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ARTICLES

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Hilary M. Goldberg, J.D., Nanci K. Carr, J.D., and Paul J. Silvia, Ph.D.



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STEALING TIME: THE PROPRIETY OF ALLEGING COMMON LAW CONVERSION IN MODERN WAGE THEFT LAWSUITS

Hilary M. Goldberg, J.D., Nanci K. Carr, J.D.,**
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ABSTRACT

The words “wage theft” frequently make headlines when workers sue employers for underpayment or nonpayment of wages.¹ Wage theft is “the illegal refusal by an employer to pay a worker the wages and benefits that he or she has legally earned.”² In the United States, employer violation of wage and hour laws is a vast and enduring problem affecting as many as two-thirds of workers. In an attempt to combat this epidemic threat to hourly workers’ bottom lines, legislatures have fashioned numerous laws, some even invoking the power of “wage theft” terminology, such as New York’s Wage

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¹ See Brady Meixell & Ross Eisenbrey, *An Epidemic of Wage Theft Is Costing Workers Hundreds of Millions of Dollars a Year*, ECON. POL’Y INST. (Sept. 11, 2014), <http://www.epi.org/publication/epidemic-wage-theft-costing-workers-hundreds>; Josh Eidelson, *LinkedIn Stiffed its Own Employees, Agrees to Pay Millions*, BUSINESSWEEK (Aug. 5, 2014), <https://www.bloomberg.com/news/articles/2014-08-05/linkedin-stiffed-its-own-employees-agrees-to-pay-millions>; and Monica Potts, *The Very Real Scourge of Wage Theft*, THE DAILY BEAST (Feb. 15, 2015), <http://www.thedailybeast.com/articles/2015/02/15/the-very-real-scurge-of-wage-theft.html>.

² Hilda L. Solis, *Wage Theft Harms All of Us*, HUFFINGTON POST (July 19, 2015, 9:31 PM), http://www.huffingtonpost.com/hilda-l-solis/wage-theft-harms-all-of-u_b_7829514.html.

Theft Prevention Act.³ However, despite the pervasive usage of the term “wage theft” by the media, politicians, and pundits, a search of the term “wage theft” in legal libraries yields little precedent. This begs the question: can employers be liable for conversion for failing to compensate employees for time-spent working? The efficacy of conversion claims in wage-related lawsuits remains an unsettled question. However, if as a society, we are sounding the alarm in every incidence of possible wage and hour law violations, we ultimately misinform the population of potential plaintiffs regarding the viability of a claim for theft, or conversion, of earned yet unpaid wages.

The term “wage theft” is not a term of art; its closest legal corollary is the common law tort of conversion. Although we, as a society, frequently identify underpayment or nonpayment of wages as “wage theft,” pleading and proving that the employer has *converted* an employee’s wages presents an array of challenges that few plaintiffs can overcome. In this paper, we will explore the term “wage theft” as used in our society, and we will contrast this common understanding with the strict legal framework within which plaintiffs must present “wage theft” claims. Finally, we will explore this disconnect in an attempt to reconcile why such a gap exists and persists between the commonplace description of a worker’s reality, and the laws available to make the worker whole again. While it appears the term “wage theft” equates more readily with an exclamation of outrage than an effective claim for relief, its persistence underscores the continuing need for common law remedies, like conversion, to fill in the enforcement gaps left behind by persistently reactive legislation.

³ Wage Theft Prevention Act, 2010 Leg., 233d Sess. (N.Y. 2010).

I. INTRODUCTION

“Close enough” is rarely adequate. No one wants a doctor to get “close enough” while extracting a tumor or an engineer to get “close enough” on the safety calculations for a bridge. Yet, employees are increasingly asked to accept “close enough” when paid their wages. Employers have argued that overlooking relatively minor off-the-clock tasks before or after a shift, or not precisely paying overtime, has a *de minimis* impact on employees,⁴ but that notion is frequently inaccurate. A minimum wage worker shorted just a half-hour per day has lost close to ten percent (10%) of her earnings over the course of one year.⁵ Imagine the impact this deficit makes on basic living expenses like rent, groceries, and childcare. Sadly, wage theft typically affects financially vulnerable, low-wage workers and those struggling with poverty.⁶ Undoubtedly, employers face a panoply of discreet challenges in managing employee tasks and time. In other cases, employers are *deliberately* shaving employee timecards in an attempt to be more competitive, innovative, or profitable. What would happen if employees were *inadvertently* overpaid a little here and a little there, totaling a ten percent overpayment in the course of a year? You can bet that employers would move mountains to correct those errors. Legislators and lawyers have consistently pressed for increased accuracy, largely in recognition of the gross disparity in bargaining power and the disproportionate burden borne by employees.

A. Wage Theft Encompasses a Broad Array of Employment Practices

“Wage theft is the illegal refusal by an employer to pay a worker the wages and benefits that he or she has legally earned.”⁷ Wage theft occurs in

⁴ See Leah Avey, *Walk to the Line, Compensable Time: Cash in the Pockets of Employees*, 32 OKLA. CITY U. L. REV. 135, 159 (2007) (Discussion of the concept of “*de minimis*” time, and its applicability to various employment fact patterns.). See also Scott J. Brewerton, *Employment Law—Twenty-Five Minute Security Screening of Warehouse Employees Is Noncompensable, Postliminary Activity—Integrity Staffing Solutions, Inc. v. Busk*, 135 S. Ct. 513 (2014), 48 SUFFOLK U. L. REV. 969, 974 (2015).

⁵ Meixell & Eisenbrey, *supra* note 1, at 1.

⁶ Michael De Groot, *Wage Theft: How employers steal millions from American workers every week*, DESERET NEWS NAT’L (June 24, 2014), <http://national.deseretnews.com/article/1748/Wage-theft-How-employers-steal-millions-from-workers-every-week.html>.

⁷ Solis, *supra* note 2, at 1.

a number of ways: It includes failing to pay workers minimum wage or overtime wages (usually time and a half)⁸ or not making rest or meal breaks available.⁹ Some workers must start work early, before clocking in, or continue to work after clocking out.¹⁰ Some employees even forego wages altogether, under the guise of an “unpaid internship,”¹¹ while others have their wages held artificially low by collusion among employers in the marketplace.¹² For example, after a Papa John’s franchisee was caught rounding employee timecards down to the nearest hour and failing to pay overtime, the franchise was required to pay \$800,000 in back-pay to restaurant employees.¹³

Another strategy is to classify workers as exempt, rather than nonexempt, to exclude workers from overtime after they have worked over 40 hours per week.¹⁴ An increasing trend is to classify workers as independent contractors rather than employees because independent contractors are excluded from protection under the Affordable Care Act, affecting minimum wage, overtime, and benefits.¹⁵

Large-scale studies depicting the prevalence of employee versus independent contractor misclassification are infrequent but informative. An early 1984 study by the IRS found that, at that time, “15 percent of employers misclassified 3.4 million workers as independent contractors.”¹⁶ A 2007 study limited to New York State found that almost 40,000 employers misclassified over 700,000 employees as independent contractors.¹⁷

⁸ Rory Lancman, *Wage Theft is Grim Business*, THE HUFFINGTON POST (July 19, 2014, 10:38 AM), http://www.huffingtonpost.com/rory-lancman/wage-theft-is-grim-business_b_5274170.html.

⁹ WAGE THEFT IS A CRIME, <http://wagetheftisacrime.com/> (last visited Mar. 21, 2017).

¹⁰ De Groote, *supra* note 6, at 3.

¹¹ See *Glatt v. Fox Searchlight Pictures, Inc.*, 791 F.3d 376 (2d Cir. 2015).

¹² See *United States v. Lucasfilm, Inc.*, No. 10-02220 RBW, 2011 WL 2636850, at *1 (D.D.C. June 3, 2011).

¹³ Potts, *supra* note 1.

¹⁴ *Id.* See also Dave Jamieson, *Obama Says Workers Are Being “Cheated” Out of Overtime Pay*, THE HUFFINGTON POST: POLITICS (Mar. 21, 2015, 5:30 PM), http://www.huffingtonpost.com/2015/03/21/obama-overtime-pay_n_6911808.html (last visited February 27, 2017).

¹⁵ This misclassification often occurs in the construction and trucking industries. Lancman, *supra* note 8; PATIENT PROTECTION AND AFFORDABLE CARE ACT, 42 U.S.C. § 18001 (2010).

¹⁶ Michael E. McKenney, *Employers Do Not Always Follow Internal Revenue Service Worker Determination Rulings*, DEPARTMENT OF THE TREASURY (June 14, 2013), <https://www.treasury.gov/tigta/auditreports/2013reports/201330058fr.pdf>.

¹⁷ Linda H. Donahue et al., *The Cost of Worker Misclassification in New York State*, CORNELL U. SCH. OF INDUS. & LAB. REL. (Feb. 2007), <http://digitalcommons.ilr.cornell.edu/reports/9>.

Recognizing this enduring issue, a 2013 report issued by the U.S. Treasury Inspector General aptly titled, “Employers Do Not Always Follow Internal Revenue Service Worker Determination Rulings” confirmed the ongoing prevalence of employee misclassification and made a series of recommendations to the IRS to increase employer compliance.¹⁸ Court dockets provide a powerful indicator that independent contractor misclassification persists. Employer giants Uber and Amazon are fighting lawsuits brought by delivery drivers allegedly misclassified as independent contractors.¹⁹ Uber reached a \$100 million settlement with its drivers, later rejected by a San Francisco federal judge as inadequate.²⁰ Meanwhile, Amazon and its drivers remain deeply steeped in litigation.²¹

Even “tipped” workers whose total pay is not, in theory, fully dictated by the employer, can fall victim to “wage theft.”²² Workers earning tips, such as restaurant wait-staff and baristas, frequently report that employers unlawfully retain all or part of customer-paid tips and fail to ensure that workers are making minimum wage.²³ Workers paid in cash are particularly at risk.²⁴

¹⁸ McKenney, *supra* note 16.

¹⁹ See Erik Sherman, *Uber Faces New Class Action Suit By Drivers*, FORBES (May 4, 2016), <https://www.forbes.com/sites/eriksherman/2016/05/04/will-a-new-class-action-suit-change-uber-or-cause-drivers-to-permanently-lose/#27c2b3be47f0>; see also Kali Hays, *Amazon Driver Says She was Misclassified as a Contractor*, LAW360 (Sept. 21, 2016, 3:04 PM), <https://www.law360.com/articles/842688/amazon-driver-says-she-was-misclassified-as-a-contractor>.

²⁰ Joel Rosenblatt, *Uber’s \$100 Million Driver Pay Settlement Rejected by Judge*, BLOOMBERG TECHNOLOGY (Aug. 18, 2016), <https://www.bloomberg.com/news/articles/2016-08-18/uber-s-100-million-driver-pay-settlement-is-rejected-by-judge>.

²¹ *Rittmann v. Amazon.com, Inc.*, No. C16-1554-JCC, 2017 WL 881384, at *3 (W.D. Wash. Mar. 6, 2017).

²² Neil Patrick McConnell, *Mr. Pink Never Leaves A Tip: How Current Tip Credit and Tip Pool Guidelines Leave Employees at the Mercy of Employers*, 114 PENN ST. L. REV. 621, 626 (2009).

²³ De Groote, *supra* note 6; see also Yoram Margalioth, *The Case Against Tipping*, 9 U. PA. J. LAB. & EMP. L. 117, 141 (2006) (“The FLSA allows employers of tipped employees (defined as employees who customarily and regularly receive more than \$30 a month in tips) to consider such tips as part of their wages, but, nevertheless, requires employers to pay a direct wage of at least \$2.13 per hour, irrespective of the employee’s income from tips. The combined amount of tips and direct pay must equal or exceed the [federal] minimum wage . . . [s]tate laws, in California for example, are often even more demanding of employers and disallow any consideration of tip income for minimum wage purposes.”).

²⁴ Lancman, *supra* note 8.

B. Wage Theft is Endemic; No Industry or Skill Level is Immune

A study of workers in New York, Chicago, and Los Angeles found that in an average week, two-thirds of workers suffered wage law violation-related losses.²⁵ The study found a loss rate of \$2,634.00 per year, which extrapolated to all U.S. low-wage workers, yields wage theft losses of more than \$50 billion per year.²⁶ Employers will argue that this is just an error or that wages are paid as close as feasibly possible. Would a storeowner agree that shoplifting just a little is okay? In 2012, reported robberies in the United States totaled over \$340 million.²⁷ Though we do not know how much wage theft has occurred (after all, many employees do not report it), we do know that in 2012, victims of wage theft who engaged private lawyers or got federal or state agencies involved were able to recover \$933 million, which is almost triple the money reported lost in more traditional forms of theft.²⁸

In just five years, cases filed in federal court under the Fair Labor Standards Act (“FLSA”) increased from 5,302 in 2008 to 7,064 in 2012.²⁹ This is “five times the number [of cases filed] 20 years ago,” and a staggering figure given that many victims are unlikely to report wage theft, fearing retaliation, job loss, or other adverse outcomes.³⁰ Ben Basom, from the Pacific Northwest Regional Council of Carpenters observes, “[w]orkers are scared. They’re trying to provide for families or themselves, and threats to that will turn them off from talking [about wage theft.]”³¹

Wage theft does not affect only low-income workers. Over 64,000 tech employees filed a class-action lawsuit against Google, Apple, Intel, and Adobe, arguing that the tech giants agreed not to solicit the others’ employees in order to keep wages artificially low, effectively stealing the employees’

²⁵ Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America’s Cities*, UCLA (Mar. 21, 2017), <http://www.nelp.org/content/uploads/2015/03/BrokenLawsReport2009.pdf>.

²⁶ *Id.*

²⁷ Meixell & Eisenbrey, *supra* note 1.

²⁸ *Id.*

²⁹ Bernhardt et al., *supra* note 25.

³⁰ *Id.*; see also Seyfarth Shaw, LLP, *FLSA Cases in Federal Court, 1993–1999, 2000–2012* (2012), http://seyfarth.com/dir_docs/publications/FLSA2.pdf; Meixell & Eisenbrey, *supra* note 1.

³¹ Meixell & Eisenbrey, *supra* note 1.

wages.³² *Time Magazine* chronicled the drama, opining that the cutting-edge tech companies were just as “intent on exercising power over their workers as the old-line corporate dinosaurs Silicon Valley tends to look down upon.”³³ Damning quotes were extracted from a March 2007 email, for example, [wherein Google’s Eric Schmidt] assured Apple’s Steve Jobs that a Google recruiter who’d called into Apple had gone against company policy and was being fired for her actions. “Should this ever happen again please let me know immediately and we will handle,” Schmidt wrote. Jobs replied with a smiley face.³⁴ In the end, the tech giants settled for \$415 million.³⁵

Not even law students are immune from wage theft. Eric Glatt, while studying at Georgetown University law school, worked as an unpaid intern on the 2010 hit film *Black Swan*. He later brought a class-action lawsuit against Fox Searchlight Pictures and related Fox entities alleging that defendants’ failure to pay their interns violated the Fair Labor Standards Act.³⁶ Glatt argued that he, as well as other unpaid interns, were victims of wage theft.³⁷ Glatt ultimately settled the class action lawsuit, receiving \$7,500.00 pursuant to the court-approved settlement agreement.³⁸

Some employers, even innovators and thought-leaders, feel pressure to strategically navigate (and sometimes violate) wage laws to compete with

³² Mark Ames, *The Techtopus: How Silicon Valley’s most celebrated CEOs conspired to drive down 100,000 tech engineers’ wages*, PANDO (Jan. 23, 2014), <https://pando.com/2014/01/23/the-techtopus-how-silicon-valleys-most-celebrated-ceos-conspired-to-drive-down-100000-tech-engineers-wages/>.

³³ Rick Walter, *\$3 Billion Silicon Valley Suit Shows How Not to Manage*, TIME (Apr. 23, 2014), <http://time.com/71343/angry-silicon-valley-engineers-say-apple-google-and-others-owe-them-3-billion/>.

³⁴ *Id.*

³⁵ *In re High-Tech Employee Antitrust Litig.*, 11-CV-02509-LHK, 2015 WL 5159441, at *1 (N.D. Cal. Sept. 2, 2015); Settlement Agreement and related documents publicly available at http://www.hightechemployeelawsuit.com/media/264425/redacted_settlement_agreement.pdf.

³⁶ *Id.* at 7.

³⁷ Carol Ross Joynt, *Are Washington’s Numerous Unpaid Interns Victims of “Wage Theft?”*, THE WASHINGTONIAN (July 12, 2013), <https://www.washingtonian.com/2013/07/12/are-washingtons-numerous-unpaid-interns-victims-of-wage-theft/> (“The Glatt action, involving claims brought on behalf of unpaid interns, was among the first to be brought nationwide and began an important discussion about the legality of unpaid internships at private employers.”). For more discussion see 129 HARV. L. REV. 1136 (Feb. 9, 2016).

³⁸ *Id.*; Dominic Pattern, *Fox Settles ‘Black Swan’ Interns Lawsuit After Five Years*, DEADLINE HOLLYWOOD (July 12, 2016), <http://deadline.com/2016/07/black-swan-intern-lawsuit-fox-settles-1201785666/>. See also Order Granting Preliminary Approval of Settlement Stipulation at 1, *Glatt v. Fox Searchlight Pictures, Inc. et al.*, No. 11-CV-678 WHP, 2012 U.S. Dist. LEXIS 80905 (S.D.N.Y. July 12, 2016).

other businesses and overseas labor to increase profits.³⁹ David Weil, Administrator of the Wage and Hour Division of the United States Department of Labor,⁴⁰ opines that the increased use of franchises, subcontractors, and supplemental staffing agencies is driving employer cost-cutting initiatives.⁴¹ “We have a change in the structure of work that is then compounded by a falling level of what is viewed as acceptable in the workplace in terms of how you treat people and how you regard the law.”⁴² These constantly shifting social concerns coupled with an ever-changing workplace landscape, enabled by technological advancements driving pathways towards access and efficiency, create a constantly evolving problem to which no lasting solution exists or is envisioned.

II. THE EARLY ORIGINS OF WAGE THEFT, AN ENDURING PROBLEM

While wage theft is inarguably an endemic problem currently on the radar of legislators, employers, workers, and society-at-large, it is not a new phenomenon. Historians of labor and timekeeping have pointed out that “time measurements typically are bound up in contests for power and authority.”⁴³ During the early stages of industrialization when personal timekeeping devices were expensive, employers exploited an information asymmetry concerning time.⁴⁴ The factory owner could afford a large factory clock and possibly a pocket watch, but the laborers were too poor to afford the expensive pocket watches of the time.⁴⁵ As a result, only the employer knew the time that regulated the workday. Workers suspected—with good

³⁹ See, e.g., *Glatt v. Fox Searchlight Pictures, Inc., Second Circuit Crafts “Primary Beneficiary” Test for Unpaid Interns*, 129 HARV. L. REV. 1136 (Feb. 9, 2016).

⁴⁰ *Wage and Hour Division*, UNITED STATES DEPARTMENT OF LABOR (Nov. 24, 2017), <https://www.dol.gov/whd/>.

⁴¹ Steven Greenhouse, *More Workers Are Claiming ‘Wage Theft,’* N.Y. TIMES (Aug. 31, 2014), <https://www.nytimes.com/2014/09/01/business/more-workers-are-claiming-wage-theft.html>.

⁴² *Wage and Hour Division*, *supra* note 40.

⁴³ ALEXIS MCCROSSEN, MARKING MODERN TIMES: A HISTORY OF CLOCKS, WATCHES, AND OTHER TIMEKEEPERS IN AMERICAN LIFE 10 (2013).

⁴⁴ DAVID S. LANDES, REVOLUTION IN TIME 78–79 (2000).

⁴⁵ *Id.*

reason—that their employer was stopping or slowing the factory clock to shorten breaks and stretch the working day.⁴⁶

Because early industrial wage theft stemmed from the employer's control of the time, struggles over workplace clocks were common. Some employers took to locking and guarding the clock to prevent employees from speeding it up or vandalizing it.⁴⁷ In some workplaces, employees seized control of the time. When a group of mechanics won the right to a 10-hour workday, for example, the workers paid to have a bell forged and hired someone to strike it, to ensure that the hours were exact.⁴⁸ Other workers raised money for expensive public clocks that would “tell the time” by chiming loud enough to be heard inside the workplace's walls.⁴⁹

Wage theft founded in an employer's knowledge of time motivated the growth of inexpensive pocket watches that laborers could use to contest the factory clock and increased workers' support for public clocks, so this information asymmetry was short lived.⁵⁰ Many employers sought to stem the tide by forbidding or confiscating their employees' pocket watches,⁵¹ but the eventual spread of time knowledge—through public clocks, personal watches, and radio—made wage theft via time control impractical.

Wage theft, through “stopping the clock,” is thus largely a thing of the past, but many modern forms of wage theft are rooted in other mechanism by which employers control time, such as how it is recorded (e.g., rounding timecards or requiring employees to clock out early), and what minutes count as “on the clock” (e.g., defining pre-shift set-up or post-shift security inspections as non-work time).⁵² Employers no longer confiscate pocket watches, but the modern struggles over wage theft have their echoes in the early history of industrial employment.

⁴⁶ See E.P. THOMPSON, *PAST & PRESENT* (1967), and DAVID R. ROEDIGER & PHILIP S. FONER, *OUR OWN TIME: A HISTORY OF AMERICAN LABOR AND THE WORKING DAY* (1989).

⁴⁷ THOMPSON, *supra* note 46, at 82.

⁴⁸ MCCROSSEN, *supra* note 43, at 45–6.

⁴⁹ ROEDIGER & FONER, *supra* note 46, at 20.

⁵⁰ *Id.*

⁵¹ HANS-JOACHIM VOTH, *TIME AND WORK IN ENGLAND: 1750–1830*, at 8 (2000).

⁵² See Hilary M. Goldberg & Nanci K. Carr, *When Does Compensation for 'Time Spent under the Employer's Control' Include Pre and Post Shift Waiting and Other Activities?*, 6 S. J. OF BUS. & ETHICS 33, 38 (Oct. 2014) (includes list of minimum wage requirements in all 50 states).

III. NEW AND NOTABLE EFFORTS TO COMBAT WAGE THEFT

Since the inception of the clock tower and affordable wristwatch, government, union, and employee-driven initiatives have created enhanced protections to guard against wage theft. As discussed above, wage theft is endemic, and all layers of government have an active role in prohibiting, preventing, and redressing wage theft in all forms:

Wage theft, particularly from low wage legal or illegal immigrant workers, is common in the United States. Wage theft happens through various means, such as failure to pay overtime, minimum wage violations, employee misclassification, illegal deductions in pay, working off the clock, and total denial of pay. These violated rights have been guaranteed to workers in the US since 1938, by the Fair Labor Standard Act.⁵³

Generally, when employees bring a claim for wage theft, they are actually bringing cases for violation of a specific provision of the Fair Labor Standards Act (“FLSA”), state labor code, or relevant wage order.⁵⁴

The FLSA⁵⁵ establishes federal minimum wage and overtime pay requirements applicable to most, but not all, private and public sector workers.⁵⁶ Congress has specifically allowed states to enforce wage and hour laws more generously than the FLSA; thus, where a state law sets a minimum wage or overtime requirement that is more favorable to the employee, the state law applies.⁵⁷ Recently, states like New York have passed new laws to increase and expand criminal and civil penalties for wage theft activities, and to protect employees from employer retaliation.⁵⁸ New York, for example, has special concerns about the construction and trucking industries, whose labor forces are frequently misclassified as independent contractors.⁵⁹

⁵³ *What Is Wage Theft?*, UCLA LABOR CENTER (Oct. 24, 2014), <http://www.labor.ucla.edu/wage-theft/> (Mar. 7, 2017).

⁵⁴ Daniel V. Dorris, *Fair Labor Standards Act Preemption of State Wage-and-Hour Law Claims*, 76 U. CHI. L. REV. 1251, 1252 (2009).

⁵⁵ 29 U.S.C. § 201 *et seq.* (2012).

⁵⁶ 29 U.S.C. § 202(a) (2012) (the FLSA, with some exceptions, applies to employees working in industries that engage in, or produce goods for, interstate commerce).

⁵⁷ 29 U.S.C.A. § 218 (West 2017); *see also* Pac. Merch. Shipping Ass’n v. Aubry, 918 F.2d 1409, 1422 (9th Cir. 1990).

⁵⁸ Lancman, *supra* note 8.

⁵⁹ *Id.*

While the vast majority of states have enacted wage and hour legislation, laws do vary by state,⁶⁰ and frequently, the jurisdiction within which the employee works determines the protections provided. Iowa, for example, has enacted few wage theft laws.⁶¹ Those against new legislation in Iowa argue that it is unfair to impose new, burdensome laws on all businesses to address the dishonest practices of a few Iowa employers.⁶² However, Iowa legislators are now observing, “Iowa’s wage theft laws are so weak they are impossible to enforce.”⁶³ The hope is that enhanced labor and employment laws might prevent incidences such as the unlawful tip-pooling taking place at one Iowa Applebee’s, where wait-staff were forced to pay between five to twenty percent of their tips to a pool for management.⁶⁴ Taking such tips is a violation of federal law as well as Iowa state law, but the consequence of violating the state law was insignificant, lacking any deterrent effect.⁶⁵

Businesses argue that they are more careful than ever when complying with wage laws, due to the increase in enforcement actions.⁶⁶ However, employers will still gamble, wagering that they will go unnoticed or unchallenged. Such was the case for the owner of a Fremont, California janitorial company,⁶⁷ who forced employees to sign blank time sheets. The company later recorded inaccurate clock-in and clock-out entries to produce time cards that complied with wage laws. Michael Rubin, a plaintiffs’ lawyer,⁶⁸ recently observed, “[t]he reason there is so much wage theft is many employers think there is little chance of getting caught.”

⁶⁰ See MCCROSSEN, *supra* note 43.

⁶¹ See I.C.A. § 91A *et seq.*

⁶² *Id.*

⁶³ THOMPSON, *supra* note 46.

⁶⁴ *Id.*

⁶⁵ William Petroski, *Senate Democrats Offer Plan to Stop Iowa Wage Theft*, DES MOINES REGISTER (Jan. 27, 2015), <http://www.desmoinesregister.com/story/news/politics/2015/01/27/iowa-wage-theft-senate/22430863/>.

⁶⁶ *Id.*

⁶⁷ *Labor Commissioner Issues Over \$332,600 in Citations to Janitorial Services Provider for Wage Theft*, DEPARTMENT OF INDUSTRIAL RELATIONS, STATE OF CALIFORNIA (Dec. 20, 2013), <https://www.dir.ca.gov/dimews/2013/IR2013-60.pdf> (Little Lopez Corporation of Fremont paid \$236,175 in back wages plus \$96,500 in civil penalties.).

⁶⁸ *Id.*

A. *The Role of Administrative Agencies*

The protective and deterrent impact of wage theft legislation is only as strong as the available enforcement mechanisms and prescribed consequences. Legally, employees encountering wage theft have many options.⁶⁹ On a federal level, if employees are not comfortable reporting wage theft to supervisors, they can contact the U.S. Department of Labor (“DOL”) Wage and Hour Division⁷⁰ to complain. The DOL “administers and enforces more than 180 federal laws,” including the FLSA.⁷¹ This applies to both documented and undocumented workers.⁷²

Most, but not all, individual states have employment laws and enforcement agencies tasked with enforcing state labor codes and standards.⁷³ Local governments are also following suit. In Los Angeles, California, Hilda L. Solis, a member of the Los Angeles County Board of Supervisors, characterized wage theft as a crime that disproportionately impacts the most vulnerable members of our society.⁷⁴ In response, she has introduced, together with Supervisor Mark Ridley-Thomas, a “motion directing County departments to propose a wage theft enforcement structure that is cost-effective, efficient, and leverages existing state and federal resources.”⁷⁵

The government cannot possibly police every employer nor follow up on every complaint. “[P]art of the effort has been to dis-incentivize the employers by increasing the penalties, which makes it more attractive for

⁶⁹ While these options are technically available to employees, many employees feel unable to complain due to fears of retaliation or other adverse action. Karen Foshay, *You’re Fired! When retaliation and abuse are part of the job*, KCRW (Aug. 2, 2016), <http://curious.kcrw.com/2016/08/youre-fired-when-retaliation-and-abuse-part-of-the-job>.

⁷⁰ Employees can call 866-487-9243 or visit the website at <http://www.dol.gov/dol/contact/contact-phonecallcenter.htm> (Mar. 21, 2017).

⁷¹ *Summary of the Major Laws of the Department of Labor*, DEPARTMENT OF LABOR (Jan. 20, 2017), <https://www.dol.gov/general/aboutdol/majorlaws>.

⁷² De Groote, *supra* note 6.

⁷³ Most, but not all, states have laws governing wage and hour disputes. *E.g.*, California (<https://www.dir.ca.gov/DLSE/dlse.html>); New York (https://labor.ny.gov/workerprotection/laborstandards/labor_standards.shtm); Oregon (http://www.oregon.gov/boli/WHD/Pages/W_Whhowinf.aspx); and Vermont (<http://labor.vermont.gov/vosha/employee-rights/>). Alabama’s state labor laws are limited to child labor issues (https://labor.alabama.gov/Wage_and_Hour_Info.pdf); *see also* Goldberg & Carr, *supra* note 52.

⁷⁴ Solis, *supra* note 2.

⁷⁵ *Id.*

private attorneys to take these cases and pick up the slack from the government,” says Chris Moody, an attorney specializing in employment law with the firm of Moody & Warner in Albuquerque, New Mexico.⁷⁶ Employees who suspect wage theft can file a wage claim with the appropriate administrative agency to recover unpaid wages, report a labor law violation, or make a public works complaint.⁷⁷ If an employee suspects that adverse employment action, such as demotion or termination, was in retaliation for making a complaint, the employee can file a retaliation complaint with the same administrative agency.⁷⁸ If an employee is unable to resolve his or her complaint through administrative channels, the employee may seek relief in the judicial system by suing his or her employer.

B. The Role of the Courts in Combatting Wage Theft

Courts cannot take a proactive approach to resolving inequities present in the workforce. However, when litigants bring wage theft disputes before the Courts, their decisions carry the force of law. Wage and hour issues frequently appear on the United States Supreme Court docket, firmly solidifying wage and hour law as a focal point in American jurisprudence. For example, in March of 2016, in *Tyson Foods, Inc. v. Bouaphakeo*, the Supreme Court found in favor of workers at a Tyson pork processing facility.⁷⁹ Workers were required to “wear protective gear, but the exact composition of the gear depends on the tasks a worker performs on a given day.”⁸⁰ Tyson did not pay its employees for the time spent donning and doffing the protective wear, although the gear was required to prevent injuries, including knife cuts.⁸¹ Tyson argued that because there are significant variations among employees and the amount of time spent on a given day donning and doffing the gear necessitated by the day’s activities, that the class lacked sufficient “commonality,” and was not amenable to class

⁷⁶ De Groote, *supra* note 6.

⁷⁷ *What is Wage Theft?*, WAGE THEFT IS A CRIME (2017), <http://wagetheftisacrime.com/>.

⁷⁸ *Id.*

⁷⁹ *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1039 (2016).

⁸⁰ *Id.*

⁸¹ *Id.* See also Adam Liptak, *Supreme Court Upholds Worker Class-Action Suit against Tyson*, N.Y. TIMES (Mar. 22, 2016), <https://www.nytimes.com/2016/03/23/business/supreme-court-upholds-worker-class-action-suit-against-tyson.html?r=0>.

treatment.⁸² The Supreme Court disagreed, stating that the employees could properly rely on a statistical expert opinion to determine the amount of uncompensated time for which Tyson was liable, especially given the absence of time records maintained by Tyson.⁸³

In January 2017, the United States Supreme Court agreed to consider whether companies could require employees to sign an arbitration agreement, that included a class action waiver, wherein employees expressly waive their right to participate in class action litigation against the employer.⁸⁴ This is problematic because many employee plaintiffs are unable to afford an attorney to prosecute their individual case. Plaintiffs' attorneys often take cases on a contingency fee basis, which is only financially feasible arrangement when a large number of employees join together as a class.⁸⁵

Some of the country's largest institutions now require employees to sign class action waivers, including Bank of America Corp., Ernst & Young, and Citigroup Inc., who argue that individual arbitration is the most cost effective and efficient means to resolve employee concerns.⁸⁶ The Supreme Court will now review and reconcile the splits between the Fifth, Seventh, and Ninth Circuits regarding the legality of class action waivers, in light of the rights of employees to assemble and act collectively.⁸⁷

⁸² *Tyson Foods*, 136 S. Ct. at 1044.

⁸³ *Id.* at 1048.

⁸⁴ Joe Liburt & Megan Lawson, *Breaking Development: Supreme Court to Rule on Enforceability of Class Action Waivers in Arbitration Agreements*, ORRICK (Jan. 13, 2017), <http://blogs.orrick.com/employment/2017/01/13/breaking-development-supreme-court-to-weigh-in-on-enforceability-of-class-action-waivers-in-arbitration-agreements/>.

⁸⁵ E. Gary Spitko, *Federal Arbitration Act Preemption of State Public-Policy-Based Employment Arbitration Doctrine: An Autopsy and an Argument for Federal Agency Oversight*, 20 HARV. NEGOT. L. REV. 1, 44–5 (2015) (“[A] great concern of critics of consumer arbitration is that arbitration agreements that include a waiver of any right to bring a class or collective action may leave the adhering party with no viable means to vindicate small value claims.” Citing Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court’s Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 464–71 (2011), “the most pressing issue in consumer arbitration, in the wake of recent Supreme Court decisions, is the lack of a viable forum for consumers with low value claims.”).

⁸⁶ Search Results for 16–307, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/search.aspx?Search=16-307&type=Supreme-Court=Dockets> (Includes docket sheets for *Morris v. Ernst & Young LLP*, 834 F.3d 975 (9th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (Jan. 13, 2017) (No. 13-16599); *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, 127 S. Ct. 809 (Jan. 13, 2017) (No. 15-2997); *Murphy Oil Co. v. NLRB*, 808 F.3d 1013 (5th Cir. 2016), *cert. granted*, 137 S. Ct. 908 (Jan. 13, 2017) (No. 14-60800)).

⁸⁷ Liburt & Lawson, *supra* note 84.

The courts, when addressing wage-related grievances, have been challenged in reconciling what society generally understands “wage theft” to be, with the appropriate cause of action.⁸⁸ As case law has evolved, and deep-pocketed employers have amassed scores of favorable opinions,⁸⁹ plaintiffs’ attorneys have trended toward including claims for common law conversion within the bundle of claims alleged. However, whether courts permit employees to pursue such claims is largely dependent upon the jurisdiction within which the case proceeds.

IV. STOLEN TIME: RETREAT TO COMMON LAW CONVERSION

Conversion, the civil law tort corollary for theft, “is the wrongful exercise of dominion over the property of another.”⁹⁰ The elements of a conversion claim are: “(1) the plaintiff’s ownership or right to possession of the property; (2) the defendant’s conversion by a wrongful act or disposition of the property rights; and (3) damages.”⁹¹ When the “property” converted is wages, most often determined by multiplying time spent by the worker’s hourly wage, we endeavor to place a monetary value on an intangible, irretrievable commodity: one’s time. Can we recover stolen time? If so, what legal claim should provide the vehicle for relief?

Courts have held that “[m]oney cannot be the subject of a cause of action for conversion unless there is a specific, identifiable sum involved[.]”⁹² While a specific sum must be capable of identification, the law does not require a plaintiff to identify the physical coins or notes allegedly converted.⁹³ California courts, for example, generally permit actions for conversion to proceed beyond the pleadings stage where a readily ascertainable sum has been misappropriated, commingled, or misdirected.⁹⁴ Under California law, plaintiff employees have an ownership or right to

⁸⁸ E.g., Heather N. Retchless, *Alternative Dispute Resolution—Has the Supreme Court Significantly Expanded the Enforceability of Arbitration Agreements and Class-Action Waivers?*, 35 AM. J. TRIAL AD. 227, 227 (2011); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

⁸⁹ Retchless, *supra* note 88.

⁹⁰ *Mendoza v. Rast Produce Co.*, 140 Cal. App. 4th 1395, 1405 (2006).

⁹¹ *Id.*

⁹² *PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP*, 150 Cal. App. 4th 384, 395 (2007).

⁹³ *Haigler v. Donnelly*, 18 Cal. 2d 674, 681 (1941).

⁹⁴ *PCO*, 150 Cal. App. 4th at 396.

possession of the property the moment wages are due.⁹⁵ Wages, once earned, become the property of the employee.⁹⁶ When alleging conversion, employees generally allege that the employer wrongfully withheld wages, knowingly failed to compensate plaintiffs, and that these wages were wrongfully converted at the time the wages were first due to be paid.

Plaintiffs have encountered seemingly sporadic success bringing claims for conversion based upon the wage theft that has occurred as a result of an employer's timekeeping and rounding procedures. The California Labor Commissioner even acknowledges and uses the term "wage theft" as a description of similar employment practices.⁹⁷

A recent federal appellate decision has affirmatively upheld an employee's right to bring a claim for conversion based on an analysis of recent California Supreme Court rulings, although little case law exists beyond the pleadings stage.⁹⁸ In *Sims v. AT&T Mobility Services, LLC*,⁹⁹ the court analyzed recent authority, and concluded that a common law conversion action for unpaid wages exists, denying the employer's motion to dismiss. The *Sims* court reasoned as follows:

[T]he California Supreme Court analyzed the legal status of unpaid wages in the context of a claim brought under California's Unfair Competition Law ("UCL"). 23 Cal. 4th 163, 96 Cal. Rptr. 2d 518, 999 P.2d 706 (2000). The court held that wages, once earned, become the property of the employee. *Id.* at 168, 96 Cal. Rptr. 2d 518, 999 P.2d 706. The Cortez decision relied on the doctrine of equitable conversion under which the law considers "that which ought to have been done as done." *Id.* at 178, 96 Cal. Rptr. 2d 518, 999 P.2d 706 (citing Cal. Civ. Code § 3529 and *Parr-Richmond Indus. Corp. v. Boyd*, 43 Cal. 2d 157, 165, 272 P.2d 16 (1954)). The sole remedy available under § 17200 is restitution of lost money or property, but the court found that employees possess equitable title in their earned but unpaid wages because the employer had a legal obligation to pay them. *Id.* Cortez therefore held that unpaid wages could be awarded as restitution for wrongfully acquired money or property under the UCL, even though the UCL does not authorize compensatory damages and the employees never had physical possession of their lost property, i.e., their unpaid wages. *Id.* This aspect of the

⁹⁵ *Id.*

⁹⁶ Cortez v. Purolator Air Filtration Prods. Co., 23 Cal. 4th 163, 168 (2000).

⁹⁷ Erika Monterroza & Peter Melton, *Labor Commissioner Cites Southern California Warehouse over \$1 Million to Wage Theft*, CISION (Jan. 28, 2013), <https://www.prnewswire.com/news-releases/labor-commissioner-cites-southern-california-warehouse-over-1-million-for-wage-theft-188733851.html>.

⁹⁸ *Sims v. AT&T Mobility Services, LLC*, 955 F. Supp. 2d 1110, 1119 (2013).

⁹⁹ *Id.*

Cortez holding is instructive first because it shows that employees are deemed to possess their wages when they earn them, and second that recovery of unpaid wages is not limited to remedies sounding in contract or the Labor Code.¹⁰⁰

The *Sims* court relied upon *Lu v. Hawaiian Gardens Casino, Inc.*,¹⁰¹ wherein the California Supreme Court underscored the availability of tort claims to employees denied earned compensation in the form of unpaid gratuities. The *Lu* court held that employees might have a conversion claim in the context of tip-pooling and certain misappropriated gratuities, stating, “we see no apparent reason why other remedies, such as a common law action for conversion, may not be available under appropriate circumstances.”¹⁰²

A. Faced With Suits for Conversion, Employers Protest Misplaced Claims

When faced with claims for conversion, employers have historically argued that money cannot be converted.¹⁰³ Employers have also turned to analogous scenarios in support of a general rule that when a statute creates a right that did not exist at common law, and provides a comprehensive remedial scheme for its enforcement, the statutory remedy is exclusive.¹⁰⁴ Where a new right is created by statute, the party aggrieved by its violation is confined to the statutory remedy provided by that statute.¹⁰⁵ Employers, citing case law, posit that the FLSA and state labor codes provide comprehensive and detailed remedial schemes, thus providing the exclusive statutory remedy for violations thereof.¹⁰⁶ Using this foundation, employers argue that a worker’s claim for conversion, based on state labor code

¹⁰⁰ *Id.*

¹⁰¹ *Lu v. Hawaiian Gardens Casino, Inc.*, 50 Cal. 4th 592, 604 (2010).

¹⁰² *Id.*

¹⁰³ *Vu v. California Commerce Club, Inc.*, 58 Cal. App. 4th 229, 235 (1997).

¹⁰⁴ *Rojo v. Kliger*, 52 Cal. 3d 65, 79 (1990) (reciting the rule).

¹⁰⁵ *See Lubner v. City of Los Angeles*, 45 Cal. App. 4th 525, 530 (1996) (concluding that the enactment of Civil Code section 987 precluded a common law recovery for loss of reputation, because Section 987 provides a comprehensive remedial scheme for damage to artistic reputation).

¹⁰⁶ *See, e.g., Thomas v. Home Depot USA Inc.*, 527 F. Supp. 2d 1003, 1010 (N.D. Cal. 2007) (dismissing conversion claim).

violations, cannot stand given the comprehensive statutory remedies available under the labor codes.¹⁰⁷

California, most notably, has seen a marked evolution in the viability of conversion claims.¹⁰⁸ Although published opinions are in short supply, opinions and orders entered by trial court judges are instructive to parties considering prosecuting, defending against, and settling conversion claims.¹⁰⁹ For example, The Honorable Daniel J. Buckley, a California state judge faced with federal precedent dismissing employment conversion claims, stated those federal rulings “were not binding in California courts.”¹¹⁰ In the case before Judge Buckley, *Stark v. CVS Pharmacy Inc.*, a putative class of employees claimed that CVS was liable for conversion for its failure to compensate pharmacy employees for required travel time between pharmacy locations. The conversion claim survived defendant’s demurrer, which argued that the existing remedies under the state labor code precluded plaintiffs’ conversion claim. Another state court judge, The Honorable Elihu M. Berle, who also declined to dismiss plaintiffs’ conversion claims, revisited the issue. In so deciding, Judge Berle concluded, “[w]ages are vested property rights.” Judge Berle further denied CVS’s motion to strike plaintiffs’ request for punitive damages under their conversion claim, ruling that the law permitted it.¹¹¹ Notably, there are numerous reported decisions in which courts note without any criticism that plaintiffs are suing employers

¹⁰⁷ *Id.* See also *In re Wal-Mart Stores, Inc. Wage and Hour Litigation*, 505 F. Supp. 2d 609, 618–19 (N.D. Cal. 2007) (granting employer’s motion to dismiss employees’ claim for conversion, which claim was based on violations of the Labor Code); *Pulido v. Coca-Cola Enterprises Inc.*, 2006 WL 1699328, at *9 (C.D. Cal. 2006) (granting defendant’s motion to dismiss plaintiff’s conversion claim where claim was based on alleged violation of Labor Code § 226.7, requiring payment for meal and rest break violations); *Green v. Party City Corp.*, 2002 WL 553219, at *5 (C.D. Cal. 2002) (dismissing plaintiff’s conversion claim and noting that plaintiff had failed to cite any authority for the notion that a statutorily-based claim for unpaid overtime wages could also be the subject of a conversion claim, particularly given the existence of the California Labor Code’s “detailed remedial scheme for violation of its provisions”).

¹⁰⁸ *Lubner*, 45 Cal. App. at 530.

¹⁰⁹ *Id.*

¹¹⁰ *Stark v. CVS Pharmacy Inc.*, 2012 Cal. Super LEXIS 13832, at *2.

¹¹¹ *Heiati v. CVS Pharmacy et al.*, Order dated Mar. 7, 2013, LASC Case No. BC501118, coordinated with *Stark*, 2012 Cal. Super. at *2, *Schwartz v. CVS Pharmacy Inc. et al.*, LASC Case No. BC502732, and *Ibrahim v. CVS Pharmacy, Inc. et al.*, LASC Case No. BC489738.

for conversion.¹¹² Perhaps even more telling, however, is the absence of decisions awarding damages for conversion of unpaid wages.

B. Employers Caution Against the Inappropriate Use of Litigation as Leverage for Labor Related Negotiations

Businesses argue that labor unions and employees are increasingly using lawsuits as a tactic to increase unionization. For example, a worker at a Walmart-affiliated warehouse filed a lawsuit at the same time unions were pressuring Walmart to increase wages.¹¹³ Interestingly, attorneys for the plaintiffs sought to hold Walmart jointly liable in the lawsuit against the warehouse, a move that was successful since Walmart “exercised tremendous control over warehouse operations, including setting productivity metrics and safety standards.”¹¹⁴ Similarly, lawsuits against McDonald’s coincided with employees’ demand for a \$15 wage. Stephen J. Caldeira, president of the International Franchise Association, called it a “classic special-interest campaign by labor unions.”¹¹⁵ Elite Staffing, a supplemental staffing agency in Joliet, Illinois, found itself at the cross-section of litigation, politics, and lawmaking. In 2015, while concurrently campaigning for a \$15 per hour wage and the right to unionize, workers sued Elite for wage theft.¹¹⁶ Workers alleged that they were required to arrive two and a half hours early for a shift only to be bussed from warehouse to warehouse with no guarantee of available work.¹¹⁷ They might return home hours later without any

¹¹² See, e.g., *Gentry v. Superior Court*, 42 Cal. 4th 443, 451 (2007) (noting without discussion that plaintiff was bringing class action against employer for conversion of unpaid wages on account of employer’s alleged misclassification of employees as exempt); *On-Line Power, Inc. v. Mazur*, 149 Cal. App. 4th 1079, 1082 (2007) (noting without discussion that employee sued employer for conversion for failure to pay wages); *Alvarez v. May Dept. Stores Co.*, 143 Cal. App. 4th 1223, 1127 (2006) (noting that managers were bringing class action alleging conversion for failure to pay overtime); *Dunlap v. Sup. Ct.*, 142 Cal. App. 4th 330, 332 (2006) (noting class action against employer included claim for “conversion and theft of wages”).

¹¹³ *Schneider Logistics Inc.* settled a lawsuit with 1800 warehouse employees, paying \$21 million in unpaid wages, interest and penalties. Ricardo Lopez, *Workers Reach \$21-Million Settlement against Wal-Mart, Warehouses*, LA TIMES (May 14, 2014, 6:30 PM), <http://www.latimes.com/business/la-fi-wal-mart-warehouse-workers-20140515-story.html>.

¹¹⁴ *Id.*

¹¹⁵ Greenhouse, *supra* note 41.

¹¹⁶ Lauren Leone-Cross, *Workers Rally For Higher Wages, Allege Wage Theft With Joliet Temp Agency*, JOLIET HERALD NEWS (Apr. 17, 2015), www.warehouseworker.org/news/.

¹¹⁷ *Id.*

payment.¹¹⁸ This dispute was highly publicized and politicized as workers launched visible protests outside the Joliet, Illinois location, and later joined 10,000 other low-wage workers in Chicago to participate in broader protests demanding “\$15-an-hour wages and the right to form a union.”¹¹⁹

C. The Existence of a Protective Statute Does Not Supplant Pre-existing Common Law Claims

Employers have repeatedly argued that wage and hour legislation, which enumerates specific remedies, preempts common law conversion claims.¹²⁰ This argument, the “new right-exclusive remedy” rule, holds that where a new right is created by statute, the statutory framework provides the exclusive remedy for enforcement, and derivative common law claims are disallowed.¹²¹ With regard to the FLSA and its possible impact on state labor and employment laws, courts have consistently determined that “[e]xpress preemption is improper . . . as the statute’s plain language evinces a clear intent to preserve rather than supplant state law.¹²² Moreover, the presence of the savings clause undermines any suggestion that Congress intended to occupy the field of wage and hour regulation.”¹²³

Turning to the question of whether a state labor code statute preempts a common law claim, like conversion, the answer hinges upon whether a statute created the right, or whether it existed prior to the statute’s enactment. “If a right existed at common law, a statutory remedy is considered cumulative, even if the remedy is comprehensive.”¹²⁴ Workers, thus, can rest assured that their common law claims for conversion can be included in their suits for statutory-based claims for wage and hour law violations. However, the strength of the conversion claim in the employment context is tempered by the lack of authority defining its reach. As discussed above, while

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Sims v. AT&T Mobility Services LLC*, 955 F. Supp. 2d at 1114.

¹²¹ *Rojo v. Kliger*, 801 P.2d 373, 381 (Cal. 1990).

¹²² *Knepper v. Rite Aid Corp.*, 675 F.3d 249, 262 (3d Cir. 2012).

¹²³ *Id.*; *see also Thorpe v. Abbott Labs., Inc.*, 534 F. Supp. 2d 1120, 1124 (N.D. Cal. 2008) (“[T]he FLSA clearly indicates that it does not preempt stricter state law claims.”) (citing 29 U.S.C. § 218(a)).

¹²⁴ *Sims v. AT & T Mobility Services LLC*, 955 F. Supp. 2d at 1117, citing *Rojo v. Kliger*, 52 Cal. 3d 65, 79–80 (1990) (California Supreme Court refused to hold that the Fair Employment Practices Act provided an exclusive remedy and supplanted common law claims relating to employment discrimination.).

conversion claims have repeatedly survived pleadings attacks, plaintiff-employees have yet to score a victory by jury, summary judgment, or otherwise, definitively stating that the worker is entitled to relief on a conversion claim and assigning appropriate damages. This uncertainty renders conversion claims particularly amenable to out-of-court settlement, where, in the absence of precedent, the parties can more confidently mediate an acceptable outcome.

V. CONCLUSION

While employers no longer guard company clocks or confiscate employee pocket watches, the battle over accurate payment for time continues. Workers at all levels, from unpaid interns and low-income wage earners, to those bringing home six-figure salaries in the tech industry, all struggle to balance the fear of losing a much needed job with the right to be paid fairly and lawfully. The steady stream of wage and hour laws enacted to address this perpetuating dilemma has been reactive at best, and at times, ineffective. With almost a billion dollars in wage theft returned to employees in 2012, the magnitude of the problem is undeniable. One might wonder how we can get ahead of this problem. Can our legislative and regulatory solutions endure the rapid evolution experienced in many sectors of the employment arena where employer-employee relationships are cemented in smart-phone applications?¹²⁵

Employers are cautioned to be more careful than ever, ensuring compliance with wage and hour laws, guided by increased enforcement actions and attention from multiple layers of government. Concurrently, employee plaintiffs continually produce allegations describing new and different methods of wage theft, oftentimes as innovative as the industry within which the employer operates. Despite changing work conditions, laws, and claims, the common law claim for conversion has maintained its relevance. Employers will continue to argue that wages cannot be converted, that there is already a comprehensive remedial statutory scheme for

¹²⁵ Angel Gonzalez, *Amazon Delivery Drivers Sue Company Over Job Status*, SEATTLE TIMES (Oct. 5, 2016) <http://www.seattletimes.com/business/amazon/amazon-delivery-drivers-sue-company-over-job-status/> (“The complaint underscores the conflicts brewing in the so-called ‘gig economy,’ in which independent enabled by technology play a critical role but have fewer privileges than traditional full-time workers.”).

enforcement, and that it is exclusive. However, California has seen a marked evolution in the viability of conversion claims, and other states may follow as workers and their lawyers reject “close enough” and seek accuracy and equity in payment of wages.