

Testimony of Annette Bernhardt, Ph.D.**Policy Co-Director, National Employment Law Project****Hearing Before the New York City Council, Committee on Civil Service & Labor**

Chairperson Sanders and members of the committee, thank you for this opportunity to testify about Wal-Mart's labor practices, and in particular, its track record on wage theft and noncompliance with core workplace protections.

In my current position as Policy Co-Director of the National Employment Law Project, I conduct applied research on low-wage jobs and work with community advocates and legislators to develop policy solutions at the federal, state and local level. Most recently, I was lead author of *Working Without Laws: A Survey of Employment and Labor Law Violations in New York City*, which documented the growing problem of wage theft in communities across the five boroughs. I hold a Ph.D. in sociology from the University of Chicago, with a concentration in labor economics and statistics, and as such, will be presenting my analysis of Wal-Mart's labor practices as a social scientist, not as a lawyer.

1. A long and consistent pattern of employment and labor law violations

My reading of the public record is that the recent history of litigation against Wal-Mart shows a recurring and remarkably consistent pattern of employment and labor law violations in states across the country – including unpaid overtime, requiring employees to work through breaks, erroneously classifying low-level managers as exempt from workplace protections, and hiring subcontractors who pay their workers less than the minimum wage.

To begin, in 2005 my research team at the Brennan Center for Justice conducted an exhaustive inventory of employment and labor law cases brought against the company. The resulting report, *What Do We Know About Wal-Mart*,¹ identified the following:

- **Wages and Hours:** In 2005, over 40 pending wage-and-hour cases against Wal-Mart were seeking class action status in more than 19 states. Among the allegations were that the company forced employees to work off-the-clock and failed to provide legally-required breaks.
- **Right to Organize:** Between 1995 and 2005, the National Labor Relations Board (NLRB) issued 60 complaints against Wal-Mart. These complaints cited the company for illegally retaliating against employees who attempted to organize, through illegal firings, unlawful surveillance, threats and intimidation.
- **Workers' Compensation:** In 2000, Washington State's Department of Labor and Industries threatened to take over the management of Wal-Mart's workers' compensation claims. The Department found that Wal-Mart repeatedly did not allow employees to file accident reports or workers' compensation claims, failed to respond to claims, made unreasonable

delays in payments, prematurely terminated and miscalculated compensation, had consistently poor record-keeping, and failed to recognize injured workers' rights to lost-time compensation.

- **Child Labor:** An internal Wal-Mart audit of 128 stores found that in one week in July 2000 there were 1,371 instances of minors working too late, during school hours, or for too many hours in a day. Wal-Mart paid \$135,540 to settle a case with the U.S. Department of Labor alleging that the company violated child labor laws in Arkansas, Connecticut and New Hampshire between 1998 and 2002 by having teenage employees use hazardous equipment such as chain saws, paper balers and forklifts.

During the next several years following this 2005 study, the number of class action suits alleging wage-and-hour violations at Wal-Mart increased in number, resulting in a stunning decision by the company.

In December of 2008, Wal-Mart announced it had settled 63 wage-and-hour class action suits in 43 states, involving hundreds of thousands of current and past workers.² The agreements required the company to pay at least \$352 million, with a ceiling of \$640 million. (There were 10 additional pending wage-and-hour suits that were not included in this settlement).

Many observers saw this decision as a response to recent judgments:³ in particular, a 2006 Pennsylvania jury award of \$78 million in a lawsuit over rest breaks and off the clock work, which a judge later increased to \$188 million,⁴ and a 2005 jury verdict in California ordering the company to pay \$172 million for requiring employees to miss breaks (which the company ended up settling for \$150 million).⁵

With this massive settlement, Wal-Mart cleared the deck of a cascade of wage-and-hour lawsuits that had piled up over time. However, at the end of 2010, Wal-Mart reported six wage-and-hour class action suits (with three having a pending settlement) and six suits charging erroneous exemption of assistant managers from minimum wage and overtime.⁶ The most recent of these suits continue to show the very same patterns of wage theft detailed in the earlier generation of cases.⁷

2. Types of wage theft described in class action suits

What is remarkable is the consistency of the class actions suits over the years and in states across the country, suggesting a failure by the company to rectify structural, systemic underpayment of its employees.

The most common forms of wage theft described by plaintiffs in the class action suits include the following:⁸

- Employees working off the clock, either before or after their shift, without pay.
- Employees working through meal and rest breaks guaranteed by state laws.

- Employees locked inside stores and forced to restock shelves before being allowed to leave, without pay.
- “Time shaving,” where employees who did not clock out at the end of a shift were credited with only a 1-minute-long shift, regardless of the amount of time they had actually worked.
- Misclassifying assistant managers as exempt from wage-and-hour laws, even though the assistant managers actually performed many of the same duties as hourly workers.
- Hiring unaccountable subcontractors who commit wage theft to staff the company’s warehouses.

Another common refrain that emerges from the long lineage of class action suits is the narrative about how these instances of wage theft happen. Claimants repeatedly mention systematic understaffing by Wal-Mart, which effectively forces workers to skip breaks and to put in unpaid hours before or after their normal shift. Also frequently mentioned are the company’s incentive systems for managers and payroll guidance directives from headquarters, that combine to put a premium on labor cost reductions and profit maximization.⁹

For students of Wal-Mart, these practices are entirely consistent with the company’s business model – the famous “everyday low prices” made possible by efficiencies in supply chain management combined with low wages, paltry health benefits, and high turnover of workers.

3. Scale matters: Case studies

It is important to understand the sheer scale of the numbers involved in these cases, underlining that Wal-Mart stands in a class by itself when we consider the scope and impact of its labor practices.

Consider a Massachusetts class-action case filed on behalf of present and former Wal-Mart employees in 2001, which was settled in 2009 for \$40 million covering as many as 87,500 workers. Based on Wal-Mart’s own payroll records, the plaintiff’s expert witness identified 10.1 million missed and unpaid rest breaks between 1995 and 2005, and 21,383 incidents of working off the clock where workers were not paid for their time. Court documents describe two “time-shaving” techniques used by Wal-Mart. In the first, workers testified that supervisors would insert meal break periods into their time records, when they had in fact not taken any breaks (thus reducing their paid hours). In the second, workers testified that managers would insert a “clock-out” one minute after the worker had clocked in, even though the employee continued working for much longer than that. Court documents state that the combined amount of estimated wage theft equaled \$25 million.¹⁰

A New Jersey class action case covering more than 70,000 current and former employees presented similar claims about having to work through meal breaks, but added evidence of workers being locked inside stores after clocking out and forced to work off the clock. In this suit, a statistician documented the “one minute” time shaving scheme in actual company payroll records. Plaintiffs also cited emails sent by Wal-Mart to managers encouraging them to cut employee’s hours.¹¹ And in the Pennsylvania class action lawsuit referenced above, payroll

records indicated that Wal-Mart forced employees to work through more than 33 million rest breaks between 1998 and 2001. A key feature of this case was testimony by a former regional vice president, who testified that managers knew that employees were working through their breaks and viewed the practice necessary to meet the company's financial goals.¹²

Nor are these types of data limited to expert testimony in class action suits. In fact, an internal Wal-Mart audit of 128 stores found that in one week in 2000 there were 60,767 instances of employees not taking breaks and 15,705 instances of employees working through meal times.¹³

4. The stakes for New York City

A final closing thought on wage theft in New York City. As I presented to this committee last year, our state's labor laws are failing to protect hundreds of thousands of New Yorkers. These protections, such as the right to be paid at least the minimum wage and the right to be paid overtime, are being violated at alarming rates. The sheer breadth of the problem, spanning key industries in the economy, as well as its profound impact on both workers and their communities, demand urgent attention.

In the months and years ahead, policymakers at both the city and state level will need to leverage all of their powers – whether in the form of legislation, regulations or administrative actions – to tackle the problem of wage theft. In my mind, a key goal in that process will be to build a strong base of law-abiding employers in New York that don't commit wage theft and that pay decent wages and support working families and their communities. Wal-Mart does not fit the bill. It has a consistent and unprecedented record of wage-and-hour violations that are a fundamental outgrowth of the company's cost-cutting business model. Given its sheer scale and market power, having Wal-Mart in New York City would significantly set back our collective efforts to turn the tide on wage theft and ensure that workers' rights are fully enforced and protected.

At the National Employment Law Project, we believe that economic opportunity is built on strong labor standards that are fully enforced. Thank you for the opportunity to testify in front of this committee, and I look forward to providing any help that I can in your deliberations going forward.

Endnotes

¹ See http://nelp.3cdn.net/c2b825db82518d6e25_tam6bnxs1.pdf.

² See Wal-Mart's 2009 10k form: <http://services.corporate-ir.net/SEC.Enhanced/SecCapsule.aspx?c=112761&fid=6250524>.

³ See <http://www.nytimes.com/2008/12/24/business/24walmart.html>.

⁴ This case is still under appeal, see <http://www.walmartpaclassaction.com/case.htm>.

⁵ See <http://www.walmartwagesca.com/>.

⁶ See Wal-Mart's 2010 10k form: <http://services.corporate-ir.net/SEC.Enhanced/SecCapsule.aspx?c=112761&fid=6839103>.

⁷ See *Klink v. WM*, USDC, Dist. of OR, 2/26/09; *Zinman v. WM*, USDC, Northern Dist. of CA, 05/08/09; *Gellhaus v. WM*, USDC, Eastern Dist. of TX, 7/21/09.

⁸ See, for example, the following, among many others: *Braun/Hummel v. WM*, Ct. of Common Pleas, Philadelphia County, PA, 3/20/02, 8/30/04; *Savaglio v. WM*, Superior Ct. of CA, Alameda County, 2/6/01; *Armijo v. WM*, 1st Judicial Dist. Ct., Rio Arriba County, NM, 9/18/00; *Sepulveda v. Wal-Mart Stores, Inc.*, 237 F.R.D. 229 (C.D. Cal. 2006); *Carter v. WM*, Ct. of Common Pleas, Colleton County, SC, 7/31/02; *Klink v. WM*, USDC, Dist. of OR, 2/26/09; *Zinman v. WM*, USDC, Northern Dist. of CA, 05/08/09; *Gellhaus v. WM*, USDC, Eastern Dist. of TX, 7/21/09; as well as the overviews in media coverage such as <http://www.nytimes.com/2008/12/24/business/24walmart.html> and <http://communitymediaworkshop.org/newstips/?p=1057>.

⁹ See for example, *Hale v. WM*, Circuit Ct., Jackson County, MO, 8/15/01, and *Iliadis v. WM*, Superior Ct. of NJ, Middlesex County, 5/30/02.

¹⁰ See http://www.boston.com/business/ticker/2009/12/walmart_agrees_1.html and <http://masscases.com/cases/sjc/452/452mass337.html>.

¹¹ See <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aJvJ.caDI2Y>.

¹² See <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a97qQoccXLfc> and http://www.reclaimdemocracy.org/walmart/2006/pennsylvania_lawsuit_overtime.php.

¹³ See <http://www.nytimes.com/2004/01/13/us/in-house-audit-says-wal-mart-violated-labor-laws.html?scp=1&sq=In-House%20Audit%20Says%20Wal-Mart%20Violated%20Labor%20Laws&st=cse>.