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**“Strategic Enforcement
in the
Fissured Workplace”**

The 2015 John T. Dunlop
Memorial Forum



The Labor and Worklife Program

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**Keynote Address
David Weil**

Introduction



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I'd like to thank Elaine Bernard, Richard Freeman, co-chair of the Labor and Worklife Program, and Ben Sachs, his counterpart at the Law School. I taught in the Harvard Trade Union Program (HTUP) for 25 years, starting as a graduate student. Elaine and I followed each other, worked together, and co-taught for many years. It was always a highlight of my year to have the opportunity to work with the future generation of labor leaders at HTUP, from this country and around the world.

I'm delighted to see so many friends from Harvard, the Boston community, and the Massachusetts labor movement here – including my past co-author Fred Abernathy. I look forward to our discussion.

A Few Words on John T. Dunlop

When I was on the faculty here, it was sometimes my honor to introduce the guest for the Dunlop speaker series. We were often fortunate to have Beverly Donahue, John Dunlop's daughter, join us to say a few words about John. Today, I have the honor of saying some words about the person for whom this annual lecture is named.

I had the good fortune to study with John Dunlop when I was a graduate student. In the mid-1980s, John was just becoming an emeritus professor. As was typical of him, he remained as active as ever, including taking on a few PhD students. My first

interaction with John was hardly auspicious. I had breakfast with him, during which time I nervously described my ideas about my dissertation. Those of you who knew John know exactly the kind of face he made, and he started to pull his arm back, which I also learned was a bad sign. When I finished talking, he said, "I don't understand your use of the English language." And then he ripped apart my theory for fifteen minutes. He told me I used the word "technology" seven different times in seven different ways, all of them incorrectly. And so on. But that was John. John put people through the test of fire and then, if you survived, he became a lifelong mentor and incredible guide.

He was a professor, his whole career at Harvard serving as a distinguished labor economist. He loomed over a whole field that we now call Industrial Relations Systems.

John's work was well informed by his world of practice. He was an active arbitrator until later years when arbitration became an established field, and he no longer found it as interesting as the "wild west" experience it was during World War II. He was proud to say that he had served every American president from Franklin Roosevelt through President Clinton. And he was invariably on the Washington-Boston shuttle doing what he liked to do: solving problems. This meant taking an issue that had arisen in the work place and bringing parties together to come to some kind of decision that ultimately, fundamentally helped working people but also dealt with the realities of employers and government objectives.

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John held many posts at Harvard, including Dean of the Faculty of Arts and Sciences, often at the same time as he was holding posts in Washington. For many of us, and I know I am speaking for a lot of people in this room, he modeled how to be a rigorous analytic scholar while simultaneously seeking solutions for the practical problems of working people. Particularly given my own almost 20-year opportunity to work with John in the latter part of his life, I am truly honored to speak at this particular forum today.

In the Great Hall at the U.S. Department of Labor, the walls are lined with portraits of every Secretary of Labor back to Woodrow Wilson’s administration, including a portrait of John Dunlop. On certain days, as I pass his picture en route to my office, I think about what I learned from observing John operate on many different types of labor problems over the years.

I strive every day to think about the problems that we face at the Department of Labor as John would have – examining issues through a larger analytic lens. It is impossible to imagine doing a job like mine without having some kind of mental map of how the world is “wired.” Every day, I am faced with any number of problems that I had no idea would arise at the beginning of the day. It would be easy to become bogged down in managing my inbox and lose the larger picture. Instead, as Administrator I try to approach these problems through an analytic frame.

With that background in mind, today I want to tell you about the Wage and Hour Division (WHD). I

want to talk with you about how we do strategic enforcement, including focusing more on what I call the “fissured workplace.” I’ll cover what I mean by the term “fissured workplace,” the argument behind it, and what has changed in the workplace to bring it about. The fissured workplace is something that affects working people generally, and in particular touches on the issues of greatest concern to my agency: compliance with the most fundamental labor standards in the country, such as the minimum wage, overtime, and prohibitions on child labor. Many of my colleagues in other parts of the Labor Department are equally affected by this fundamental change in business organization. Finally, I will share some of our current goals and initiatives in WHD.

Our Mission: A Fair Day’s Pay for a Fair Day’s Work

Our strategic plan at WHD states our mission as follows: “We promote and achieve compliance with labor standards to protect and enhance the welfare of the nation’s workforce.” Put another way, we want to make sure working people in the U.S. receive a fair day’s pay for a fair day’s work.

There is one part of that phrase of which I am particularly proud; it does not say “U.S. workers” it says “working people in the U.S.” Our laws are basic labor standards that protect people regardless of their immigration status. Everyone in my agency takes great pride in defending that principle.

“Understanding changes in business organization, which I have called the ‘fissured workplace,’ has been an important new focus and starting point for strategic enforcement.”

There has been significant erosion in working standards for many workers in this country over the last few decades. Over the last six months, I travelled to all six regions of our organization to see what is happening. I have been introduced to what I can only describe as jaw dropping labor law violations. While most employers, in most industries, are doing the right thing, in many instances they are not. It is fundamental to our mission to try to rectify that situation and improve compliance. The question is: how do we achieve our mission? How do we make sure that, in light of some of the challenges we face as an agency, we can undertake the fundamental obligation of responding to how working people are treated in this country? The answer depends, in part, on a strategic approach to enforcement.

Understanding the Fissured Workplace

Understanding changes in business organization, which I have called the “fissured workplace,” has been an important new focus and starting point for strategic enforcement. Some of you who have known me for a while know I used this term because my wife, Miriam, is a former geologist. One day we were talking about this phenomenon, and Miriam said the description reminded her of a rock breaking apart, or a “fissure.”

Business organization in many industries has fissured in two respects. When rocks fissure, they get fissures that deepen, and once they start, they get deeper and deeper. What I have found is that when a business begins sub-contracting work, inevitably subcontractors start subcontracting,

and so on down the chain. Subcontractors then may begin classifying everyone who works for them as independent contractors. That is what I call a “deepening fissure.” Secondly, fissures spread. This phenomenon has moved from a set of industries where it was historically common, such as construction and garment, to other segments of the economy, including the service sector, food sector, and agricultural industries.

Let me illustrate with an example from the hospitality industry. When most people walk into a Hilton or a Marriott, they see the marquee and the brand on the staff uniforms and their hotel room amenities, and they come to the logical conclusion that everyone who works there is a Hilton or Marriott employee. Thirty to thirty-five years ago, that assumption would have been correct. In 1962, only 2% of US motels were franchised. Today, more than 80% of hotel properties in this country are franchised. As a result, a small percentage of hotels are owned and managed by the brand name we see over the front door and on the badges of the staff that provide service. Often, most of the work has been parceled out among multiple players. Management service providers may manage the hotel property for a group of investors, who do not represent the brand itself, but could be any number of entities (i.e. private equity) who are smaller players in the hotel industry. That hotel management company will then typically break up the day-to-day work of the hotel among another host of players: the front office work to one company, landscaping to another, restaurant activity to another (hotel restaurants may further



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“farm out” work to still other food service entities). Though we often think of hotel cleaning staff as providing a service core to the hotel’s business, those services are often carried out by multiple agencies, including temporary agencies or labor brokers. This is emblematic of a fissured workplace: a constellation of different companies delivering what the consumer may think of as simply “the Marriott experience.”

In general, the typical fissured workplace is the product of three key elements:

First, businesses face increasing pressure from public and private capital markets to focus on “core competencies.” Fundamentally, there is no problem with that. This is a basic feature of how economies develop: businesses specialize in what they are good at. Over time, businesses that drill down to core competencies make business “all about the brand,” promoting a distinctive service or a portfolio of brands geared towards different consumer segments. It then becomes crucial to the overall business that the entity delivering the service follows, say, the “Marriott recipe book.”

Second, the delivery of service is shifted out to multiple organizations, so that the branded company at the top can avoid the “messy business” of providing services or making the product. In many cases, firms may pursue this model because they want to distance themselves from the responsibilities of the employment relationship.

The third element, a system of standards, derives from the tension, from the firm’s perspective,

between the first two elements. On the one hand, firms are trying to achieve core competency. On the other hand, they seek to shift the work to other parties. Without measures to prevent it, those other parties could quickly undermine that core competency. Firms need a system of standards and an organizational form to make sure that all the different entities follow the same “recipe book.” For instance, in hotels, there are very explicit standards that the brand maintains and requires all involved parties to follow. In my previous work examining retail supply chains, I found that major retailers require explicit standards in their supply chain. This way, they can undertake the job they are doing in a way that ultimately fits their business model.

Franchising is another example of where standards are critical for the business model. In my first few months as Administrator, I reached out to all the business groups that had opposed my nomination, and I met with them, including the International Franchise Association. The first thing I wanted to stress to them is that I have no problems with franchising. Franchising is a legitimate and growing form of business organization. But the central premise of a franchise is that the brand that the franchisee is purchasing has value and has standards that everyone needs to follow. That is critical for the business model.

This tension between core competencies and standards raises questions. Can businesses have it both ways? It seems reasonable that a business organization that owns the Brand should dictate



the terms of the work. But should that firm then be able to completely wash its hands of labor standards and say “Not my employees, not my problem”? At DOL, we’re trying to ask these questions of employers. We are not demanding that businesses simply go back to the old employment model for answers. Economic history does not go backwards.

We must, however, ask the question about who “owns” those responsibilities of compliance, given the many players that make up the fissured workplace.

To illustrate what happens when we don’t ask that question about who “owns” those responsibilities, I will diverge from my own jurisdiction to talk about health and safety, governed by the Occupational Safety and Health Administration (OSHA). OSHA is currently led by David Michaels, who gave the Dunlop lecture a few years ago. Dr. Michaels’s agency is doing wonderful work tackling this same problem in the context of health and safety, particularly in regard to temporary workers.

Cell phone towers are an example of how fissuring affects OSHA’s work.

Many of us have iPhones. The incredible exponential growth of iPhones required the development of huge cellular networks. To achieve this expansion in the 2000s, major carriers like AT&T in the United States used the same model. Instead of employing workers directly to expand and maintain the new cellular system, they fissured. The carriers bid out contracts to major

companies, called “turfers.” AT&T, for example, would set technical standards, time standards, and pricing standards, and then the turfer would figure out how to do the work. Typically, the major turfer (companies as large as Bechtel) did very little of the work directly. Instead, they would subcontract that work out to a lower level, and those subcontractors often would further subcontract the work, vastly expanding subcontracting work as the cell network expanded.

There was a staggering number of fatalities in the first height of the cell tower boom. The fatalities of cell tower workers were at ten times the fatalities of construction, and three times the fatality rate of underground coal mining. It was the highest occupational fatality rate in the country, save probably taxi cab drivers. This worker safety problem is a natural consequence of the lack of coordination that comes with firms “having it both ways”: no company is taking direct responsibility for health and safety and the lowest level of the fissured structure suffers the consequences. These are very troubling outcomes.

Recently the *Washington Post* featured a story on Live Nation, one of the largest and most profitable concert providers in the country, taking advantage of low-wage workers to stage large rock concerts. In many venues, it turns out that the company farms the staging work out to independent contractors, some paid as little as \$10 an hour or less. This story captured my attention because it discusses, again, the impact this model has on both wages and worker safety. This use of independent contractors

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exposed many young, untrained workers with no experience doing electric work to the dangers of lighting and cable setup, rigging, and more.

Back in the world my own agency works in every day, we look at the rates of violations of labor standards in industries with high levels of fissuring. In 2008, Annette Bernhardt, Ruth Milkman, Nik Theodore and other colleagues conducted a very significant study on a three-city sample of low-wage workers. This study found amazingly high rates of non-compliance with very basic labor standards: “off-the-clock” work, and overtime and minimum wage violations. Seventy-four percent of workers in the hotel and restaurant industries experience some “off-the-clock” work, which is essentially being told to work without compensation. Over two-thirds of workers in those industries experience overtime violations. Even as low as federal and state minimum wages were at the time the study was conducted, the authors still found minimum wage violation rates at between 18.2 percent among hotel and restaurant workers and 25.9 percent among all workers.

DOL recently commissioned a study focusing specifically on California and New York. Those of you who study the minimum wage know that its value has eroded and that at its current level, someone working full time making the minimum wage and supporting a family of four is living well below the poverty level. Even so, we found that 3-6 percent of all workers in California and New York were paid below the minimum wage. In low-wage industries, that number is closer to

12-13 percent of workers. If we extrapolate, this would equate to about 2 million workers nationally whose wages violate the Fair Labor Standards Act (FLSA). Of those workers paid less than the minimum wage in New York and California, we are talking about \$20 to \$29 million of lost wages per week. Here’s a more striking way to think of this: we estimate those workers lost, on average, 40 percent of their earnings. We are talking about a huge impact on the livelihood of individual families and households. You can visit our WHD website to learn more about what these wages can mean for individual workers.

These types of violations are highly prevalent in fissured industries, where we at WHD are focusing our attention.

The fissured workplace has given rise to compliance challenges with this lack of coordination between business entities, which has an impact on health and safety and even growing wage inequality. In many circumstances, because of shifting responsibility, the wage setting process essentially just becomes contracting for services. For instance, if you, General Motors, a major auto company, are setting the wages for your janitors, you are much more cognizant of their pay relative to the rest of your pay structure. You may be taking into account that they are your employees (or whether they are union or non-union). But you likely will not make that same consideration if they are subcontractors working for someone else, and you are just paying a different party for janitorial services.

Strategic Enforcement

The fissured workplace poses challenging, but not insurmountable, problems for enforcement. An optimistic outlook – the belief that we can actually respond to this – is fundamental to what we are trying to do as an agency. If we understand what drives the fissured workplace, we can respond.

As I discussed, businesses in the fissured workplace are balancing the benefits of focusing on their core competencies against the risks of shifting work out. If shifting the work out starts having too many costs and undermining a firm’s core competency it needs to respond, for example, by more careful monitoring. Other options firms might consider include bringing some of the work back or treating some of the workers as employees. We are trying to communicate to companies that they need to consider the costs of their actions from a regulatory perspective, and we’re doing this through both enforcement and outreach. This requires a systematic approach.

The statute WHD is responsible for enforcing collectively cover 135 million working people in 7.3 million workplaces. President Obama has been incredibly successful increasing our number of investigators. The good news is that we have built up significantly. The bad news is that we now have almost as many investigators as we had at the end of the Carter Administration. This means we have to cover those 7.3 million workplaces with almost 1,000 wage and hour investigators nationally based in 54 different district offices. So as good as the news is of the growth in our staff,

the increase is a drop in the bucket relative to the universe we cover. And that is why we cannot, even in a world without the fissured workplace, think about a workplace-by-workplace type of approach.

Similarly, we can’t continue our historical approach, which was to respond principally to complaints. Historically about 75 percent of wage and hour investigations arose from worker complaints. Those complaints usually traced back to very real problems, so we would recover back wages for workers who were not paid what they were entitled. But again, we would too easily use up all of our resources playing “whack-a-mole” as these problems appear.

One thing we have been doing over the last five years is to focus more on what we call directed investigations. These are proactive strategic investigations led by initiatives in particular industries, most of which are low-wage fissured industries. We focus the majority of directed investigations in about 15 industries. Additionally, we triage complaints to keep those investigations, like our directed work, focused on our priorities.

To determine these priorities we first use statistical evidence to see where there is the highest likelihood that workers are not receiving the minimum wage, overtime payments, or where we are likely to find child labor violations. We also look at complaint rates in a counterintuitive way – we seek out industries where complaint rates are lowest – because we know that we find some of the worst violations in industries where



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people are least likely to complain. This should illustrate for you the fallacy of a complaint driven strategy: it relies on the voices of workers who often feel the most vulnerable, the most exposed, and are the least likely to pick up the phone. These are workers in industries with low union density and high immigrant populations.

The second thing we are doing, and I have already alluded to this, is to focus our attention at the top of different types of business structures. A complaint driven strategy and our historic strategy focuses on the “bottom rung.” We could certainly spend all of our resources chasing after the bottom of these fissured structures, focusing solely on the contractor at the bottom rung where violations are found. I can assure you that we would find significant back wages owed and recover substantial amounts of money for those workers. But we would leave the system – and the causes of violations – unchanged. We simply cannot do that.

What we need to do is to connect the dots between the two to try to change behaviors. In some cases, that means seeking evidence of joint employment, which gives us a direct statutory, regulatory way to bring players from higher levels of organizations to the table. Often we are addressing the problem of misclassification, so we can trace the roots of violations back to those who are the employers.

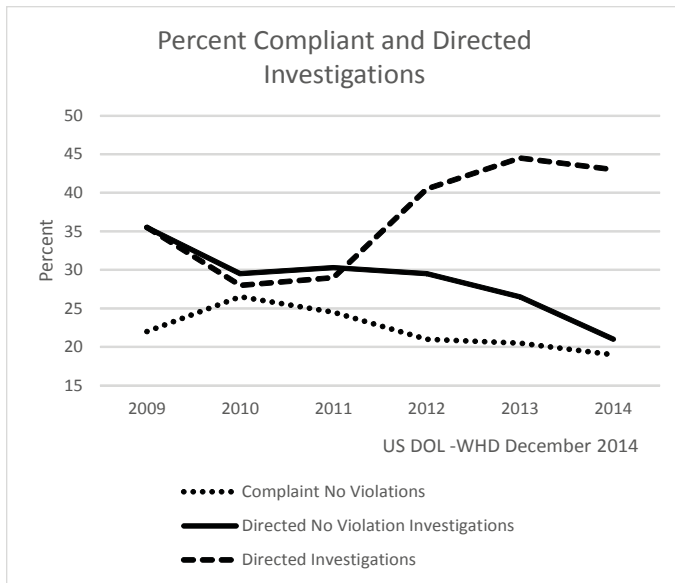
Part of thinking differently about enforcement is also using all of the tools Congress gave us to ensure compliance. This summer, I had my first opportunity to give Congressional testimony to discuss our use of the “hot goods provision” of

the Fair Labor Standards Act, which we use very judiciously. This provision gives us the ability, generally, to ask employers not to ship goods that have been produced in violation of the law, to say “We need you to resolve this before we can allow those goods to move.” That is another important tool. We use it predominantly in the garment industry, or in agriculture. We have used it to great effect to change behavior.

We are also thinking more strategically about compliance. We have many positive relationships with employers where we have been able to work out cooperative agreements to address systemic problems. Even in circumstances where the employer is not necessarily a joint employer, but the employer has been persuaded to come to the table to take actions like instituting monitoring relationships. We call these enhanced compliance agreements (ECAs).

For instance, we have an ECA with a major construction player in New York called Lettice Construction. The ECA is actively changing the behavior of a big player in the construction market.

In some cases, we reach these agreements after aggressive enforcement and litigation. But by building relationships and working with proactive companies who do not want to jeopardize their brand or undermine their core competency, we can come to a different resolution with systemic impact.



My agency is very fact driven; we try to use evaluation and data as much as we can to determine what works and what does not.

You can see from the above chart that there has been an increase in the percentages of investigations that we do on a directed basis. We have increased, from about 35 percent of our investigations being directed to close to 45 percent being directed. We have gone from 75 percent of our investigations being complaint driven to 50 percent. In the past, directed investigations tended to be less likely to result in findings of violations because we were shooting in the dark to a certain extent. When you get a complaint, the worker is providing a road map to the problem. In a directed investigation, if you have not done your homework, you can end up spending a lot of time on something that does not show a problem. But you can see here that the number of directed investigations with no

violation findings has declined substantially, from 35 percent to 22 percent. We are very excited that this number is converging on the percentage of complaint no violations, which as you might imagine, stays relatively flat. This means our directed investigations are looking more and more like complaint investigations - we are getting better and better at our proactive game.

We are also doing an enormous amount and a different kind of outreach. Since 2009, we have conducted about 12,000 outreach events to business groups, stakeholders, members, worker advocacy communities, and union communities. We want to help businesses understand their responsibilities and come into compliance voluntarily. And we want workers to understand their rights and feel able to exercise them.

I do not want to say that we are done. This is an evolutionary process: we try strategies that work, and we try others that may not work out as well. We are now in a phase of development that we call “Strategic Enforcement 2.0,” where we are trying to do all of the work that I have just described, but better. We are trying to make sure we plan our work, and that we allocate our resources. We have had the good fortune of new hires and bringing on new investigators.

One of the things I am struck by as I visit our offices around the country is that our investigators look increasingly like the population of people whom we are trying to help. We have become more conscious of selecting investigators and staff based on the ability to speak multiple languages. In our Las

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Vegas office, which I recently visited, 90 percent of our investigators speak at least two languages. In Denver, 60 percent of our investigators speak at least two languages. Having that kind of capacity on the ground is huge when you are trying to reach out to a population of multilingual workers, such as those in the industries where we are focusing our attention.

We are also trying to bring this strategic approach into this new generation of staff throughout the agency, and to make it part of the agency culture. We are thinking about other ways to use data and information and do mapping to support this strategy, as a tool that helps us understand how a business operation works. While we are nowhere near the “promised land,” some of the results I have showed you give me hope that we are pushing in the right direction.

The story of fissuring obviously has impacts beyond core labor standards and affects many of the Department of Labor’s policy areas. I have already mentioned that this is also a major concern for OSHA. It is even a concern for our colleagues in MSHA, the Mine Safety and Health Administration. It is also important for the Employee Benefits Security Administration, the part of the Department of Labor agency that enforces the Employee Retirement Income Security Act (ERISA), which regulates pensions. The fissured workplace has undermined the traditional way we think about funding pensions systems and making sure people have an ability to support themselves at retirement.

The way we do training is also potentially undermined by fissuring. Who has the incentive to do training in this new business reality? Those of you in the building trades know that the organized part of the construction industry figured out a way to do training in a fissured kind of industry structure years ago. But we don’t have that in most industry structures. It is not present in the majority of construction labor markets, where there isn’t an apprenticeship system. Even parts of the workplace safety net are undermined if we don’t think strategically, positively, and in forward thinking ways about the impacts of these workplace changes such as the unemployment system, and the workers’ compensation system. There are a whole host of public policies out there that could similarly affect everything we have talked about.

In my domain as Administrator, my role is to enforce the law. But there are clearly some areas where public policies need to better address the fissured workplace. I have had interesting conversations with people on Capitol Hill who are considering how we think about this in terms of changing liability structures: How do we think about industry classification problems? How do we think about responsibility for fair workplaces?

Conclusion

I’ll conclude by returning to WHD’s mission: At the end of each week, I ask myself “Have we moved the needle at all concerning compliance with labor standards? Have we done something

to make sure that people will get a fair day's pay for a fair day's work?"

Now this is not something that one government agency can do alone. I always have liked how Jane Jacobs, the great scholar of urban life, responded to the question, "How do you make a street safe?" Her response was that streets are not made safe by having lots of police on the beat, even though they must be present. Instead, safe streets arise when you have people in neighborhoods who are engaged and feel ownership of their community. Engaged community members are the true police of public safety and the creators of a civil society.

We can think of the "workplace street" in an analogous way. We cannot expect to have, even in the best of regulatory worlds, enough investigators to do the job of assuring compliance alone. A government agency cannot solely reverse the erosion of workplace standards that has taken place over the last few decades. Workplaces where workers are treated fairly, enjoy safe conditions, and exercise their rights comes from the collective activities of responsible employers and workers who feel empowered to exercise their rights under the law. The challenge facing all of us who care about such conditions is thinking about our role in improving conditions on the "workplace street." That is certainly the challenge we will continue to work on at the Wage and Hour Division.