

Testimony of Laura Huizar

National Employment Law Project

Effective Strategies and Tools for Wage Enforcement

Hearing before the Oregon Senate Interim Committee on Workforce and General Government

January 13, 2016

Laura Huizar
Staff Attorney

National Employment Law Project
2040 S. Street, Lower Level
Washington, D.C. 20009

(202) 683-4825
lhuizar@nelp.org

Good afternoon and thank you for the opportunity to testify today. My name is Laura Huizar, and I am a staff attorney at the National Employment Law Project (NELP).

NELP is a non-profit, non-partisan research and advocacy organization specializing in employment policy. We are based in New York with offices across the country, and we partner with federal, state, and local lawmakers on a wide range of workforce issues. Across the country, our staff are recognized as policy experts in areas such as unemployment insurance, the minimum wage, and, as is relevant for today's hearing, wage enforcement.

NELP testifies today to offer national context on the problem of wage and hour violations, often referred to as wage theft. We would also like to highlight important tools for wage enforcement and lessons from other jurisdictions.

Who Is Affected by Wage Theft?

Approximately 42 percent of workers in America earn under \$15 per hour.¹ They are nursing assistants, home care workers, janitors, waiters and waitresses, cashiers, truck drivers, auto workers, and many others who keep our families and businesses going.² They are also disproportionately women, people of color, and immigrants.³ As the real value of wages generally continues to decline⁴ and income inequality worsens, ensuring that low-wage workers are paid the minimum wage and overtime required by law must be a priority. Wage theft is widespread across the country and across industries, costing workers and local economies billions of dollars each year.⁵

A seminal 2009 study by NELP and other academic partners surveyed over 4,000 workers and found that 26 percent were paid less than the required minimum wage in the previous work week, and nearly two thirds experienced at least one pay-related violation in the previous week, such as failure to pay overtime, not being paid for all hours worked, and stolen tips.⁶ The report estimates that workers surveyed lost an average of 15 percent, or \$2,634, of their annual wages due to workplace violations.⁷

Dozens of other studies of specific industries have uncovered similar rates of wage-related violations. A recent NELP study of business outsourcing, for example, found that the restructuring of employment arrangements through multi-layered contracting, the use of staffing or temp firms, franchising, and other means can result in poor working conditions and a lack of corporate responsibility.⁸ The report focused on non-compliance in some of our largest and fastest-growing sectors. In the fast food industry, it reported that based on a 2014 study, nationally, nearly 90 percent of fast food workers suffered some sort of wage theft on the job.⁹ In the warehouse and logistics industry, 23.1 percent suffered minimum wage violations and 67.8 percent suffered overtime violations.¹⁰ About 80 percent of port truck drivers who transport goods from ports to railheads or logistics firms are classified as independent contractors, and approximately 80 percent of these workers are misclassified.¹¹

In Oregon, a 2015 fact sheet by the Oregon Center for Public Policy stated that “[d]uring the 12-month period ending June 2014, over 1,100 workers filed wage claims with the [Oregon Bureau of Labor and Industries (BOLI)]” with almost one in four claims concerning minimum wage violations.¹² Complaints occurred “more frequently among workers of restaurants, bars, office cleaning companies and staffing agencies.”¹³ Given the information we have about wage theft nationally, as well as the many challenges facing workers who suffer violations, such as the high cost of legal representation, the possibility of retaliation, and language barriers, these numbers likely represent only the tip of the

iceberg when it comes to wage and hour violations in the state. In short, the wage theft crisis is not only severe, it is pervasive. It affects industries and occupations across our economy, and while it is especially severe among our nation's low-wage workforce, it is not limited to those sectors.

What Are The Most Important Tools for Wage Enforcement?

An effective enforcement scheme must protect workers who come forward to raise complaints, because that is how the vast majority of workplace violations are identified and remedied, given our complaint-driven system of enforcement. An effective scheme must also include strong public and private enforcement tools to better guarantee compliance and help ensure collection of owed wages. To achieve these goals, NELP recommends, at a minimum, including these "Top 5" tools in any enforcement regime: 1) strong remedies and penalties; 2) a private right of action; 3) dedicated resources for investigation and enforcement; 4) community partnerships; and 5) anti-retaliation protection.¹⁴

1) Strong Remedies and Penalties

When workers report violations, they should recover all the wages they are owed in addition to damages that compensate the worker for the time, effort, risk, and costs associated with reporting unpaid wages, as well as costs resulting from not receiving those wages in the first place (i.e. late fees on monthly bills). Most local and state laws, as well as the federal Fair Labor Standards Act, allow workers to recover double the amount of wages owed (and some allow for triple the amount of wages owed or a fixed amount for each day a violation took place).¹⁵ Without such compensation, there would be little to deter an employer from violating the law—violating employers would only have to pay the wages they were required to pay in the first place.

Miami-Dade County in Florida is one example of a jurisdiction that has adopted a triple damages provision. In 2010, a coalition of advocates won passage of a broad anti-wage theft ordinance that included triple damages for wage theft violations.¹⁶ As of December 2014, the County had "handled almost 2000 cases and recovered almost three million dollars in unpaid back wages through its conciliation process and through wage awards after a hearing."¹⁷ Washington D.C.,¹⁸ Arizona, Idaho, Massachusetts, New Mexico, and Ohio are other jurisdictions that impose triple damages for minimum wage violations.¹⁹

Strong non-discretionary penalties for violating a local minimum wage law are similarly key in deterring violations. States can also impose criminal penalties to raise the costs to employers of violating the law.²⁰ As of January 2011, thirty states and the District of Columbia had criminal penalties for unpaid wages in their state wage and hour laws.²¹ In at least two major cities, New York and Los Angeles, criminal prosecution of employers who violate wage and hour laws, along with press attention, has contributed to raising public awareness around wage theft as a crime.²² Employers "learn that wage theft is a real and serious crime, and compliance is increased."²³ It is important to note however, that while these criminal prosecutions and penalties may raise public awareness and deter future violations, they do not recover unpaid wages and other damages owed to workers whose rights were violated—it is therefore vital to ensure that measures such as the triple damages provisions discussed above are also included in wage enforcement provisions.

One policy that states and cities can implement to ensure that workers receive compensation even when their employer has disappeared or lacks sufficient funds to cover their wages is a wage bond requirement.²⁴ A wage bond is money that an employer puts into a state agency fund or with a bonding company to ensure that the employer has sufficient capital up front to responsibly engage in business and pay workers in case of wage and hour violations.²⁵ Wage bonds are “routine in most states for public works and construction projects and are also commonly imposed on employment agencies.”²⁶ To be most effective, a bond has to be large enough to cover wages owed to potential claims as well as penalties.²⁷ The process for collecting unpaid wages from a bond should be straightforward.²⁸

Although opponents sometimes argue that wage bonds will discourage new businesses, wage bonds typically cost only around 10 percent of the amount they guarantee, so a wage bond for \$100,000 would cost \$10,000.²⁹ As of 2011, at least thirty-eight states required that employers post bonds for at least some jobs.³⁰ Last year, California enacted SB 588, a wage theft law that, among other things, requires employers who fail to pay workers their unpaid wages after a final judgment to post a bond of at least \$50,000 and up to \$150,000 to continue doing business.³¹

Wage liens offer another effective policy for ensuring that workers will recover unpaid wages.³² A lien is a claim made directly on property. It “ties up the property so that, at least temporarily, it cannot be sold without the amount of the lien being paid by the property owner,” creating an incentive for owners to fulfill their payment obligations.³³ “When a wage lien is filed for non-payment of wages, it gives the worker a claim against [the employer’s or property owner’s] property, including real estate and bank accounts.”³⁴ To be most effective, a wage lien should “provide for a lien against the property of an employer or property owner as soon as a wage claim is filed.”³⁵ Some states allow workers to file wage liens prior to filing an agency or court claim.³⁶ An ideal wage lien law would also “not impose any limitations on the recovery amount, and would prioritize the lien over all other debts, regardless of an employer’s insolvency.”³⁷ States that have enacted wage lien laws include Alaska, Idaho, New Hampshire, Texas, Washington, and Wisconsin.³⁸

Ultimately, strong damages and penalties provisions, as well as mechanisms for ensuring that workers can recover unpaid wages, are crucial to adequately compensating workers and deterring future violations in Oregon. In fact, the Oregon Center for Public Policy found that “[d]uring a recent three-year period, nearly three quarters of all [BOLI] monetary findings against employers have not been recovered from the employers.”³⁹ From July 2010 to June 2013, “BOLI issued monetary findings against employers in 3,303 wage claim cases totaling \$6.2 million.”⁴⁰ This total included unpaid wages, civil penalties, penalty wages, interest, and court fees. Employers paid only \$1.8 million of the total.⁴¹

2) Private Right of Action

A private right of action gives workers the right to bring a lawsuit in court to address violations and recover their unpaid wages. It is important because wage theft is rampant and government agencies with limited public resources simply cannot tackle enforcement alone. Additionally, public agencies’ funding and priorities for enforcement can change over time and giving workers access to courts ensures they always have a way to protect their rights.

To be effective, a private right of action must also allow workers to recover attorneys’ fees and costs. The prohibitive cost of legal representation is a significant barrier to low-wage workers who want to protect their rights.⁴² A civil legal needs assessment in Washington State found that “only half of low-

income people with employment problems were able to get advice or representation from an attorney.”⁴³ While policymakers may argue that both plaintiffs and defendants in wage and hour disputes should be entitled to attorneys’ fees if they are the prevailing party, allowing defendants to recover attorneys’ fees is “likely to dissuade many low-wage workers from bringing suits in the first place.”⁴⁴ As of 2011, forty states allow prevailing plaintiffs to recover attorneys’ fees under state wage and hour laws and half of these states, including Minnesota, Montana, and Nebraska, make attorneys’ fees mandatory for the prevailing plaintiff.⁴⁵

3) Dedicated Resources for Investigation and Enforcement

For a state to effectively address wage law violations, it must dedicate sufficient resources and staff to enforce the law. An enforcement team must, at a minimum, be able to issue rules and regulations; conduct thorough investigations; perform outreach and education geared to both workers and employers; resolve complaints in a timely manner from start to finish; and recover the wages owed to workers. A well-resourced investigation and enforcement team should develop programs seeking to ensure that employers comply with the law; it should also collect and analyze data to identify gaps and strategically target enforcement.

Due to insufficient resources, public enforcement of wage and hour laws has significant difficulty keeping up with violations. At the federal level, the U.S. Department of Labor (USDOL), which is responsible for enforcing federal wage, child labor, and other laws, has just over 1,000 investigators nationwide who are tasked with enforcing these laws in more than 7 million workplaces.⁴⁶ Because of these scarce resources, the average employer has just a .001% chance of being investigated by USDOL’s Wage and Hour Division or Occupational Safety and Health Administration in any given year.⁴⁷ And at the state level, according to a nationwide survey, states have the equivalent of one inspector for every 146,000 workers.⁴⁸ Most states have fewer than ten investigators.⁴⁹

A comprehensive survey of state wage enforcement agencies conducted by Columbia Law School found increasing numbers of low-wage workers coinciding with cuts or freezes in resources dedicated to wage and hour enforcement.⁵⁰ But as this survey noted, “[i]t is difficult to track the resources and authority allotted to wage and hour enforcement entities, because internal shifts in funding and personnel may be made toward or away from wage and hour enforcement, while the publicly reported budget and human resources of the broader division of which the wage and hour entity is a part remains unchanged.”⁵¹ Further research is necessary to better understand how different levels of funding and resources affect the effectiveness of wage enforcement by state agencies.⁵² Nonetheless, as the Columbia Law School study concluded, “most states . . . possess generous authority to enforce their wage and hour laws, allowing for significant expansion of state activity in this area if policymakers see fit.”⁵³

4) Community Partnerships

Workers’ fear of retaliation, as well as their limited knowledge about workplace rights and how to report violations, contribute to the high rates of wage theft. Community-based organizations are crucial partners for enforcement agencies. Their ties to workers in specific industries and sectors, as well as their roots in certain racial or ethnic communities, can assist enforcement through outreach and education; detection and reporting of violations; filing complaints; and identifying high-violation

industries and employers for proactive investigations.⁵⁴ Some specific ways to engage community groups include:⁵⁵

- Conferring regularly with community advocates, state enforcement agencies, and other stakeholders to discover community needs and to work out partnerships;
- Convening task forces on specific problem areas or industries, inviting workers' advocates and stakeholders to share information and participate in other appropriate ways;
- Designating staff to act as liaisons to immigrant worker groups, attend events, and act as a resource; and
- Implementing community-safeguarding models that designate certain stakeholders to educate the community about the agencies' priorities and policies, especially in underserved areas.

Cities enacting minimum wage laws have begun to issue grants to local community groups to enlist their assistance with tasks such as education, outreach, and preparing complaints. San Francisco alone issues \$482,000 to immigrant and low-income community organizations for these activities.⁵⁶ Los Angeles plans to allocate \$700,000 annually to community groups for outreach and education, and Seattle recently awarded contracts to community groups amounting to \$1 million.⁵⁷

5) Anti-Retaliation Protection

Anti-retaliation protection is crucial for effective wage enforcement. Workers need strong protection so they will not be vulnerable to employer harassment and retaliation when they report a violation. This is especially important because enforcement relies heavily on workers coming forward and filing complaints. Retaliation is common—a national survey found that 43 percent of workers who complained to their employer about their wages or working conditions experienced retaliation.⁵⁸ The survey also found that 20 percent of workers never made a complaint because they feared retaliation or thought it would not make a difference.⁵⁹ Employers should be subject to strong penalties when they retaliate. Oregon's wage enforcement efforts must make anti-retaliation protection a priority to ensure the success of its overall enforcement strategy.

Thank you so much for the opportunity to testify today. I would be happy to answer any questions that you may have.

For more information, please contact NELP Staff Attorney Laura Huizar at lhuizar@nelp.org. For more about NELP, visit www.nelp.org or www.raisetheminimumwage.org.

¹ Irene Tung et al., *The Growing Movement for \$15* (Nov. 2015) at 1, *available at* <http://nelp.org/content/uploads/Growing-Movement-for-15-Dollars.pdf>.

² *Id.* at 6–8.

³ Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities* (2009) at 9, *available at* <http://www.nelp.org/content/uploads/2015/03/BrokenLawsReport2009.pdf?nocdn=1>; *see also supra* note 1.

⁴ National Employment Law Project, *Occupational Wage Declines since the Great Recession* (Sept. 2015), *available at* <http://www.nelp.org/content/uploads/Occupational-Wage-Declines-Since-the-Great-Recession.pdf>.

⁵ Brady Meixell & Ross Eisenbrey, Economic Policy Institute, An Epidemic of Wage Theft Is Costing Workers Hundreds of Millions of Dollars a Year (Sept. 2014), *available at* <http://www.epi.org/publication/epidemic-wage-theft-costing-workers-hundreds/>.

⁶ *See supra* note 3 at 2.

⁷ *Id.* at 5.

⁸ Catherine Ruckelshaus et al., National Employment Law Project, Who's the Boss: Restoring Accountability for Labor Standards in Outsourced Work (May 2014) at Executive Summary, *available at* <http://www.nelp.org/content/uploads/2015/02/Whos-the-Boss-Restoring-Accountability-Labor-Standards-Outsourced-Work-Report.pdf>.

⁹ *Id.* at 11.

¹⁰ *Id.* at 15.

¹¹ *Id.* at 22. In addition, "in audits of employers in 1999 and 2000, the US Department of Labor (USDOL) found high rates of minimum wage, overtime and other violations across the country, including in 50 percent of Pittsburgh restaurants, 74 percent of Georgia day care centers, 50 percent of St. Louis nursing homes, 38 percent of Reno hotels and motels, and 47 percent of adult family homes in Seattle, to name just a few." National Employment Law Project, Winning Wage Justice: An Advocate's Guide to State and City Policies to Fight Wage Theft (Jan. 2011) at 5–6, *available at* <http://www.nelp.org/content/uploads/2015/03/WinningWageJustice2011.pdf>.

¹² Oregon Center for Public Policy, Restaurants, Bars and Business Services Lead in Minimum Wage Complaints (Apr. 2015), *available at* <http://www.ocpp.org/media/uploads/pdf/2015/04/fs20150415MinWageViolationsfnl.pdf>.

¹³ *Id.*

¹⁴ National Employment Law Project, Top 5 Enforcement Tools for Local Minimum Wage Laws (Dec. 2015), *available at* <http://www.nelp.org/content/uploads/Policy-Brief-Top-Five-Enforcement-Tools-Local-Minimum-Wage.pdf>.

¹⁵ National Employment Law Project, Winning Wage Justice: An Advocate's Guide to State and City Policies to Fight Wage Theft (Jan. 2011) at 19–20, *available at* <http://www.nelp.org/content/uploads/2015/03/WinningWageJustice2011.pdf>.

¹⁶ *Id.* at 20.

¹⁷ Research Institute on Social and Economic Policy, Center for Labor Research and Studies at Florida International University, Wage Theft in St. Petersburg, Florida (Dec. 2014) at 8, *available at* <https://risep.fiu.edu/research-publications/workers-rights-econ-justice/wage-theft/2015/wage-theft-in-st-petersburg-florida/wage-theft-report-for-st-petersburg.pdf>.

¹⁸ Guy Brenner, "The D.C. Wage Theft Prevention Amendment Act Goes into Effect Today – What D.C. Employers Need to Know" (Feb. 26, 2015), *The National Law Review*, *available at* <http://www.natlawreview.com/article/dc-wage-theft-prevention-amendment-act-goes-effect-today-what-dc-employers-need-to-k>.

¹⁹ *See supra* note 15 at 20.

²⁰ Haeyoung Yoon & Tsedeye Gebreselassie, National Employment Law Project, Building Robust Labor Standards Enforcement Regimes in our Cities and Counties (Mar. 2015) at 3, *available at* <http://www.nelp.org/content/uploads/2015/03/Building-Robust-Labor-Standards-Enforcement-Regimes-in-Our-Cities-and-Counties-.pdf>.

²¹ These states include: Alaska, California, Colorado, District of Columbia, Georgia, Hawaii, Illinois, Indiana, Maryland, Mississippi, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Rhode Island, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, and Wisconsin. *See supra* note 15 at 35.

²² *See supra* note 15 at 34.

²³ *Id.*

²⁴ *Id.* at 117.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ 2015 Cal. Legis. Serv. Ch. 803 (S.B. 588), *available at* https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201520160SB588.

³² *See supra* note 15 at 113.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ Oregon Center for Public Policy, *Employers Pay Only a Fraction of What They Owe in Wage Theft Cases* (Feb. 2015), *available at* http://www.ocpp.org/media/uploads/pdf/2015/02/fs201500211WageTheftRecovery_fnl_.pdf.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *See supra* note 15 at 31.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 32.

⁴⁶ Wage and Hour Division, U.S. Department of Labor, FY 2011 Congressional Budget Justification at WHD – 21, *available at* <http://www.dol.gov/dol/budget/2011/PDF/CBJ-2011-V2-03.pdf> (stating that for 2011, WHD expect to have 1,006 full time investigators); Wage and Hour Division, U.S. Department of Labor, *Fair Labor Standards Act*, *available at* www.dol.gov/whd/flsa/comprehensive.ppt (stating that more than 130 million workers in more than 7 million workplaces are covered by the Fair Labor Standards Act) (last viewed Jan. 12, 2016).

⁴⁷ National Employment Law Project, *Winning Wage Justice: Talking Points on the Need for Stronger Anti-Wage Theft Laws* (Jan. 2012) at 3, *available at* <http://www.nelp.org/content/uploads/2015/03/WinningWageJusticeTalkingPoints.pdf>.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Jacob Meyer, Esq. & Robert Greenleaf, Esq., Columbia Law School National State Attorneys General Program, *Enforcement of State Wage and Hour Laws: A Survey of State Regulators* (Apr. 2011) at 14, *available at* http://web.law.columbia.edu/sites/default/files/microsites/attorneys-general/files/Wage%20and%20Hour%20Report%20FINAL_0.pdf.

⁵¹ Jacob Meyer, Esq. & Robert Greenleaf, Esq., *Enforcement of State Wage and Hour Laws: A Survey of State Regulators (Executive Summary)* at 3, *available at* [http://web.law.columbia.edu/sites/default/files/microsites/career-services/Wage%20and%20Hour%20Report%20-%20Exec%20summary%20PDF\(1\).pdf](http://web.law.columbia.edu/sites/default/files/microsites/career-services/Wage%20and%20Hour%20Report%20-%20Exec%20summary%20PDF(1).pdf).

⁵² For a comparison of various states' budgets for wage and hour enforcement as well as staffing, see Tables 3–5 of the Columbia Law School study. *See supra* note 50.

⁵³ *See supra* note 50 at 7.

⁵⁴ For a more detailed discussion of the importance of community-based partners, see Diego Rondón Ichikawa and Rebecca Smith, *Delivering \$15: Community-Centered Wage and Hour Enforcement in Seattle* (Oct. 2014) at 12–15, *available at* <http://www.nelp.org/content/uploads/2015/03/Delivering-15-Community-Centered-Wage-and-Hour-Enforcement-Seattle.pdf>.

⁵⁵ *See supra* note 15 at 39.

⁵⁶ Tia Koonse et al., UCLA Center for Labor Research and Education, *Enforcing City Minimum Wage Laws in California: Best Practices and City-State Partnerships* (Oct. 2015) at 13, *available at* <http://laborcenter.berkeley.edu/pdf/2015/minimum-wage-enforcement.pdf>.

⁵⁷ *Id.*

⁵⁸ *See supra* note 15 at 55.

⁵⁹ *Id.*