in Part Two, wage theft threatens many different members of a community, including the workers who are victims, as well as employers who do pay day laborers, and, indirectly, workers whose wages are driven down due to wage theft. The challenge here is to overcome the two exceptions referenced in the statute.

As discussed in NELP’s guide, legislation punishing wage theft could be written in two different ways: first such legislation could establish wage theft as a crime under penal code, including an element of intent.^203 Alternatively, it could impose harsher penalties for nonpayment of wages, without the inclusion of an element of intent.^204 Under the first alternative, the ordinance would have to be crafted so that it would not be deemed as duplicative of the obtaining property by false pretenses criminal statute under N.C. General Statutes 14-100, discussed previously.^205 One might argue that given the

^200 § 160A-174(b)(5).
^201 § 160A-174(b)(5), (6).
^202 § 160A-174(a).
^203 NELP GUIDE, supra note 36, at 34.
^204 Id.
^205 N.C. GEN. STAT. § 14-100. Many states have “theft of services” statutes which essentially criminalize the elements of wage theft. See, e.g., 18 Pa. Cons. Stat. § 3926. However, it is worth noting that under the Pennsylvania statute, tying the act of wage theft to the statute is much less difficult, and that the element of intent may be more readily applied. Id. Under Pennsylvania law, “absconding” without paying someone who has delivered a service gives “rise to the presumption that the service was obtained by deception as to intent to pay.” § 3926(a)(4). See also, NJ Crim. Code § 2C:20-8 (same). No such presumption exists under North Carolina law.
previously discussed difficulties making the false pretenses statute work for wage theft, an ordinance which expressly criminalized wage theft would not be duplicative.

Additionally, such an ordinance would have to be drafted so that it was not deemed “to regulate a field for which a state or federal statute clearly shows a legislative intent to provide a complete and integrated regulatory scheme” because the N.C. Wage and Hour Act clearly provides civil law remedies, including additional damages when failure to pay is in bad faith, and criminal penalties in the case of fraudulent recordkeeping or deceitful behavior under investigation.206 Advocates would need to demonstrate the differences between the Wage and Hour Act’s criminal provisions and the elements involved in wage theft, and that due to the difficulty in making a typical wage theft case fit within the intended criminalized conduct under the false pretenses statute, this area has not been foreclosed for municipal criminalization by ordinance. These challenges are not insignificant and would require precise legislative drafting and political will.207

Turning to the second alternative, an ordinance enacting harsher penalties for simple nonpayment of wages without adding an element of intent might be a possible approach, but without a mens rea element it may be difficult to establish criminal-level penalties by municipal ordinance. This kind of ordinance might face challenges under N.C. General Statute Section 160A-174(b)(5) and (b)(6) because of the existence of comprehensive North Carolina statutory scheme under the N.C. Wage and Hour Act, and

206 See N.C. GEN. STAT. § 95-25.21-22. See also previous discussion about applicability of N.C. Wage and Hour Laws in this Subsection, and Subsection B of Section IV.
207 Even if a criminal ordinance could be enacted, a criminal element of intent similar to that under North Carolina’s false pretenses statute, even in the context more specifically directed at nonpayment of wages, would set a standard that would be difficult to prove in most cases.
because the elements for non-payment of wages could be viewed as duplicative of N.C. General Statute Section 95-25.22. 208 However, N.C. General Statute Section 160A-174(b) concludes by stating “[t]he fact that a State or federal law, standing alone, makes a given act, omission, or condition unlawful shall not preclude city ordinances requiring a higher standard of conduct or condition.” 209

In interpreting this statute, the North Carolina Supreme Court has held that an ordinance may not create a “new and independent framework for litigation.” 210 Thus, an ordinance adding criminal penalties to the provisions of N.C. General Statute 95-25.22 or otherwise substantially changing the punitive structure of the N.C. Wage and Hour Act would have to be consistent with the existing framework. However, under the N.C. Wage and Hour Act, there are already criminal penalties in place for some employer actions, so one might argue that this creates a precedent for criminal sanctions in the context of an otherwise civil employment law scheme.

Alternatively, as discussed in the Subsection B of Section IV, a civil ordinance could be enacted that heightened civil penalties in some way, such as by imposing higher punitive damage levels. If the goal is to scare employers into compliance with employment law concerning wage payment, an ordinance which simply increases punitive damages without the possible threat of jail time and law enforcement

208 See N.C. GEN. STAT. § 95-25.22.
209 N.C. GEN. STAT. § 160A-174(b).
210 See Williams v. Blue Cross Blue Shield of North Carolina, 357 N.C. 170, 581 S.E.2d 415 (2003) (holding that an employment discrimination ordinance which gave citizens subpoena power and the right to sue in the absence of a finding by the county human rights commission, and the right to seek an injunction against an employer and recover backpay, compensatory and punitive damages went beyond requiring a higher standard of conduct, substantially exceeding the leeway permitted); see also, Greene v. City of Winston-Salem, 213 S.E.2d 231, 287 N.C. 66 (1975), in which an ordinance enacted by a city requiring sprinkler systems in high-rise buildings, where the state had not made that unlawful, did not fall within the intended meaning of N.C. GEN. STAT. § 160A-174(b), allowing municipalities to impose higher standards of conduct than the state).
involvement may simply not have enough teeth to achieve this objective, but it could still be a step in the right direction. Additional possibilities could include passing state statutory law expressly criminalizing wage theft or amending the N.C. Wage and Hour statute to add additional criminal provisions, passing state law heightening civil remedies in wage theft cases, or using test cases to challenge existing law and determine the bounds of the false pretenses statute.

Enacting a municipal ordinance that criminalizes wage theft requires consideration of many challenges, skilled legislative drafting and political will. But the effort to create such an ordinance in the context of a community integration project may have positive effects. Existing law in North Carolina does not completely foreclose the possibility of enacting this kind of an ordinance. Thus, the argument that criminalizing wage theft may be one potential solution should be considered, along with other ideas. Bringing the idea out can help not only to test and expand the boundaries of municipal power, but also to popularize the idea of wage theft as a crime in the media, and build public support for state legislation that could criminalize or enact sharper penalties for actions by employers that constitute wage theft.

C. Worker Centers as a Possible Wage Theft Solution: A Legal Analysis

This Section looks specifically at a day labor worker center as a potential solution to the wage theft problem and other problems faced by day laborers in Carrboro and Chapel Hill. Subsection A of this Section first provides a brief overview of the worker center phenomenon in the United States and a cursory look at the services which worker centers are capable of providing, the successes of the centers in affecting positive change for day laborers and other low
income immigrant workers, and finally the demonstrated weaknesses of worker centers.

Subsection B of this Section discusses the specific components which a proposed worker center in Carrboro might include and how this could provide benefit to the day laborer community.

Subsection C of this Section briefly examines concerns raised by and on behalf of the day laborers as well as concerns raised by community leadership of Carrboro and Chapel Hill, in the context of leading studies on worker centers in the United States. Finally, Subsection D of this Section responds to the question: “How do worker centers comply with the Immigration Reform and Control Act (IRCA)?”

1. An Overview of the Worker Center Phenomenon in the United States

In recent years, workers centers have emerged in cities and towns throughout the United States as strategic locations for low-wage workers to organize. In 2006, Janice Fine published a comprehensive book on the worker center phenomenon, entitled Worker Centers: Organizing Communities at the Edge of the Dream, which looks in depth at the successes and struggles of a number of worker centers across the U.S. For the purpose of her cross-country case study, Fine has defined worker centers as “community-based and community-led organizations that engage in a combination of service, advocacy, and organizing to provide support to low wage workers.” The majority of these centers work specifically with immigrants. This Subsection looks at the worker center phenomenon, first summarizing the variety of services that worker centers can provide in light of the research done by Fine and other scholars, and second,

---

211 JANICE FINE, WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM 5 (2006). “Worker centers have emerged as central components of the immigrant community infrastructure, and, in the combination of services, advocacy and organizing they undertake, are playing a unique role in helping immigrants navigate the worlds of work and legal rights in the United States. They are gateway organizations that are meeting immigrant workers where they are and providing them with a wealth of information and training.” Id. Worker centers “have grown from five centers in 1992 to at least 139 in over 80 U.S. cities, towns and rural areas across 32 states.” Fine, supra note 211, at 1.

212 See generally, FINE, supra note 211.

213 Id. at 3.

214 Id. (stating that 122 of the 143 centers she identified worked with immigrants).
examining the advantages of and challenges faced by worker centers which function as hiring halls.

a. Services Provided by Worker Centers

Worker centers are capable of delivering a variety of services and opportunities to the immigrant population which would otherwise be unavailable, and they can also unify the voices of the worker community for the purposes of improving worker conditions. Among other services, worker centers can provide legal clinics, a platform for impact litigation and lobbying, ESL and other classes, job training, health services, and in some instances other services, like check wiring, emergency lending, and, as is the case at CASA de Maryland, identity cards which members of the worker center can present to local banks, schools and police officers.

Worker centers can also provide an excellent vehicle for community integration. When they function well, worker centers can provide a voice to the worker community, and can negotiate to affect positive change for these workers by partnering with other organizations nationally and working locally with community officials on specific goals. Fine cites many specific

---

215 Id., at 2, 5. Worker centers are actually an ideal platform for a broader reform agenda, since work is the “locus” of immigrant life, and thus the problems immigrants experience generally revolve around this. Id. at 11.

216 See id. at 74-87

217 See id. at 88-90

218 See id. at 91-92

219 See id. at 92-93

220 See id. at 93.

221 Id., at 235.

222 Id., at 181.

At the centers themselves, immigration and employment struggles are almost always intertwined. When local residents, businesses or municipalities move to restrict day laborers from seeking employment, or police make arrest at shape up sites, references to them as “illegal aliens” or claims about their immigration status are always a major part of the public conversation. As the debate on immigration reform becomes more contentious, centers are often called on as the local spokespersons of a pro-immigrant point of view, speaking in opposition to anti-immigrant policies and practices and discussing the unfairness of the current immigration system. Id. “This establishes a foundation on which a local campaign of support for federal immigration reform, and one that draws support beyond the ‘usual suspects,’ can be launched.” Id.
successes which worker centers have had. One kind of success is that worker centers have been able to improve relationships with specific employers. For example, the Garment Worker Center successfully targeted clothing retailer Forever 21 and ultimately won a lawsuit on behalf of workers. As a result, numerous employees were able to receive paid back wages and the company agreed to improve work conditions.\(^{223}\) Likewise, the Coalition for Humane Immigrant Rights of Los Angeles (CHIRLA) was ultimately able to improve hiring conditions for day laborers by working with the City Councilor of L.A to pressure Home Depot into forming a partnership with the city.\(^{224}\) As a result of media attention and negotiations, a hiring hall was constructed in the Home Depot parking lot, and CHIRLA continues to negotiate with Home Depot about possibilities for similar, broader, nation-wide day laborer worker center partnerships.\(^{225}\)

When day laborers and their advocates work closely with local political figures, they can often produce positive results.\(^{226}\) In Omaha, Nebraska, Omaha Together One Community (OTOC) worked together with a state Republican leader, Governor Mike Johanns, who agreed to investigate the meat packing industry in the area.\(^{227}\) When his investigators uncovered seriously unsafe working conditions and realized that workers were too intimidated to report these issues, Governor Johanns established a Workers’ Bill of Rights for Nebraska and required all workplaces to post this Bill of Rights. Moreover, he created a new position in the Nebraska state department of labor called “meatpacking industry workers rights coordinator.”\(^{228}\) Similarly, a

\(^{223}\) *Id.*, at 103-106.

\(^{224}\) *See id.* at 107-109.

\(^{225}\) *See id.*

\(^{226}\) *See id.* at 162. Partnering with local and state government, it is possible for worker centers to develop partnerships in powerful cases “to ensure that existing labor and employment laws and regulations are fully and fairly enforced to the benefit of low-wage workers.” *Id.*

\(^{227}\) *See id.* at 162-63.

\(^{228}\) *See id.* However, ultimately few reports for Bill of Rights violations were pursued by the Nebraska Department of Labor. *See id.*
day laborers organization in Houston, TX partnered with Richard Shaw, the secretary-treasurer of Harris County Central Labor Council, and put together a research report on wage theft for the Equal Employment Opportunity Commission (EEOC) entitled “Houston’s Dirty Little Secret.” A successfully waged media war earned the support of the Houston mayor, who established a formal Office of Immigrant and Refugee Affairs, funded the creation of three day labor worker center cites in Houston, and helped to establish Justice and Equality in the Workplace (JEWP), a program intended to establish a “one stop grievance procedure” for day laborers that functioned successfully and produced important results.229

One common element of most worker centers is an empowering organizational structure.230 Fine considers the importance of organizational structure as a critical factor in creating leaders within the immigrant worker community and thus as one of the greatest strengths of the worker center phenomenon.231 Most worker centers have established formal membership procedures,232 many have a volunteerism component,233 and approximately 48% have some kind of system for dues.234 Moreover, centers have complex networks for leadership, such as committees and internally-elected boards which run the centers.235 These systems vary as appreciably as the centers themselves.236 Centers frequently make hiring decisions from within, drawing from the ranks of the workers.237 One unique strategy implemented by the large Los Angeles worker

---

229 See id., at 169-70.
230 See id. at 202. A major goal of worker centers is “identifying and developing activists and organizational leaders from within the ranks of low-wage immigrant workers.” Id.
231 Id. at 248-49.
232 See id. at 208-209. 203- Fine believes structures are necessary for the success of worker centers, providing venues for participation at different levels for members and fostering strong cores of active participants. Id. at 203. Participation is sometimes optional and sometimes mandatory, varying by organization. Id. at 203-204.
233 Id. at 210.
234 Id. at 219-220. While 48% of centers have some kind of dues, the systems for dues are often on a continuum and vary appreciably as well. Id. Fine observes that dues are not usually a central component to funding the worker centers, but exist more to develop a sense that the workers own their own organizations. Id. at 221.
235 See FINE, supra note 211, at 202-204.
236 See id.
237 See id. at 211-217.
center network IDEPSCA is to select day laborers from within the worker centers’ ranks and to provide funding for these individuals to become licensed construction contractors. These contractors, in turn, are then able to hire other day laborers from the working center, and do so on more fair terms than other contractors.238

b. Advantages and Challenges of Worker Centers as Hiring Halls

Within Fine’s definition of worker centers, not all worker centers are day labor worker centers, and many worker centers are not coupled with hiring halls.239 Fine distinguishes between worker centers in general and day labor working centers, hiring halls and shape up sites, which have an employer/employee matching component.240 Likewise, in Amy Pritchard’s article on day laborers, “‘We are your Neighbors’: How Communities Can Best Address a Growing Day-Labor Workforce,” hiring halls are distinguished from worker centers as two distinct community entities, while Pritchard observes that hiring halls are “typically housed by workers’ centers.”241 Pritchard states that as of January 2006, there were sixty-three formal day-laborer centers.242

Day labor worker centers that also function as hiring halls or shape up sites can have positive results for day laborers. They can help to raise the wages for these workers by setting center minimum wages.243 They can also help to address the problem of wage theft, by requiring

238 See id. at 115
239 See id. at 112-115. “Attempting to organize day laborers has led a number of worker centers to press for the formation of day laborer hiring halls.” Id. at 113.
240 See id. at 112-115.
241 Pritchard, supra note 2, at 398. “Specifically, the development of two different types of community centers has provided instrumental resources and protections to immigrant workers, in general, and day laborers, in particular. The first are workers’ centers, which are usually nonprofit community service organizations offering a variety of services to day laborers. The second are hiring halls, typically housed by workers’ centers, which are specifically designed to provide a formal hiring process for day laborers and offer resources to protect workers from exploitation.” Id.
242 Id.
243 See Fine, supra note 211, at 112 (“Most important, they [day labor worker centers] have been able to establish minimum wages at the shape-up sites and day laborer worker centers where day laborers gather daily to seek
employers and workers to sign contracts or by recording employer information. Moreover, they can help to improve day laborers’ self-image. Day labor worker centers can also provide a benefit to the community by getting workers off the corner, by resolving issues that are commonly complained about by community members with respect to day laborers, such as littering, public urination, and traffic hazards. Also, offensive behavior that may occur at informal day labor hiring sites can be controlled and addressed at a formal site such as a day labor worker center.

However Fine recognizes and other scholars criticize the limitations of worker centers’ effectiveness as hiring halls. Day labor worker centers must employ some kind of procedure for determining who gets a job, and this is often accomplished through a lottery system or a waiting list, with separate lists of workers who have specific skill sets. The democratic structure of worker centers can also empower the workers to decide for themselves how selection will work. Inevitably, however, some workers will not get jobs at the day labor center and some work.”). However, “most [day labor worker centers] found that before they could move into organizing proactively for a minimum wage, they first had to wage defensive campaigns to stop the harassment of day laborers.” Id. See Pritchard, supra note 2, at 398. See also Arturo Gonzales, Day Labor in the Golden State, 3-3 California Economic Policy, 13-14 (noting that these centers can help prevent wage theft and can also help to enforce safety standards on employers). See FINE, supra note 211, at 113. Raul Anorve, executive director of IDEPSCA, remarked, “With the day labor centers, we’ve been able to move up their [day laborers’] expectations of themselves to have some dignity about what they’re worth in this society and have some pride behind it.” CHIRLA of California waged a campaign to raise the self-image of its day laborers. Id. The organization’s campaign, “somos jornaleros” [we are day laborers] involved day laborer parades in various communities. Id. See id. at 398-99. “For example, in order to address littering and public urination concerns, hiring halls have trash receptacles and restroom facilities. Similarly, traffic disturbances can be regulated at a hiring hall by designating an area where drivers can park in order to negotiate hiring arrangements.” Id. at 399.

See id. at 112-115. See also Pritchard, supra note 2, at 399 (“While formal day-labor hiring halls may be an appealing option for communities, some day laborers report mixed experiences with the site”); Gonzales, supra note 244, at 3 (“[I]t has not been clear whether these centers are as attractive to key market participants—workers and employers—as informal, open-air hiring sites.”); Greg W. Kettles, Day Labor Markets and Public Space, 78 UMKC L. REV. 139 (“The strategy of shelter similarly misunderstands the advantages offered by the street to day laborers. Like those who in earlier advocated sheltering the homeless and helping them find work, advocates of sheltering day laborers exhibit good intentions. But they risk turning street entrepreneurs into dependents.”). See FINE, supra note 211, at 114.
workers will choose not to utilize the hiring sites, instead taking their chances on the streets. Their willingness to accept lower wages can undermine the hiring site, or even cause it to fail. Moreover, this situation can cause a rift in the day laborer population. A comprehensive report on worker centers in California, “Day Labor in the Golden State,” found that more workers in California get work on the streets than at the worker centers regardless of the number of hiring sites. This problem is compounded when there are fewer jobs, and workers will feel that their chances of employment are improved by waiting in the street rather than in the center.

Worker centers are uncomfortable with using coercive behavior to get workers into centers, though communities on a national scale have often paired funding of worker centers with enactment of coercive ordinances which prohibit solicitation of employment anywhere but the centers, hiring halls, or shape up sites. As previously discussed, such ordinances not only raise constitutionality issues, but also unfairly punish workers who do not use the centers. A related strategy discussed by Fine is to legally compel the contractors, rather than the workers, to

\[^{250}\text{See id. ("One of the major problems IDEPSCA and CHIRLA face is that some workers prefer to stand out on nearby street corners and offer to work for less, instead of coming into the day laborer worker centers.").}\]

\[^{251}\text{See id. ("When workers stand out in the streets offering to go to work for less money, it undercuts the minimum wage that has been set at the centers.") Id. Pablo Alvarado of the Pasadena CHIRLA organization stated that organizers were considering relocating the center closer to where the workers currently seek jobs, because they are not using the center. Id.}\]

\[^{252}\text{Gonzales, supra note 244, at 2.}\]

\[^{253}\text{See FINE, supra note 211, at 114 ("Some people feel that in the streets they have more chances.").}\]

\[^{254}\text{Id. at 115.}\]

\[^{255}\text{See Pritchard, supra note 2, at 399 (discussing how day labor worker centers can coexist with such statutes, and might be most appropriate for communities with opposition to the more informal outdoor day labor market); see also infra Section V, Subsection D, discussing Garcia v. Dieterow and Town of Herndon v. Thomas, both cases concerning communities with worker centers that coexisted with ordinances limiting where workers could solicit work.}\]


come to day labor worker centers.\textsuperscript{256} Again, however, such a strategy has raised similar First Amendment constitutionality issues in some jurisdictions.\textsuperscript{257}

While some have called into question the effectiveness of day labor worker centers as hiring halls, in “Day Labor Markets and Public Space,” Greg Kettles, law professor, argues that the use of “shelter” in the context of day laborers is itself a harmful and coercive measure which unnecessarily hampers the market of day laborers, and instead of empowering them, takes power from them.\textsuperscript{258} He bases his argument on both economic and historic principles\textsuperscript{259} and postulates that day labor worker centers hamper these “street entrepreneurs” by forcing reliance on day labor worker centers and adding unnecessarily arduous steps to formalize employment process which are undesirable to both worker and employer.\textsuperscript{260} He insinuates that the workers are capable of self-policing against wage theft, and that the use of centers to this end is not necessary.\textsuperscript{261} He further argues that the market exists on the sidewalk because that is where the worker and the employer know to find each other, and, in essence, that the community should

\textsuperscript{256} See FINE, supra note 211, at 115. The Workplace Project, in Freeport, on Long Island is an example of this. Police officers would go out a few times a year and warn contractors to seek day laborers at the day labor worker centers rather than on the street corners, or ticket them for violations. \textit{Id.}

\textsuperscript{257} See, e.g., \textit{Town of Herndon v. Thomas}, 2007 Va. Cir. LEXIS 161 (Va. Cir. Aug. 29, 2007), which is discussed in great detail under the IRCA analysis, a case in which the Virginia circuit court overturned an ordinance penalizing employers who sought day laborers on the street, on First Amendment grounds.

\textsuperscript{258} Kettles, supra note 248, at 35.

Most day laborers do not use work centers, many of them even when they have an opportunity to do so. One reason is the loss of control over work task and employer. Day laborers on the street occasionally refuse work—especially from employers with a reputation for dishonesty. The method of assigning jobs on a first come first served used by many centers induces day laborers to go to work earlier than they would have felt necessary had they been seeking work on the street. At one Los Angeles, California day labor center, the sign-in list is made available each morning at 6:30 a.m. For some day laborers, going to a work center would “feel more like a job.” Some day laborers left jobs in the formal economy to escape mistreatment by their employers. Having won some control over their lives, these street entrepreneurs are not eager to give it up.

\textsuperscript{259} He discusses the economic principles behind the formation of a “market,” the market of day laborers being in the street, and he explores the history of workers in the streets, discussing hobo work culture as historical evidence to suggest that the day labor street market will exist with or without undocumented immigrants.

\textsuperscript{260} \textit{Id.}

\textsuperscript{261} \textit{Id.}
come to accept that, and that such an arrangement has broader social benefits. Ultimately, he concludes that instead of trying to shelter day laborers, communities should let the informal day labor market continue as is.

A final weakness which nearly all worker centers face, but which can be compounded in the case of worker centers coupled with hiring halls is the problem of funding. Operating on meager budgets and attempting to steer tremendous agendas, worker centers can become spread thin. Funding can often come from local and state governments, however accepting such funding can place a burden on the organization to adhere to governments’ preferences for the use of funds. In his critique of sheltering workers, Kettles also criticizes the cost of a day labor worker center both to set up and to maintain.

Notwithstanding their weaknesses, workers centers “are uniquely situated to facilitate a dialogue among community stakeholders to ensure that the best solution is found.” As Fine argues, workers centers are “succeeding at providing an ongoing vehicle for collective voice to workers at the very bottom of the wage scale.” In embarking on the development of a worker center in Carrboro, it is important to recognize the ways in which worker centers have succeeded, while remaining carefully mindful, in particular, of the criticism toward day labor

---

262 See generally, id.
263 See Fine, supra note 211, at 217 (finding that 51% of all worker centers operate on annual income of $250,000 or less, and only 9% have income greater than $500,000 per year).
264 See generally, id. at 217-223.
265 See id. at 219.

Angelica Salas, executive director of CHIRLA, also cautioned about the organizational compromises involved with contracting with government to deliver a service, as is the case with the organization’s operation of day laborer centers for the City of Los Angeles. “Although the city councilors always understood our interest in developing the leadership skills of day laborers and working with them to organize for better treatment, we were repeatedly reprimanded by city administrators for integrating these activities into our work at the day laborer centers.”

266 See Kettles, supra note 248, at 9.
267 Pritchard, supra note 2, at 399-400.
268 Fine, supra note 211, at 266.
worker centers which provide a forum for day laborers and employers to meet and make employment arrangements, and the weaknesses inherent in these kinds of centers.

2. How do Worker Centers comply with the Immigration Reform and Control Act (IRCA)?

How do Worker Centers comply with the Immigration Reform and Control Act (IRCA)? This is an important threshold question in the development of support for and establishment of a worker center which is consistent with federal law.

a. Overview of Legal Analytical Framework

The Immigration Reform and Control Act of 1986 (IRCA) is a series of federal law provisions intended to deter unlawful immigration. IRCA stipulated legalization for certain unlawfully present immigrants. The statute also included important anti-discrimination provisions to prevent employers from discriminating against lawfully present employees on the basis of national origin, and for authorized employees, citizenship status in most positions of work, and punish employers who do so. But IRCA also tightened border controls and made it unlawful for employers to knowingly hire undocumented workers, imposing a duty on employers to check employment status of most perspective employees.

Section 1324a(1) [Immigration and Nationality Act (I.N.A.) Section 274A(a)(1)] states: "[i]t is unlawful for a person or other entity to hire, or to recruit or refer for a fee, for employment in the United States -- (A) an alien knowing the alien is an authorized alien . . . or (B) an individual without complying with the requirements of subsection (b)."

---

270 See USCIS, Immigration Reform and Control Act of 1986 (under USCIS Glossary) (last accessed Mar. 7, 2011) http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextchannel=b328194d3e88d010VgnVCM10000048f3d6a1RCRD&vgnextoid=04a295c4f635f010VgnVCM100000ecd190aRCRD.
describes the recordkeeping requirements for employers, including acceptable forms of documentation which perspective employees can use to prove work authorization. Failure of an employer to comply with IRCA can result in civil fines or even criminal sanctions.

Though IRCA places a substantial burden on employers to assure the legal employment status of employees, this burden does not extend to every work-based relationship, and it does not extend beyond employers, those who “recruit or refer for a fee,” or their agents. The burden on employers established by IRCA does not extend to not-for-profit worker centers that assist workers in finding day labor or other positions, nor does it implicate the municipality in which such a worker center operates, even in instances where the municipality uses taxpayer funds to finance the facility's existence.

As a preliminary matter, Subsection D(2) considers the meaning of “employee” within IRCA’s implementing regulations. Employers are not required by IRCA to verify worker status in every hiring relationship, and many day laborer/employer relationships are excluded from the IRCA record keeping requirements by IRCA’s implementing regulations. Subsection D(3) examines the meaning of “employer” for the purposes of IRCA and maintains that not-for-profit worker centers are not “employers,” and they do not “hire,” “recruit for a fee” or “refer for a fee.” Therefore, they are under no duty to inquire about employment status of day laborers who utilize these centers. Subsection D(4) surveys existing case law concerning whether a municipality can be the agent of a worker center, or can be in violation of IRCA for using taxpayer revenue to fund a worker center for day laborers, and argues that a municipality

272 Id. § 1324a(b).
273 Id. § 1234a(e)(4)(2).
274 Id. § 1234a(f)(1).
275 See 8 C.F.R. § 274a(1)(f) (2010).
276 See generally id. § 274a.
277 See generally id. § 274a(1)(c-j).
cannot be implicated by IRCA for merely funding and endorsing a worker center site. Subsections D(3) and D(4) consider in some detail two cases in which the same organization, Judicial Watch, with viewpoints antithetical to immigrant day laborers, sought to challenge municipality-funded worker centers by bringing lawsuits on behalf of taxpayers against the municipalities and alleging IRCA violations. *Karunakarum v. Town of Herndon*, 278 decided in the Fairfax County Circuit Court of the state of Virginia in 2006, concerns the well-publicized and controversial creation of a worker center in Herndon, VA. In this published decision, the court held that the taxpayers of Herndon had standing to challenge the center, calling for more briefing on the substantive questions of the case. 279 In *Garcia v. Dicterow*, 280 an unpublished decision in the Court of Appeal, Fourth District, Division 3 of California, the court held that the municipality of Laguna Beach did not violate IRCA by paying for a worker center with taxpayer funds. 281 Finally, Subsection D(5) of this Section briefly considers and dismisses the other arguments advanced in the Judicial Watch cases, that the operation of day labor centers violates federal laws regarding the harboring of unlawfully present persons, that it constitutes “aiding and abetting” unlawful immigration in violation of the Immigration and Nationality Act (I.N.A.) and that it violates the “Dillon Rule” 282 for the same reasons advanced in these cases. 283

279 See id. See also infra Subsections D(3)-(5) for a comprehensive discussion of the case and its relevance. Ultimately no further action was taken in this case.
281 As far as can be determined, these two cases are the “leading” authority on the matter, however noting leading with great hesitancy, since neither case has any real precedential value for North Carolina. However a search included comprehensive examination of all cases on Westlaw and Lexis with any bearing for day laborers, worker centers, IRCA, undocumented employment and so on. Further, these two cases are the only two cases cited by the secondary sources relied on. It is tentatively theorized that standing may provide a barrier to challenging the existence of non-tax-funded worker centers.
282 For a discussion on the Dillon Rule and its meaning in North Carolina, *see supra* Part I, Section 1 of this report. See also, Bluestein, *supra* note 20; Bluestein, *supra* note 12.
283 *See infra* Subsection D(5).
b. Employers are not required by IRCA to verify worker status in every hiring relationship

Although studies have shown that most day laborers in the United States lack work authorization,\(^{284}\) it is \textit{not illegal} in all instances under IRCA for an employer to hire a worker without verifying employment authorization.\(^{285}\) In certain instances, the circumstances of the hiring or nature of the work that day laborers are recruited for may not impose a duty on the person hiring them to check for employment authorization status. Under IRCA’s implementing regulations, the term "hire" refers to "the actual commencement of employment of an employee for wages or other remuneration."\(^{286}\) "Employee" means "an individual who provides services or labor for an employer for wages or other remuneration but does not mean independent contractors . . . or those engaged in casual domestic employment . . ."\(^{287}\)

8 C.F.R. Section 274a(1)(j) carves out the exception to IRCA’s production of documentation requirements for those meeting the definition of an "independent contractor."\(^{288}\) The term “independent contractor” is not expressly defined by the regulations, but is generally interpreted under common law meaning and Internal Revenue Service guidelines. Whether an individual is an “employee” or an “independent contractor” turns on the circumstances of the working relationship, including behavioral control (degree of instruction and training given), financial control (investment in one’s own work, who pays for on the job expenses, and “opportunity for profit and loss”) and the relationship of the parties (employment benefits and

\(^{284}\) See, e.g., VALENZUELA, JR. ET AL., supra note 1, at iii (UCLA 2006), available at http://www.sscnet.ucla.edu/issr/csup/uploaded_files/Natl_DayLabor-On_the_Corner1.pdf (reporting that approximately 75 percent of day laborers are undocumented).

\(^{285}\) See Pritchard, supra note 2, at 382.

\(^{286}\) 8 C.F.R. § 274a(1)(c) (2010).

\(^{287}\) Id. § 274a(1)(f).

\(^{288}\) Id. § 274a(1)(j).
existence of contracts, though contracts alone are not controlling). While many day labor employees are incorrectly characterized by employers as independent contractors, in order to exempt these employers from having to comply with the Fair Labor Standards Act and other employment law, it is still conceivable that some day laborers would be independent contractors under this distinction. In addition to the “independent contractor” exemption, 8 C.F.R. Section 274a(1)(h) exempts "casual employment by individuals who provide domestic service in a private home that is sporadic, irregular or intermittent" from the definition of employment. A nationwide study conducted by UCLA in 2006 found that approximately forty-nine [49] percent of day laborers are employed by homeowners or renters, while forty-three [43] percent are employed by contractors. It is unclear how often day laborers would fall under the casual employment exception to IRCA, but apparent that the argument could be made.

Pritchard writes, "[t]hus, an employer is not required to verify the employment authorization of a day laborer he or she hires to help with short-term tasks such as yard cleanup or as an independent contractor to replace an ill full-time employee." While such an argument could help to facilitate the legitimacy of persons without work authorization gaining employment, from an advocacy standpoint making the case that an undocumented person is either an independent contractor or a casual worker can have other negative consequences, in terms of potentially rendering that individual exempt from certain federal and state employment

290 Because the independent contractor/employee determination generally turns on the matter of control (often referred to as the “Economic Realities Test”), it is not uncommon for employers to incorrectly characterize workers as independent contractors to gain exemption from worker’s compensation, Fair Labor Standards Act (FLSA) and other laws. See, e.g., Overtime Law Blog, Companies Slash Payrolls by Calling Workers Independent Contractors (Feb. 12, 2010), http://flsaovertimelaw.com/2010/02/12/companies-slash-payrolls-by-calling-workers-independent-contractors-costly-to-irs-and-states-la-times-reports/. See also discussion related to independent contractor/employee distinction under Section IV of Part II of this report.
291 8 C.F.R. § 274a(1)(h).
292 VALENZUELA, JR. ET AL., supra note 1, at ii.
293 Pritchard, supra note 2, at 382.
law protection. Moreover, it is important to note, notwithstanding the regulations, that under the express language of IRCA, employers may not use these two exemptions as means of circumventing the document production requirements--8 U.S.C. Section 1324a(a)(4) clarifies that a person using labor under contract will still be in violation of IRCA if he or she knows that the laborer is an unauthorized alien.

Some states and municipalities have attempted to enact legislation which extends the burden of verifying employment authorization to employment relationships expressly excluded by IRCA’s implementing regulations, namely independent contractors and casual employees. State and municipal legislation imposing a higher burden of production of employment verification documents on employers may be subject to federal preemption. Under 8 U.S.C. Section 1324a(h)(2), “[t]he provisions of this section preempt any state or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ or recruit or refer for a fee for employment, unauthorized aliens.” Under the precedential U.S. Supreme Court decision, De Canas v. Bica, the U.S. Supreme Court established a three-part test for determining whether a local immigration law is unconstitutional, and such a law would be preempted if one of the three following requirements was met: “(1) Congress has manifested an express intent to preempt any state law; (2) Congress has intended to completely occupy the field in which the law attempts to regulate; or (3) the state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’”

“State and local measures could potentially be found to be unconstitutional on conflict preemption grounds [the third ground] if their requirements can be characterized as

---

294 See supra note 290.
296 Id. § 1324a(h)(2).
297 Pritchard, supra note 2, at 392 (citing De Canas v. Bica, 424 U.S. 351 (1976)).
inconsistent or incompatible with federal law."298 Preemption challenges have been brought successfully against statutes that extend production requirements to the hiring of independent contractors and domestic workers in both the third and tenth circuits.299

c. Not-for-Profit Worker Centers are not “Employers” and do not “hire,” “refer for a fee” or “recruit for a fee” within the meaning of IRCA

8 U.S.C. Section 1324a(b) establishes the employment verification system required “in the case of a person or entity hiring, recruiting or referring an individual for employment.”300 Neither IRCA nor its implementing regulations give any mention to affirmative obligations of not-for-profit employment centers.301 "Employer" under IRCA’s implementing regulations is defined as "a person or entity, including an agent or anyone acting directly or indirectly in the interest thereof, who engages the services or labor of an employee to be performed in the United States for wages or other remuneration . . ."302 Under IRCA, “[o]nly employers need to verify status, while state employment agencies, for instance, have the option not to check work

299 See, e.g., Chamber of Commerce of the United States of Am. V. Edmondson, 594 F.3d 742, 769-70 (10th Cir. 2010) (holding that an Oklahoma statutes requiring verification by persons hiring independent contractors or domestic workers was inconsistent with federal law and overturning it on preemption grounds); Lozano v. City of Hazelton, 620 F.3d 170, 216 (3d Cir. 2010) (same). But see Gray v. City of Valley Park, Missouri, 2008 U.S. Dist. LEXIS 7238, at *45 (holding a local ordinance that imposed verification requirements on persons hiring independent contractors to be valid and reasoning that excluding “independent contractors” from the definition of “employees” constitutes an unreasonable interpretation of IRCA, notwithstanding the definition of “employee” which expressly excludes “independent contractors” in the regulation under 8 C.F.R. § 274a(1)(f)). See Id., at 11 (discussing these cases); Mark S. Grube, Preemption of Local Regulations Beyond Lozano v. City of Hazelton: Reconciling Local Enforcement with Federal Immigration Policy, 95 CORNELL L. REV. 391 (discussing in great detail the differences in reasoning between the Lozano and Hazelton courts, and the Hazelton court’s rejection of the Lozano decision).
300 8 U.S.C. § 1324a(b).
302 8 C.F.R. § 274a(1)(g).
eligibility.”303 Under the regulations, the term “hire” refers to “the actual commencement of employment of an employee for wages or other remuneration” which occurs “when a person or entity uses a contract, subcontract, or exchange . . . to obtain the labor of an alien in the United States, knowing that the alien is an unauthorized alien.”304 The phrase, "refer for a fee" means: the act of sending or directing a person or transmitting documentation or information to another, directly or indirectly, with the intent of obtaining employment in the United States for such person, for remuneration whether on a retainer or contingency basis; however, this term does not include union hiring halls that refer union members or non-union individuals who pay union membership dues.305

"Recruit for a fee" means "the act of soliciting a person, directly or indirectly, and referring that person to another with the intent of obtaining employment for that person, for remuneration, whether on a retainer or contingency basis; however, this term does not include union members or non-union individuals who pay union membership dues."306

Not-for-profit worker centers are not employers within the meaning of IRCA, and such centers do not “hire,” “refer for a fee” or “recruit for a fee” as defined by the implementing regulations. A not-for-profit worker center does not meet the definition of an employer under 8 C.F.R. Section 274(a)(1)(g) because the worker does not provide any service or labor to the center in exchange for any payment or remuneration; it merely provides a forum for employers and day laborers to safely meet.307 Further, the not-for-profit worker center does not “hire” the prospective worker; indeed, workers centers clearly inform perspective employers that the employer is the “hirer” of the worker, and day laborers negotiate wages and other arrangements.

303 Hobbins, supra note 627, (citing 8 C.F.R. § 274a(2), “giving agencies a choice to verify and certify workers’ immigration status for employers”).
304 8 C.F.R. § 274a(1)(c).
305 Id. § 274a(1)(d).
306 Id. § 274a(1)(e).
307 See, e.g., Hobbins, supra note 301, at 12.
independently in worker centers. As the Ninth Circuit court held in Jenkins v. Immigration and Naturalization Service, the time when a “hire” occurs is when the worker commences labor, which would not be at a worker center.

Not-for-profit worker centers should not be viewed as “agents” of employers, because the employees and volunteers that run them are not authorized to act on behalf of potential employers. In fact, worker centers often act against the interests of some employers of day laborers in that they record employers’ contact information and the agreements between workers and employers as to wages and hours, deterring employers from wage theft or unjustly low wages.

The activities of worker centers also do not amount to the other employment activities prohibited by IRCA; not-for-profit worker centers do not “refer for a fee” or “recruit for a fee” within the meaning of IRCA’s implementing regulations. Not-for-profit organizations do not solicit, and by their very definition, they operate without returning a profit. While it is true that some centers do collect dues from their workers, or even charge nominal fees for use of the center’s facilities, these funds are put back into the centers. In many cases, dues and fees are not mandatory and day laborers can volunteer at the centers in lieu of paying the fees. Furthermore,

---

308 See, e.g., Casa of Maryland, Frequently Asked Questions, http://www.casademaryland.org/storage/documents/FAQEmployment.pdf (discussing procedures, including negotiating pay rates with skilled workers, and signing written agreements between employers and workers, and stating “CASA does not screen workers or check references”); First Workers’ Day Labor Center (Austin, Texas), Program Overview, http://www.ci.austin.tx.us/health/day_labor_request.cfm (“Hourly rates and job specifics or requirements are negotiated between employers and workers”).

309 See Jenkins v. Immigration and Naturalization Service, 108 F.3d 195, 198 (9th Cir. 1997). See also interpretation of Jenkins in Hobbins, supra note 301, at 13.

310 See, e.g., Hobbins, supra note 301, at 12 (raising this argument in the context of the Herndon worker center).

311 Id. at 13.

312 See Casa of Maryland, supra note 308 (“CASA does not charge employers or workers fees for our services. As facilitators, our role is to provide a meeting place for workers and employers.”); First Workers’, supra note 308 (“There is no paperwork for employers to fill out and no fee charged to anyone for this service.”)

313 See Hobbins, supra note 301, at 13. (discussing the Herndon center, “The Center does not fall into either of these related employment categories because: (1) the Center is a non-profit organization and does not receive remuneration from either the workers or the employers; (2) the Center does not send people or documentation to employers; and (3) the Center does not solicit workers.”).
many of these centers are governed from within, by the workers themselves, who set fee
schedules and determine how they should be used.\footnote{See, e.g., FINE, \textit{supra} note 211, at 112-113 (discussing internal management structure of hiring hall worker centers) and 219-223 (discussing dues in worker centers). \textit{See also} Garcia, 2008 WL (deciding in favor of the City of Laguna Beach, which provided public funds in support of a worker center, in spite of the center’s decision to charge workers a one dollar daily fee which would be refunded to workers who did not get employment on any given day).} In essence, no remuneration is derived
from the centers’ role in facilitating the meeting between employers and day laborers.

The exemption of union hiring halls from the requirements of IRCA provides additional
support for the position that not-for-profit worker centers are likewise exempt, even worker
centers that charge membership dues, because union hiring halls charging dues are similarly not
considered employers or engaged in "recruitment or referral for a fee" under the statute.\footnote{8 C.F.R. § 274a(1)(d), (e).} In the
wake of implementation of IRCA, many unions reacted to the legislation with strong opposition,
"arguing that because they are not 'commercial ventures' they should not be bound by the same
argument, Congress expressly excluded union hiring halls from IRCA production
requirements.\footnote{\textit{See id.} \textit{See also} General Accounting Office, \textit{Immigration Reform: Status of Implementing Employer Sanctions After One Year 13} (Nov. 5, 1987) (GAO Report). The implementing regulations clarify this exclusion. 8 C.F.R. §§ 274a(1)(d), (e).} There is a great deal of fluidity between workers centers and unions; workers
centers can grow to function like unions, and engage in collective bargaining with employers,
and unions and workers centers that do not function as unions can also work closely together.\footnote{For more, see Feltman, \textit{supra} note 642, at 70-75; Pritchard, \textit{supra} note 2, at 401-404; FINE, \textit{supra} note 211, at 120-156.}

In 2006, proposed federal legislation sought to extend the duty to check documentation
status to not-for-profit worker centers, however, fortunately for worker centers, this legislation
did not pass.\footnote{H.R. 4437. See also Pritchard, supra note 2, at 388-89 ("This bill would have kept undocumented immigrants from utilizing the services of formal day-labor centers, thus pushing them to informal hiring sites and decreasing the resources available to them to ensure their workplace rights are protected.").} That Congress identified this as an area not legislated by IRCA underscores the argument that IRCA does not apply to not-for-profit worker centers, and that it was not Congress’s intent for it to apply in a not-for-profit worker center context.

As discussed in Subsection D(2), some states and municipalities have sought to enact legislation to extend requirements under IRCA,\footnote{See id. at 400. See also supra Subsection D(2).} and at least one state, Arizona, has sought to shut down day labor centers by statute.\footnote{See Pritchard, supra note 2, at 200 (discussing Arizona bill H.R. 2592, 47th Leg., 1st Reg. Sess. (Ariz. 2005)).} It is currently unclear how state laws or local ordinances prohibiting or restricting worker centers would fair under a preemption challenge, as laws prohibiting or restricting worker centers have scarcely been challenged in United States courtrooms.\footnote{As discussed in the introduction, this report has only identified two cases which consider the legitimacy of not-for-profit worker centers in any context. See Garcia, 2008 WL 5050358; Karunakarum, 70 Va. Cir. 208 (both considering the legality of taxpayer funding to support the existence of such centers, and challenging municipalities on these grounds).} A 2010 Congressional Research Service (CRS) report on this topic suggests “state or local regulations prohibiting or establishing day labor centers would, on their face, appear to raise fewer preemption issues [than legislation that expanded or limited IRCA’s employment verification requirements].”\footnote{Congressional Research Service Report 34345, supra note 624, at 13.} The CRS report maintains that restrictions on the operation of worker centers “could plausibly be characterized as targeting ‘essentially local problems’ and tailored to ‘combat effectively the perceived evils,’” such that they satisfy the preemption test established by \textit{De Canas}.\footnote{Id. at 14.} Moreover, these laws are less likely to be preempted because they fall in zones that are traditionally within states’ police powers, such as employment and zoning.\footnote{Id.} However, as the CRS report points out, “[r]estrictions upon day
labor centers . . . could also raise other constitutional issues . . . such as infringement of the rights to freedom of speech and association provided for in the First Amendment.”326

A case from the town of Herndon, VA bears further discussion here. As discussed in the introduction to this segment of this report, the *Karunakarum*327 decision, decided in the Fairfax County Circuit Court of Virginia, concerned a worker center in Herndon, VA, in which the court granted Herndon taxpayers standing to challenge the center’s existence. In the town of Herndon, VA after the *Karunakarum* decision granted standing to the taxpayers of Herndon to challenge the town for funding the worker center, political pressure caused a number of political figures to lose office.328 New community leadership was reconsidering requiring the worker center to request employment authorization information, and banning undocumented workers from the site.329 In *Town of Herndon v. Thomas*,330 a separate and related challenge under the First Amendment of the U.S. Constitution was made by an employer ticketed for soliciting a day laborer, in contravention of a local ordinance in Herndon prohibiting such conduct.331 The Herndon non-solicitation ordinance was held to be unconstitutional as violating the First Amendment, and further, the court rejected the town’s argument that the worker center constituted a “reasonable alternative,” holding that a worker center that was not universally open to all persons, regardless of immigration status, would violate the Fourteenth Amendment of the Constitution.332

---

326 Id. See also Johnson, *supra* note Error! Bookmark not defined.
327 *Karunakarum*, 70 Va. Cir. 208, 2006 WL 408389 (Va.Cir.Ct.)
329 Id.
331 The ordinance and the plans for the worker center had been conceived of as part of the same plan, as a compromise.
Although neither party continued litigation of *Karunakaum*, ultimately the Virginia Court’s decision in *Town of Herndon v. Thomas* was the death knell for the Herndon worker center, which closed its doors instead of agreeing to continue to serve undocumented and documented persons alike.\(^\text{333}\) The case is important, not only because it in some ways constitutes a victory for worker centers in that it justifies assisting all day laborers without any duty to verify employment status, but also because the broader story emphasizes that litigation alone will not sustain a worker center, and that true community backing and support is necessary for such a center’s success. The story underscores the importance of the development of a worker center that coexists with protected freedom of day laborers to solicit work from the street.\(^\text{334}\)

**d. Municipalities are neither “employers” nor “agents of employers” within the meaning of IRCA, and therefore should not be required to verify the employment authorization of day laborers at worker centers within a municipality, even if the municipalities fund such worker centers**

Both cases introduced in earlier portions of this memo, *Karunakarum* and *Garcia*, are challenges brought by Judicial Watch on behalf of taxpayers against municipalities who fund worker centers through taxes. However neither of these cases was decided against the municipality; in *Karunakarum*, after the Virginia court granted standing to the plaintiffs, neither party moved forward,\(^\text{335}\) and in *Garcia*, the court decided in favor of the municipality of Laguna Beach.\(^\text{336}\) Because the *Karunakarum* case was never decided, this analysis will focus on the

\(^{333}\) See id.

\(^{334}\) See also, Johnson, * supra* note 135.


\(^{336}\) *Garcia*, 2008 WL 5050358, at 1.
court’s holding in Garcia, but it bears mention that this unpublished decision has no precedential value in North Carolina courts.

The City of Laguna Beach created a worker center in conjunction with the adoption of an ordinance that prohibited the solicitation of employment anywhere other than the center. The center is located on publicly owned land. The center also paid monthly rent and indemnified the California Department of Transportation for losses that might occur pertaining to the use of the land. The city used taxpayer money to make improvements, including the installation of portable toilets, a water fountain, a drive way, and landscaping in the area. The city provided enough funding to the non-profit organization which ran the center to complete an office structure and to provide for two employees to run the center (more than $200,000 at the time of the action). The nonprofit organization asked employers to pay a five dollar fee per visit for using the Center, but employers were permitted to use the center even if they did not pay. It also required day laborers to pay one dollar per day to use the center, but the dollar was refunded if the laborer did not find employment that day. An “unspoken agreement” existed at the time the center was created that the city would not call INS. Finally, the city police department had posted guidelines and printed handouts in Spanish and English which stated:

The Laguna Beach Police Department wants to help you find work. We need your assistance and cooperation in helping us to keep this area a safe place to be hired by contractors, homeowners and others. . The City of Laguna Beach wants you and your family and friends to be a part of the community and to enjoy

---

337 See id.
338 See id.
339 See id.
340 See id.
341 See id. at 2.
343 Id. The enforcement arm of Immigration and Nationality Service (INS) has now been replaced by Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE), both organized under the Department of Homeland Security (DHS), established by the Bush administration after September 11, 2001.
a healthy quality of life.... We want to help you find work so that you can stay here or send money to your loved ones back home.  

The court held that, notwithstanding the signs, funding, and other elements of control present, the plaintiffs failed to show that the City of Laguna's expenditures to maintain the worker center were in violation of IRCA, because the city did not “refer unauthorized aliens for employment for a fee” and was not an agent of the worker center. Employing common law agency analysis, the court reasoned that the city could not be the agent of the worker center because it did not have any control over any decisions concerning the management of the center and it did not retain any legal right to control the center. In making this decision, the court did not rely on the fact that the city had also enacted a non-solicitation ordinance.

e. Brief Discussion of Other Arguments Overturned in Garcia and Karunakarum

In both Garcia and Karunakarum, Judicial Watch advanced various other arguments that the use of municipal funds toward the worker centers violated federal, state and local law. The responses to these arguments are discussed below:

i. Municipalities are not harboring undocumented immigrants by encouraging or inducing them to come to, enter or reside in the United States.

First, plaintiffs alleged that in both Karunakarum and Garcia, defendants violated the U.S.C. Section 1324(a)(91)(A)(iv) by harboring undocumented immigrants by “encouraging or

---

344 Id.
345 See id. at 3-4.
346 Id. at 4 (“But plaintiffs provide no evidences the City has any legal right to control South County [the non-profit organization responsible for running the center]”).
347 See generally, id.
inducing them” to come to the United States.\textsuperscript{348} In \textit{U.S. v. Oloyede}, a case involving individuals who sold fraudulent documents and immigration papers to undocumented aliens, the Fourth Circuit held that defendants were encouraging aliens to live in the United States illegally.\textsuperscript{349} Plaintiffs in \textit{Karunakarum} and \textit{Garcia} sought to apply this case to the municipalities concerned and argued that the two cases were analogous, or that the acts committed by the municipalities in these cases were more egregious.\textsuperscript{350} In \textit{Garcia}, the court held that the defendants in \textit{Oloyede} “did more than simply help illegal aliens find employment” by selling false documents, and held that the conduct of the worker center in question did not rise to the level of “encouraging” illegal immigration.\textsuperscript{351} Moreover, plaintiffs failed to name any single illegal alien who obtained employment through the center.\textsuperscript{352} Finally, the existence of 8 U.S.C. Section 1324a, which specifically covers employment and referral for employment of undocumented aliens is a misdemeanor statute. By contrast, the harboring statute is a felony statute that imposes prison terms ranging from five years to life. Thus the court relied on \textit{U.S. v. Moreno-Duque} and held “we cannot say that Congress intended the incongruous result of treating some employers as felons, and others as misdemeanants’ for the same conduct.”\textsuperscript{353} \textit{Garcia} also dismantles an argument made by plaintiffs in the alternative that the city aided and abetted the worker center in violation of 8 U.S.C. Section 1324(a)(1)(A)(v)(II). The court held that the city did not meet the requisite intent requirement of committing the underlying substantive offense.\textsuperscript{354}

\begin{itemize}
\item \textsuperscript{349} United States v. Oloyede , 982 F.2d 133 (4th Cir. 1992). \textit{See also} Hobbins, \textit{supra} note 301, at 13.
\item \textsuperscript{350} \textit{See Garcia}, 2008 WL 5050358, at *5-*6. \textit{See also} discussion of \textit{Oloyede} argument in Hobbins, \textit{supra} note 301, at 13.
\item \textsuperscript{351} \textit{Id.} at 6.
\item \textsuperscript{352} \textit{Id.}
\item \textsuperscript{353} \textit{Id.} (citing U.S. v. Moreno-Duque 718 F.Supp. 254, 259 (D. Vt. 1989).
\item \textsuperscript{354} \textit{Id.} at 7 (discussing 8 U.S.C. § 1324(a)(1)(A)(v)(II) and the elements for this offense as set out in U.S. v. Gaskins, 849 F.2d 454, 459 (1988).
ii. Municipalities are not violating the Welfare Reform Act by using taxpayer funds to finance a worker center.

Under 8 U.S.C. Section 1621, undocumented immigrants are generally ineligible to receive any “local public benefit.” Plaintiffs alleged violation of this federal statute in both Karunakarum and Garcia. In Karunakarum, the defendants argued that this Section did not apply because of the exemption in the statute for welfare that is “necessary for the protection of life or safety,” because the funding of a worker center is necessary to protect the life and safety of workers and community residents. In Garcia, the court held that this statute was inapplicable because plaintiffs had failed to establish that an agency relationship existed between the worker center and the city, as discussed in the previous Subsection.

iii. The federal preemption doctrine does not preempt a municipality from establishing a worker center.

355 8 U.S.C. § 1621(a). “(a) In general: Notwithstanding any other provision of law and except as provided in subsections (b) and (d) of this section, an alien who is not— (1) a qualified alien (as defined in section 1641 of this title), (2) a nonimmigrant under the Immigration and Nationality Act [8 U.S.C. 1101 et seq.], or (3) an alien who is paroled into the United States under section 212(d)(5) of such Act [8 U.S.C. 1182(d)(5)] for less than one year, is not eligible for any State or local public benefit (as defined in subsection (c) of this section).” Id.

356 See exceptions under 8 U.S.C. 1621(b), including “(4) Programs, services, or assistance (such as soup kitchens, crisis counseling and intervention, and short-term shelter) specified by the Attorney General, in the Attorney General’s sole and unreviewable discretion after consultation with appropriate Federal agencies and departments, which (A) deliver in-kind services at the community level, including through public or private nonprofit agencies; (B) do not condition the provision of assistance, the amount of assistance provided, or the cost of assistance provided on the individual recipient’s income or resources; and (C) are necessary for the protection of life or safety.”

357 See Hobbins, supra note 301, at 13.

In *Garcia*, plaintiffs sought to argue that a locality would be preempted from creating a worker center because it “frustrate[s] a federal law.” The court held that plaintiffs overstated the preemption doctrine, which applies only to laws and regulations of a jurisdiction, not to that state or municipality’s actions.

### iv. The creation and funding of a worker center does not violate the Dillon Rule in Virginia.

The court’s decision in *Karunakarum* states the Dillon Rule, as interpreted by Virginia courts, “provides that municipal corporations possess and can exercise three kinds of powers: a) those expressly granted by the General Assembly; b) those necessarily or fairly implied; and c) those that are essential and indispensable.” Although the court’s reasoning is not specifically noted in the decision, it declined to consider the Dillon rule challenge, which suggests that the city’s decision to establish a worker center fell within these three kinds of permissible powers which do not implicate the Dillon’s rule.

### v. Conclusion

In conclusion, because neither not-for-profit worker centers nor municipalities are “employers” within the meaning of IRCA, because they do not “hire,” “refer for a fee” or “recruit for a fee,” and because their actions do not rise to the level of an agent of an employer within the meaning of IRCA, not-for-profit worker centers are not required to verify work authorization of day laborers or others seeking work which take advantage of these centers’

---

359 *Id.*
360 *Id.* (citing Smiley v. Citibank, 11 Cal. 4th 138, 147 (1995)).
362 *Id.*
services. Thus, IRCA should not present a legal hurdle to the establishment of a day laborer worker center including a hiring hall component in Chapel Hill, Carrboro, or any other North Carolina municipality.

3. Overview of Plans for a Day Labor Worker Center in Carrboro

A number of community groups have advocated for the development of a day labor worker center in Carrboro in order to provide a safe place for employers and day laborers to negotiate, as an institution to guard against wage theft, and as a forum for the development of other services. At a meeting with municipal leadership from Carrboro and Chapel Hill present, representatives of several of these groups explained a vision for a day labor worker center.

Community organization members explained that the worker center would benefit everyone; it would improve day laborers’ standard of living and wages, it would give structure to the employment relationship and security of the hiring process to the benefit of employers, and finally it would lend to improved relationships between the police and day laborers, and between the community at large and the day laborer population, by getting many of these workers off the street. The ideal worker center would have the following characteristics: it would be safe, organized, accessible and centralized. It would be a place where day laborers could seek employment during hours that benefitted both workers and employers. It would provide basic amenities to day laborers—a place to sit, access to water, a restroom, and a more comfortable environment in general. There would be some staff, at least one permanent employee, who would be able to handle a waitlist procedure, the telephone, and other basic administration. The center would rely on day laborer input, and the day laborers would take responsibility for their own decision-making. Minimum wage payment would be enforced, possibly through the use of
written contracts. A database system could record worker and employer information so that both parties could have some idea with whom they were contracting and employers could select employees based on special qualifications and skills, if desired.

A plan for a worker center would involve community. For example, the Chamber of Commerce could help by moving employers from the streets to the center, and by advertising the availability of labor at the center. The center would require financial support from Carrboro and Chapel Hill for the costs of rent, a permanent staff person, and other start up expenses. The ultimate goal would be to build a sustainable center and tap into other funds, but there would still be continued costs.\textsuperscript{363} The city could assist by examining and possibly revising at public transportation schedules to ensure that the worker center would be accessible to day laborers in Abbey Court and other areas of Chapel Hill and Carrboro. A partnership between the center and Durham Technical Community College to offer training and other educational resources could be part of the plan as well. Finally, the center could partner with legal entities in the community to address the legal issues involved in setting up a center, as well as the potential to serve as a site where legal issues related to employment could be addressed.

\textbf{a. Concerns about a Day Labor Worker Center in Carrboro and Chapel Hill}

The vision of a day laborer worker center introduced at the task force meeting with municipal leadership present is undoubtedly a long range vision. Though other parties generally support at least the notion of some kind of worker center existing in Carrboro, concerns have been voiced both by different groups with respect to the form that the center will take. Some of the concerns are summarized as follows:

\textsuperscript{363} It was noted that the average start up cost of a worker center is between $60,000 and $200,000.
i. Community Concerns Voiced with respect to Day Laborers

Concerns raised about the interests of day laborers themselves echo some of the sentiments expressed in Greg Kettle’s “Day Labor Markets and Public Space,” including questions about how the job selection process will be fair, and how a day laborer worker center would coexist with day laborers who prefer a street entrepreneurship method for soliciting work. Concerns were also expressed about public transportation needs and the ease with which day laborers can get to a worker center. Finally strong concerns were voiced that protections for the workers who want to stay on the corner should also be a goal, rather than an approach that combines the creation of a worker center with harsher municipal legislation geared toward street labor solicitation.

ii. Concerns Voiced by Municipal Leaders

Concerns were voiced that public opposition to a workers center might develop. Municipal leaders also felt that leadership from the county government would be important to assure success and that county officials should be incorporated into the process. Issues with compliance with federal law of a day laborer worker center in the area of work authorization were also raised. These concerns are addressed in the previous Subsection C. 2. In conjunction with these concerns, municipal leaders echoed the concerns of the Human Rights Center about the advisability of formalizing the process of finding day labor work. Finally, municipal leaders

---

364 See generally, Kettles, supra note 248.
asked whether this center should be open for everyone rather than just day laborers in order to address the needs of the economy.

**b. Next Steps**

As a result of coalition meeting with municipal leaders, and ongoing conversations about the need for a workers center, the Human Rights Center of Carrboro announced its plan to open a Day Laborer Center close to Abbey Court and the current location where workers wait for work on the corner. The proposed Workers Center will also be a Community Center and will offer classes for workers through mid afternoon. It will also offer after-school programs, as well as programs open to adults. The Human Rights Center has steadily moved forward with plans for the Center, has close relationships with the immigrant day laborer community and immigrant families in Carrboro, and has a history of consistent dedication and perseverance with regard to social justice issues as they affect this population. It is expected that because of such constant attention and efforts, a workers center in Carrboro will become a successful reality.