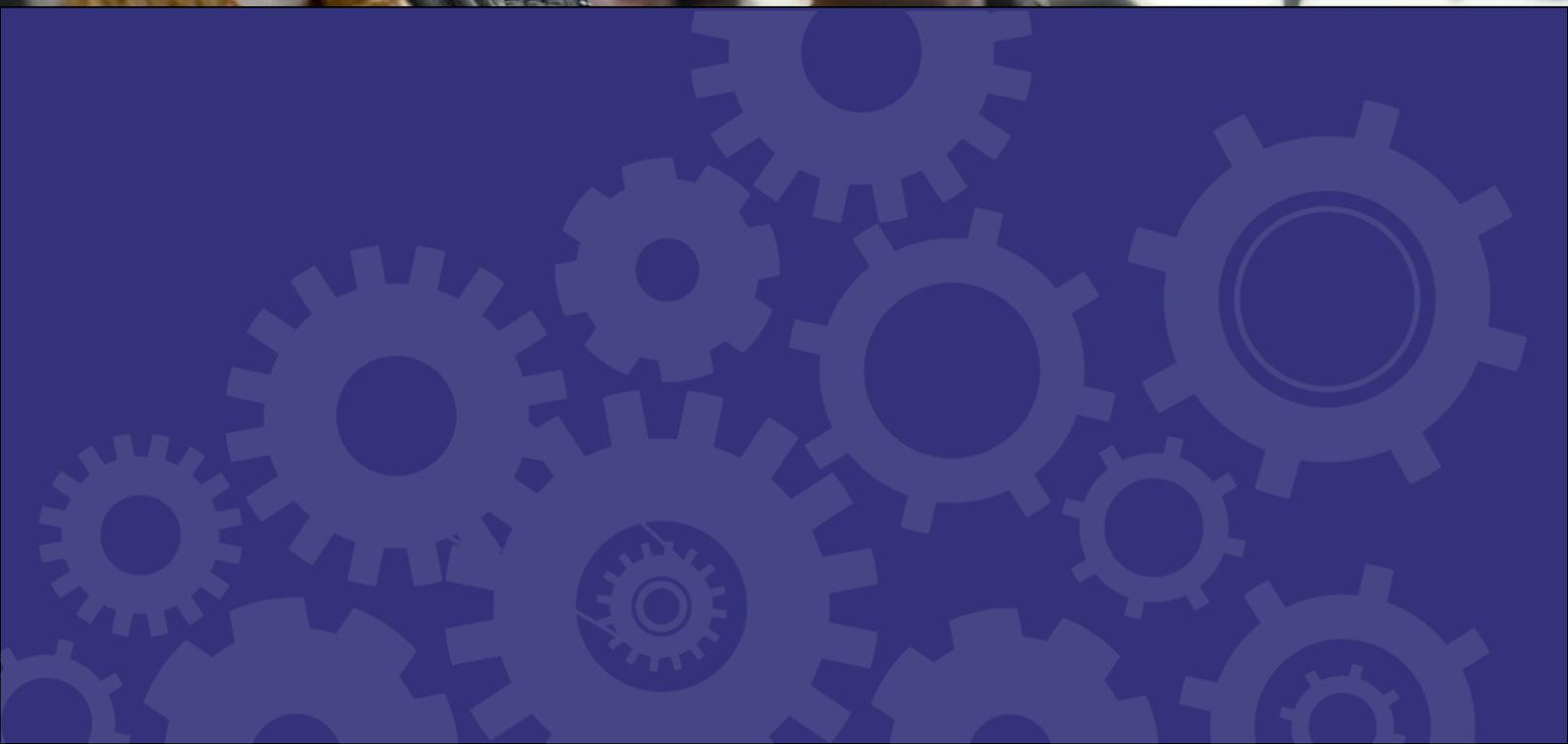


Retaliation Funds: A New Tool to Tackle Wage Theft

*A Proposal to Help Workers
Exercise Their Rights*

By Laura Huizar



Wage theft is rampant in our economy.¹ Despite countless local, state, and federal laws recognizing workers' hard-won minimum wage and overtime rights, the legal system enables employers to steal billions of dollars each year from mostly Black, brown, indigenous, and immigrant workers. The system depends on workers coming forward to report wage theft, but fear of retaliation silences countless workers.

Even our strongest retaliation protection laws have not overcome the fact that when a worker speaks up, that worker takes on an enormous and immediate risk. If their employer retaliates by cutting their pay or firing them, for example, even the best laws will normally take months, if not years, to hold the employer accountable and provide a remedy. And that is assuming that workers can even collect from their employers, who may have hidden assets or disappeared. By then, a worker may have faced eviction, gone further into debt, incurred steep fees for late payments, damaged their credit, and more. Workers facing wage theft are stuck between two impossible choices: laboring under illegal workplace conditions *or* speaking out and risking, among other things, their already precarious and insufficient economic security.

A retaliation fund enables workers to quickly access meaningful financial support if they lose their job or otherwise face retaliation for reporting wage theft.

This paper proposes a practical new tool to make it easier for workers to report wage theft: a retaliation fund that would allow workers to *quickly* access meaningful financial support when they have reported wage theft and subsequently lost their job or faced a pay cut due to retaliation. By offering some relief from retaliation when workers need it most, this fund would help fill the urgent gap in the current enforcement landscape that forces workers to remain silent or risk everything by speaking up.

Below, we outline how a retaliation fund could operate in practical terms. NELP can offer technical support to any worker organizations and labor enforcement agencies interested in establishing a pilot program or otherwise exploring the potential of a retaliation fund.

Our ability to raise our voices as workers without fear is a human right vital to building power on the job and a practical necessity in fighting back against wage theft. While workers have found ways to organize and bear the risk of retaliation together—by forming unions, establishing mutual aid funds, and pushing for better conditions through legislative campaigns, for example—our approach to enforcement must itself ensure that each and every worker can exercise their rights. As workers, particularly Black, brown, indigenous, and immigrant workers, continue to fight for a country that fully recognizes and centers their needs, rights, and priorities, a retaliation fund offers an enforcement tool that directly responds to workers' reality.

Executive Summary

Worker surveys tell us that more than two out of three workers earning low wages experience a pay-related violation in any given week,² and wage theft disproportionately harms workers of color, immigrant workers, and women.³ We also know that [retaliation and the threat of retaliation](#) are similarly widespread.⁴

Retaliation occurs in a wide range of explicit and subtle forms. Employers can fire workers, reduce their pay, change their hours or shifts to less desirable ones, report or threaten to report workers or family members to immigration authorities, involve law enforcement, blacklist workers with other employers, harass or discriminate against workers who speak up, and more.⁵ Based on NELP's consultation with worker advocates around the country, it is clear the potential financial implications of losing pay loom especially large for almost all workers considering filing a wage theft or other complaint. Lost pay, even if temporary, can derail an individual's and family's stability in both the short and long term. Lost wages can result, for example, in fees and penalties for missed payments, a reduction in one's credit score, eviction, repossession of a car, suspension of a license when a worker can no longer pay child support, taxes, or traffic fines, and more.⁶

We cannot effectively counter wage theft unless every worker can assert their rights without fear of retaliation. No worker should ever feel forced to accept workplace conditions that violate their rights simply to preserve their job or income—something that has only become more critical during the current COVID-19 pandemic. Frontline workers, who are disproportionately Black, people of color, women, and immigrants,⁷ have risked their own health and the health of their communities daily by going to work in a country that has refused to provide them the unemployment insurance, workplace safety rules, good wages, adequate retaliation protections, and other standards that would show that their lives are valued along with their labor.



A swiftly administered retaliation fund, run by labor enforcement agencies, has the potential to help more workers report wage theft by providing workers the financial support they need at the moment they exercise their rights, not months or years later. **For a worker to access prompt and meaningful financial support, a retaliation fund should only require a worker to show that they filed a wage theft complaint, that their employer had notice of the complaint, and that their employer fired them or cut their pay after learning of the complaint.** It should not require workers to “prove” retaliation before receiving financial support. Agencies should, however, require employers who are ultimately found to have retaliated to replenish the fund.

The concept of a retaliation fund is not entirely new. Worker organizations have long used various types of mutual support funds to support workers who exercise their rights, and economic hardship funds in private and public forms have played an important role in supporting workers during the COVID-19 pandemic and beyond. The proposal outlined in this paper has benefitted from those models and from the expertise and vision of dozens of worker leaders and advocates, attorneys, organizers, and labor enforcement staff around the country.

Ultimately, when workers cannot come forward to report violations, entire communities, especially Black, brown, indigenous, and immigrant communities, lose. Pay and working conditions decline in a race to the bottom, law-abiding employers struggle to compete and build businesses that can earn profits while also benefitting communities, and workers’ families and neighbors lose out on the spending and investments that they would otherwise be able to make for themselves.

The sections below provide context regarding wage theft and retaliation, as well as an outline of what an effective retaliation fund could look like. While not a complete solution to retaliation or wage theft, given the current enforcement landscape, **a retaliation fund could uniquely alter the calculus for workers who must decide whether to assert their rights, potentially helping many more workers come forward.** It would send a new, powerful signal to workers that they are not alone when enforcing their rights.





A Retaliation Fund Would Help Fill a Critical Gap in the Current Enforcement Landscape by Providing Immediate Relief to Workers

Our current retaliation protection laws leave workers vulnerable and without support when they need it most.

As [NELP's 2019 report](#) on retaliation and wage theft shows, **most states do not offer workers strong retaliation protection laws** that, at a minimum: allow workers to recover meaningful monetary damages when their employer retaliates; ensure that workers can recover attorney's fees and costs so that they have a better chance of finding legal assistance; give workers the option of either bringing a retaliation complaint to an enforcement agency or to court; and impose fines on employers that can deter future retaliation.⁸

Even when laws offer the prospect of strong remedies and penalties, most of those laws do little to support a worker immediately after they have lost some or all of their pay due to retaliation. Workers must face an uncertain adjudication through an agency or court that often comes down to proving intent and pits an employer's word against a worker's. Labor agencies often take months, if not years, to resolve a retaliation complaint.⁹ And even if a worker "wins," their employer may have disappeared or otherwise be judgment-proof, leaving workers with no money to actually collect. This failure to provide workers with meaningful relief when retaliation happens¹⁰ compounds other factors that can make even strong retaliation laws insufficient for workers considering filing a wage theft complaint. Reinstatement, for example, is not generally an easy or even desirable solution in most cases,¹¹ and for immigrant workers without work authorization, reinstatement may not be an option.¹² Immigrant workers separately face potential immigration-based retaliation that could subject them to detention and deportation. In addition, when workers anticipate imminent retaliation, not all agencies are able to seek injunctions in court to try and stop the retaliation before it occurs and before the agency's investigation is complete,¹³ and any effort to secure an injunction can be time-intensive and uncertain.

Workers who file a complaint of wage theft understand that any type of workplace complaint comes with a significant risk of being fired or otherwise retaliated against, and they know that they will likely have to bear the financial consequences on their own. Given that nearly half of U.S. households lack savings that could cover a \$400 unexpected expense,¹⁴ with Black and brown households faring worse than their white counterparts when it comes to emergency savings,¹⁵ it is not surprising that the financial risk tied to retaliation looms especially large for most workers and that workers often decide that they simply cannot take the risk of coming forward.



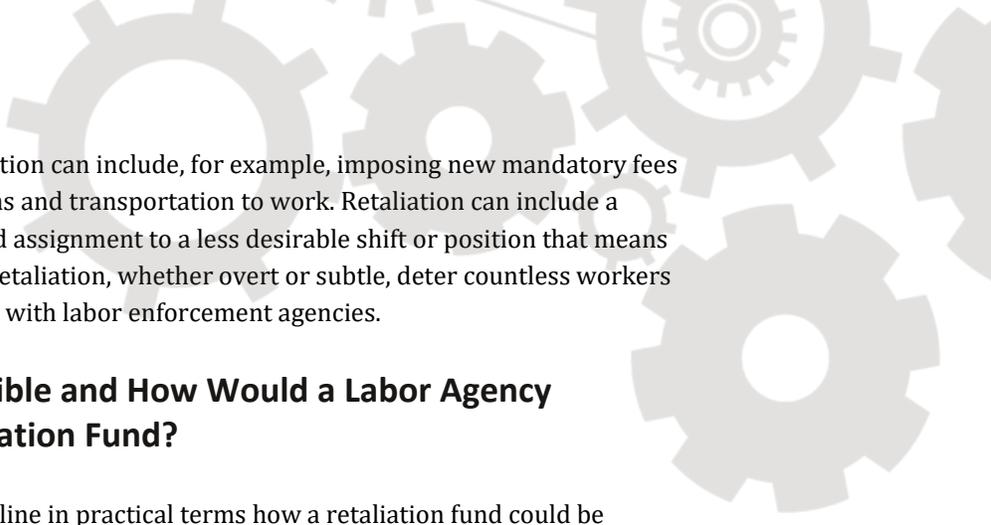
How Would a Retaliation Fund Work?

The sections below outline what NELP would recommend as guiding principles for an effective retaliation fund. They also outline in practical terms how a labor agency could set up and administer the fund, incorporating feedback NELP gathered from worker leaders and advocates around the country.

A. Necessary Guiding Principles for a Retaliation Fund

Having consulted with dozens of advocates and organizations about the potential benefits of a retaliation fund, NELP recommends that any retaliation fund adhere to the following general principles in order to respond to workers' needs and realistically fill the gap in the current enforcement landscape:

1. The fund must be **available to all workers** who have filed a wage theft complaint with an enforcement agency.
2. The fund must allow workers to access **meaningful financial relief** as soon as possible after retaliation occurs (e.g., within a few days or a few weeks at most) when retaliation results in a loss of income.
3. **Workers must not be required to prove that unlawful retaliation has occurred prior to receiving financial aid.** An agency can require a worker to file a complaint of retaliation that can then be investigated and resolved, but, in issuing support from a retaliation fund, the agency must seek to err on the side of the worker when a worker has submitted a wage theft complaint and later makes a reasonable allegation of retaliation.
4. **Workers must not be required to pay back the amount received** from the retaliation fund. It should be the employer who retaliates who should replenish the fund so that employers, not workers, bear the costs associated with unlawful retaliation.
5. **Employers, not workers, should fund the retaliation fund.**
6. **A state or local enforcement agency that establishes a retaliation fund should partner with community-based organizations** that can help with outreach, education, and implementation. As numerous articles on the importance of partnering with community-based organizations in labor enforcement emphasize,¹⁶ community-based organizations have proven critical in establishing the necessary trust, connecting workers with agencies, facilitating communication between agencies and workers, and deploying enforcement resources strategically.
7. **Both “wage theft” and “retaliation” should be defined and understood by the enforcement agency broadly.** State and local laws that define wage theft and retaliation, in addition to the regulations and policies that guide an enforcement agency, must recognize the many ways in which wage theft and retaliation occur.



Wage theft and retaliation can include, for example, imposing new mandatory fees for things like uniforms and transportation to work. Retaliation can include a reduction in hours and assignment to a less desirable shift or position that means less pay. All forms of retaliation, whether overt or subtle, deter countless workers from filing complaints with labor enforcement agencies.

B. Who Would be Eligible and How Would a Labor Agency Administer a Retaliation Fund?

The following Q&A aims to outline in practical terms how a retaliation fund could be structured. The answers incorporate the principles discussed above in order to respond to workers' needs and meaningfully reduce the economic risk workers face when exposing wage theft.

What Is a Retaliation Fund? A Summary

- A retaliation fund would operate as a resource that a state or local enforcement agency can set up for workers who file a wage theft complaint and then experience retaliation that reduces their pay.
- When a worker loses a job or income due to retaliation, the worker is quickly exposed to serious financial ramifications. Missed payments on rent or utilities, for example, can lead to eviction, increased debt, credit score reductions, fines and fees for late payments, and much more.
- The retaliation fund would provide a worker who filed a wage theft complaint access to quick financial support if the worker loses their job or income due to retaliation.
- By reducing the financial risk that a worker bears when filing a wage theft complaint, the retaliation fund could help increase the number of workers who report wage theft and better support any worker who exercises their rights.

Who Would Benefit from a Retaliation Fund?

- Wage theft is rampant, but countless workers choose not to file complaints against their employers because of the risk of retaliation. This negatively affects not only workers, but law-abiding employers and the businesses that rely on workers' spending.
- A retaliation fund would help any worker who wants to report wage theft without bearing all of the financial risk of coming forward to report a violation.¹⁷

What Kind of Retaliation Would the Retaliation Fund Cover?

- A worker would be able to receive support from the fund if their employer takes an adverse action against them for filing a wage theft complaint that results in getting fired or less pay. An "adverse action" must be defined broadly given the countless and often subtle ways in which employers retaliate. At a minimum, an "adverse action" must include:
 - getting fired;
 - constructive discharge (including transfer to another worksite that makes commuting unreasonable or threats based on a worker's suspected immigration status);

- demotion;
- blacklisting that keeps a worker from finding a new job;
- reduction in hours;
- change in schedule that impacts income; and
- other reduction in pay.

How Much Support Can a Worker Recover from the Retaliation Fund?

- A worker would be entitled to a one-time payment from the retaliation fund. This can build on existing hardship models where one-time payments are not considered taxable income and make it easier for agencies to administer.
- The amount of financial support should be calculated based on what a worker in a particular jurisdiction would find meaningful enough to come forward and report a violation. This could be, for example, a one-time payment based on the cost of living for one month for a worker, taking into account dependents. A cost of living estimate like the Economic Policy Institute’s [Family Budget Calculator](#)¹⁸ could offer a starting point for determining what amount in a particular state or locality will prove meaningful for workers. (Basing the amount of support on the number of hours actually worked or the promised/actual wage rate would complicate the process with unnecessary fact-finding only made more difficult by employers and companies that rely on cash and few records.) Advocates and agencies can conduct surveys with workers in a specific region to better understand what level of financial support would affect a worker’s decision to report wage theft and risk retaliation.
- Because the primary objective should be the provision of meaningful financial support as quickly as possible, the funds that a worker will actually need to support themselves while they search for a new job and grapple with any other financial consequences of retaliation should guide the policy.

Who Should be Eligible to Obtain Support from the Fund?

- Simplicity is critical for workers to understand the program and for enforcement agencies to administer the program without unduly complicated, time-consuming processes that would defeat the primary goal of meaningful and timely aid. The proposed framework below assumes that for a fund to provide such meaningful and timely aid, it must accept that it must err on the side of workers rather than employers at the moment a worker first believes they have experienced retaliation.
 1. A worker must have submitted a **wage theft complaint** to the agency before the alleged retaliation occurred. (Labor agencies should also consider establishing partnerships with worker centers and other community-based organizations to implement the fund and subsequently allow workers to submit their complaints through a community-based group that they may more easily access and trust.)
 2. The agency sent a **notice of investigation to the employer(s)** believed to have engaged in wage theft before the alleged retaliation, *or* there is other evidence that the employer was aware of the complaint.
 3. The employer (including a supervisor or someone working under the direction of the employer) took an **adverse action** against the worker that the worker believes is retaliation for having reported wage theft *and* that resulted in a reduction in pay.

4. The worker must submit a **complaint of retaliation** to the agency within 90 days of the alleged retaliation along with a **request for support** from the retaliation fund.

Would Workers Need to Repay Aid Received Through the Retaliation Fund?

- Absolutely not. The burden of repaying the fund should fall to employers who are found to have retaliated unlawfully.

How Should the Retaliation Fund Be Funded?

- An employer found to have unlawfully retaliated against a worker who received support from the fund should be required to replenish the fund with triple the amount of financial support withdrawn from the fund, much in the same way that a growing number of states and cities require employers to pay treble damages for wage theft.¹⁹
- Additionally, a state or local enforcement agency can consider directing funds recovered through wage theft enforcement and not collected by workers to the retaliation fund.
- A state or local agency can explore different funding models based on their unique authority and local conditions.
- State or localities could also add a nominal retaliation fund surcharge (e.g., 2%) to business license and permit fees.

What Safeguards Should the Retaliation Fund Put in Place to Avoid Perceived Fraud or Abuse?

- While nothing would suggest that the proposed retaliation fund would be vulnerable to abuse by workers, some may inquire about what safeguards can be put in place to avoid fraud.
- The fund should only be available to workers who have filed a wage theft complaint. Agencies can retain their existing discretion over whether to investigate each and every complaint.
- If a worker is found to have intentionally lied or fabricated evidence by the agency in the course of investigating a wage theft or retaliation complaint, the agency could revoke that worker's eligibility for all future support from the fund.
- The agency could retain discretion over whether to investigate any individual suspected of engaging in fraud or abuse in order to receive funds.

Establishing Community Partnerships for Success

- Worker leaders, advocates, academics, and others with experience addressing wage theft and retaliation have long emphasized the need for enforcement agencies to form close partnerships with local community-based organizations. Any state or local enforcement agency establishing a retaliation fund as part of an enforcement strategy must consider how engagement with community organizations can support the implementation of the fund, including through grants and formal agreements to allow community-based groups to conduct outreach, education, help process complaints and requests for funding, and so forth.

Applying a Retaliation Fund Beyond Wage Theft

- The retaliation fund could address retaliation in contexts other than wage theft. For example, it could apply to retaliation in cases involving paid sick leave, fair scheduling, discrimination, just-cause dismissal, health and safety, and other workplace rights. Wage theft could be a place to start.

C. A Retaliation Fund Would Build Upon Existing Public and Private Hardship Funds

The concept of a retaliation fund is not new. Worker organizations and communities have long implemented a wide variety of hardship funds to support workers and neighbors in need. And a number of groups like New Labor in New Jersey have set up funds to support members who experience financial hardship, such as when an individual requires help with funeral expenses or loses a job.²⁰

During the COVID-19 pandemic, cities and states, such as Washington, D.C.,²¹ Boston,²² New York City,²³ Atlanta,²⁴ San Antonio,²⁵ and Tucson,²⁶ have also leveraged the power of inclusive, quickly accessible hardship funds to support individuals and families impacted by the COVID-19 crisis. These funds have helped advance important public health priorities in the way that a retaliation fund could help advance important labor enforcement priorities around wage theft and retaliation. And prior to the pandemic, states and localities proved that state and local governments can establish and/or administer a variety of funds that support workers and others facing hardship as part of their labor standards, public health, criminal justice, and other roles. The federal Emergency Food and Shelter Program,²⁷ for example, distributes funds to local governments that then oversee the distribution of funds through partnerships with private non-profit organizations. All states operate a crime victims compensation fund for crime-related expenses, such as medical costs, mental health counseling, lost wages, funeral expenses, and more.²⁸ California has established funds for garment workers (Garment Restitution Fund)²⁹ and car wash workers (Car Wash Worker Restitution Fund)³⁰ that allow workers to recover owed wages when their employers close their doors, declare bankruptcy, or otherwise fail to pay their workers; and Maine (Maine Wage Assurance Fund)³¹ and Oregon (Wage Security Fund)³² have established similar programs that are not industry-specific.

D. Limitations of a Retaliation Fund and Potential Applications Beyond Wage Theft

A retaliation fund to address the financial risks of exposing wage theft would, of course, constitute only one part of the solution to retaliation. Consultation with worker advocates around the country found strong support for implementing such funds as part of an ongoing effort to test, evaluate, and build upon new and existing policies that center workers' voices and needs.

A significant limitation of any retaliation fund, as outlined here, would be its inability to directly address immigration-based retaliation and threats of such retaliation. As long as our immigration laws allow employers to play a role in immigration enforcement and insist on the fiction that depriving workers of employment authorization will keep them from working, countless employers will use immigrants' fear of deportation to violate labor laws.³³ This, of course, drives down wages and conditions for all workers, and employers are forced to compete in a race to the bottom. Consequently, any effort by a labor enforcement agency to effectively enforce workplace rights must include a careful and robust process to support workers who may be eligible for U visas and other immigration relief. Where an employer threatens to retaliate on the basis of immigration status or workers' ability to assert their rights is otherwise threatened because of their immigration status, enforcement agency staff must also be trained and ready to help a worker secure protection, including seeking prosecutorial discretion from immigration enforcement.³⁴

A retaliation fund also would not address the common practice of employers involving law enforcement to intimidate workers and potentially subjecting a worker to a biased, unjust criminal legal system.³⁵ And a retaliation fund would not address the common fear in many communities and industries that an employer will blacklist a worker who exercises their rights, nor address the risk of other subtle forms of retaliation, such as reassigning a worker to another position or shift, subjecting a worker to a new level of scrutiny or criticism, harassing a worker, and more. These and other forms of retaliation demand additional attention and targeted policy solutions alongside workers' advocacy, in addition to deeper structural change that will ensure workers have true power over the conditions of their jobs so that wage theft does not happen in the first place.

Despite its limitations, because workers commonly see the risk of being fired and losing income as a top deterrent for exercising their rights, a retaliation fund has the potential to make a significant difference as one tool in the wage theft enforcement toolbox. In addition, while this paper is focused on the potential of a retaliation fund to address wage theft, retaliation plagues enforcement of every labor standard. A retaliation fund could help agencies enforce any other workplace laws under their jurisdiction, including paid leave, fair scheduling, workplace health and safety, discrimination, and more.



Conclusion

Retaliation and the threat of retaliation have long stymied efforts to end wage theft and ensure that employers pay workers every cent they are owed. Policymakers must go beyond the existing framework for responding to retaliation.

This paper has sought to highlight one particularly glaring gap in labor enforcement landscape: the failure to provide workers with meaningful financial support immediately after retaliation happens and they lose some or all of their pay. The potential financial implications of losing one's job or pay, even for a short period of time, can be devastating and so understandably keep countless workers from asserting their rights. To fill this gap and reduce one of the most significant personal risks that workers currently bear in enforcing our labor standards, state and local agencies should urgently consider incorporating a retaliation fund like that proposed here into their broader enforcement strategy.

The more than 30 experts in wage theft and worker advocacy whom NELP consulted across the country in compiling this proposal all saw potentially substantial benefits from a retaliation fund. Researchers, worker leaders, and other worker advocates can support pilot programs to ensure that these funds effectively complement the much larger effort to combat retaliation and elevate worker voices so that workers' hard-won rights can become a reality for all. NELP is eager to engage with and offer support to anyone interested in establishing a retaliation fund as part of an agency enforcement agenda.



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Endnotes

¹ Wage theft generally refers to the practice of depriving workers of the minimum wage, overtime, tips, and other pay protections. See, e.g., Wagetheft.org, Frequently Asked Questions, <https://www.wagetheft.org/faq> (last viewed April 2, 2021).

² Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities* 5 (2009) (hereinafter "*Broken Laws, Unprotected Workers*"), <https://s27147.pcdn.co/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf>; see also David Cooper & Teresa Kroeger, Economic Policy Institute, *Employers Steal Billions From Workers' Paychecks Each Year* 1 (May 2017), <https://www.epi.org/publication/employers-steal-billions-from-workers-paychecks-each-year/> (finding in this 2017 study that in the ten most populous states, 2.4 million workers, or about 17 percent of workers eligible for the minimum wage, lose \$8 billion dollars from only minimum wage violations).

³ Women were significantly more likely than men to experience minimum wage violations at a rate of 30 percent versus 20 percent for men. *Broken Laws, Unprotected Workers* at 42. Latina women workers experienced minimum wage violations at a rate of 40 percent (versus 24 percent for their male counterparts), and African-American workers "had a violation rate three times that of white workers." *Id.* at 43. Foreign-born workers (31 percent) experienced minimum wage violations at almost twice the rate of their U.S.-born counterparts. *Id.* at 42.

⁴ The seminal 2009 survey of workers finding that more than two-thirds had experienced a pay related violation in the previous week also found that one in five workers "reported that they had made a complaint to their employer or attempted to form a union in the last year." *Id.* at 3. Of those, "43 percent experienced one or more forms of illegal retaliation from their employer or supervisor." *Id.* Twenty percent of workers surveyed did not make a complaint to their employer during that period "even though they had experienced a serious problem such as dangerous working conditions or not being paid the minimum wage" because they feared retaliation in the form of wage or hours cuts or thought it would not make a difference. *Id.* NELP's [2019 report](#) on retaliation offers a glimpse of a number of other studies confirming the prevalence of retaliation and fear of retaliation in the workplace. Laura Huizar, National

Employment Law Project, *Exposing Wage Theft Without Fear: States Must Protect Workers from Retaliation* 4–6 (June 2019) (hereinafter "*Exposing Wage Theft Without Fear*"), <https://s27147.pcdn.co/wp-content/uploads/Retal-Report-6-26-19.pdf>.

⁵ *Exposing Wage Theft Without Fear* at 4–6.

⁶ *Id.* at 13.

⁷ Elise Gould & Valerie Wilson, Economic Policy Institute, *Black Workers Face Two of the Most Lethal Preexisting Conditions for Coronavirus—Racism and Economic Inequality* (June 2020), <https://www.epi.org/publication/black-workers-covid/>; Fwd.us, *Immigrant Essential Workers Are Crucial to America's COVID-19 Recovery* (Dec. 2020),

<https://www.fwd.us/wp-content/uploads/2020/12/FWD-essential-worker-report-FINAL-WEB.pdf>; Hye Jin Rho et al., Center for Economic and Policy Research, *A Basic Demographic Profile of Workers in Frontline Industries* (Apr. 7, 2020), <https://cepr.net/a-basic-demographic-profile-of-workers-in-frontline-industries/>.

⁸ *Exposing Wage Theft Without Fear* at 19–25.

⁹ See, e.g., U.S. Department of Labor Office of Inspector General—Office of Audit, *COVID-19: OSHA Needs to Improve its Handling of Whistleblower Complaints During the Pandemic* 6 (Aug. 2020), [https://www.oig.dol.gov/public/reports/oa/v](https://www.oig.dol.gov/public/reports/oa/viewpdf.php?r=19-20-010-10-105&y=2020)

[iewpdf.php?r=19-20-010-10-105&y=2020](https://www.oig.dol.gov/public/reports/oa/viewpdf.php?r=19-20-010-10-105&y=2020) (finding in a report assessing OSHA performance during the COVID-19 pandemic that OSHA took an average of 279 days to close a whistleblower investigation). Data capturing the length of time it takes the U.S. Department of Labor's Wage and Hour Division to resolve a complaint (not specific to retaliation complaints) shows that in FY 2019, it took the Division an average of 92 days to resolve a complaint and that in FY 2020, it took the agency an average of 76 days to resolve a complaint. U.S. Department of Labor, Wage and Hour Division, WHD: All Acts, <https://www.dol.gov/agencies/whd/data/charts/all-acts> (last viewed Apr. 12, 2021). The Equal Employment Opportunity Commission publishes that the agency takes "approximately 10 months to investigate a charge." U.S. Equal Employment Opportunity Commission, *What You Can Expect After You File a Charge*, <https://www.eeoc.gov/what-you-can-expect-after-you-file-charge> (last viewed Apr. 1, 2021). Also, even in a state like California, where state law sets a deadline for the California Division of Labor Standards Enforcement (DLSE) to issue a decision on a retaliation claim, DLSE has up one year to issue a decision—and this would not include

the additional period that it would take for an employer to actually pay penalties or damages. Cal. Lab. Code § 98.7 (West 2021).

¹⁰ Many unemployment programs do not offer meaningful financial support, prove difficult to apply in cases of constructive discharge, leave many workers out, including undocumented workers, and can put workers in a position where they have to repay the funds. *See, e.g.,* Michele Evermore, National Employment Law Project Blog, *Unemployment Benefit Amounts Must Be High Enough to Sustain Workers in This Crisis*, Apr. 27, 2020, <https://www.nelp.org/blog/unemployment-benefit-amounts-must-be-high-enough-to-sustain-workers-in-this-crisis/>;

EmploymentLawFirms, *What Is Constructive Discharge?*,

<https://www.employmentlawfirms.com/resources/employment/wrongful-termination/how-i-know-case-qualifies-constructive-discharge#:~:text=Constructive%20discharge%20is%20difficult%20to.have%20felt%20forced%20to%20quit.&text=Similarly%2C%20if%20an%20employee%20never.might%20not%20have%20a%20claim> (last viewed Feb. 22, 2021); Michele Evermore, National

Employment Law Project Blog, *Unemployment Benefit Amounts Must Be High Enough to Sustain Workers in This Crisis*, Apr. 27, 2020, <https://www.nelp.org/blog/unemployment-benefit-amounts-must-be-high-enough-to-sustain-workers-in-this-crisis/>; Annelies

Goger et al., Brookings, *Unemployment Insurance Is Failing Workers During COVID-19. Here's How to Strengthen It* (Apr. 6, 2020), <https://www.brookings.edu/research/unemployment-insurance-is-failing-workers-during-covid-19-heres-how-to-strengthen-it/>; Gillian Friedman, *Jobless Benefits Saved Them, Until States Wanted The Money Back*, NYTimes, Dec. 11, 2020,

<https://www.nytimes.com/2020/12/11/business/economy/unemployment-benefit-payback.html>.

¹¹ *Exposing Wage Theft Without Fear* at 14.

¹² *See Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

¹³ California, for example, made news when Governor Brown signed SB 306 into law, allowing the California Labor Commissioner to seek a preliminary injunction during an investigation as opposed to only after an investigation is complete. *See, e.g.,* Davis Wright Tremaine LLP, *New California Law Raises the Stakes in Labor Commissioner Investigations and Whistleblower Suits*, JDsupra, Oct. 17, 2017,

<https://www.jdsupra.com/legalnews/new-california-law-raises-the-stakes-in-90245/>;

Lisa Nagele-Piazza, *Expansive California Workplace Retaliation Law Takes Effect Soon*, SHRM, Nov. 13, 2017,

<https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/expansive-california-workplace-retaliation-law-takes-effect-soon.aspx>.

¹⁴ Board of Governors of the Federal Reserve System, *Report on the Economic Well-Being of U.S. Households in 2018 – May 2019*, <https://www.federalreserve.gov/publications/2019-economic-well-being-of-us-households-in-2018-dealing-with-unexpected-expenses.htm> (last viewed Feb. 22, 2021).

¹⁵ *See, e.g.,* The PEW Charitable Trusts, *The Role of Emergency Savings in Family Financial Security: What Resources Do Families Have for Financial Emergencies?* 2 (Nov. 2015), <https://www.pewtrusts.org/-/media/assets/2015/11/emergencysavingsreportnov2015.pdf> (stating that “[t]he typical white household has slightly more than one month’s income in liquid savings, compared with just 12 days for the typical Hispanic household and only five days for the typical African-American household,” and explaining that “a quarter of black households would have less than \$5 if they liquidated all of their financial assets, compared with \$199 and \$3,000 for the bottom 25 percent of Hispanic and white households, respectively.”)

¹⁶ *See, e.g.,* Janice Fine, *New Approaches to Enforcing Labor Standards: How Co-Enforcement Partnerships Between Government and Civil Society Are Showing the Way Forward*, 2017 U. Chi. Legal F. 143 (2017); Janice Fine et al., Washington Center for Equitable Growth, *Strategic Enforcement and Co-Enforcement of U.S. Labor Standards Are Needed to Protect Workers Throughout the Coronavirus Recession* (Jan. 14, 2021),

<https://equitablegrowth.org/strategic-enforcement-and-co-enforcement-of-u-s-labor-standards-are-needed-to-protect-workers-through-the-coronavirus-recession/> (see discussion under “Involve worker organizations to improve workforce training”); Cailin Dejillas & Jenn Round, CLASP and Rutgers School of Management and Labor Relations Center for Innovation in Worker Organization, *Tool 7: Sharing Information with Community Organizations* (Sept. 2019), https://smlr.rutgers.edu/sites/default/files/2019_sharinginformation.pdf.

¹⁷ A labor enforcement agency implementing a retaliation fund should also consider how it can collaborate with other enforcement agencies to ensure that workers can obtain support even when a worker ultimately finds that they must transfer their complaint to

another agency (e.g., because the work took place across state or city boundaries).

¹⁸ Economic Policy Institute, Family Budget Calculator, <https://www.epi.org/resources/budget/> (last viewed Apr. 1, 2021).

¹⁹ National Employment Law Project, *Winning Wage Justice: An Advocate's Guide to State and City Policies to Fight Wage Theft* 19–20 (Jan. 2011), <https://s27147.pcdn.co/wp-content/uploads/2015/03/WinningWageJustice2011.pdf>.

²⁰ Based on NELP interviews with organizations.

²¹ Government of the District of Columbia, DHCD Tenant-Based Rental Assistance Program, <https://coronavirus.dc.gov/page/dhcd-tenant-based-rental-assistance-program> (last viewed Apr. 12, 2021).

²² City of Boston, Boston Resiliency Fund, <https://www.boston.gov/departments/treasury/boston-resiliency-fund> (last viewed Apr. 12, 2021).

²³ City of New York, COVID-19 Emergency Relief Fund, <https://www1.nyc.gov/site/fund/initiatives/covid-19-emergency-relief-fund.page#:~:text=With%20the%20outbreak%20and%20spread,seismic%20shift%20in%20daily%20life.&text=In%20response%2C%20Mayor%20de%20Blasio,care%20workers%20and%20essential%20staff> (last viewed Apr. 12, 2021).

²⁴ City of Atlanta, Press Releases, Mayor Keisha Lance Bottoms Announces Atlanta COVID-19 Emergency Rental Assistance Program through United Way (Aug. 20, 2020), <https://www.atlantaga.gov/Home/Components/News/News/13432/672>.

²⁵ The University of Texas at Austin, Entrepreneurship and Community Development Clinic, Direct Financial Assistance for Renters (Government-Funded), <http://sites.utexas.edu/covid19relief/directfinancialasst/> (last viewed Apr. 12, 2021).

²⁶ Pablo Lopez, *Tucson City Council Approves Additional COVID-19 Relief Funds*, KVOA.com, Dec. 1, 2020, <https://kvoa.com/news/2020/12/01/tucson-city-council-approves-additional-covid-relief-funds/>.

²⁷ United Way Worldwide, Emergency Food and Shelter National Board Program, <https://www.efsp.unitedway.org/efsp/websit/index.cfm> (last viewed Apr. 12, 2021).

²⁸ Benefits.gov, State Crime Victims Compensation, <https://www.benefits.gov/benefit/4416> (last viewed Apr. 12, 2021).

²⁹ Jennifer Lin, *Honor a Promise Made to California's Garment Workers*, California Labor Federation Labor's Edge Blog, June 17, 2019, <https://calaborfed.org/honor-a-promise-made-to-californias-garment-workers/>.

³⁰ Cal. Lab. Code § 2065 (West 2021).

³¹ Me. Rev. Stat. tit. 26, § 632.

³² Oregon Bureau of Labor & Industries, Wage Security Fund, <https://www.oregon.gov/boli/workers/Pages/wage-security-fund.aspx> (last viewed Apr. 12, 2021).

³³ See, e.g., Rebecca Smith et al., AFL-CIO, American Rights at Work Education Fund, National Employment Law Project, *Iced Out: How Immigration Enforcement Has Interfered with Workers' Rights* (Oct. 2009), https://s27147.pcdn.co/wp-content/uploads/2015/03/ICED_OUT.pdf; Daniel Costa, Economic Policy Institute, *California Leads the Way: A Look at California Laws that Help Protect Labor Standards for Unauthorized Immigrant Workers* (Mar. 22, 2018),

<https://www.epi.org/publication/california-immigrant-labor-laws/>; Tanya L. Goldman, CLASP and Rutgers School of Management and Labor Relations Center for Innovation in Worker Organization, *Tool 5: Addressing and Preventing Retaliation and Immigration-Based Threats to Workers* (Apr. 2019), https://smlr.rutgers.edu/sites/default/files/2019_addressingandpreventingretaliation.pdf.

³⁴ See Memorandum from John Morton, Director of U.S. Immigration and Customs Enforcement, to All Field Office Directors, All Special Agents in Charge, All Chief Counsel (June 17, 2011), <https://www.ice.gov/doclib/foia/prosecutorial-discretion/certain-victims-witnesses-plaintiffs.pdf>.

³⁵ See Rebecca Smith et al., AFL-CIO, American Rights at Work Education Fund, National Employment Law Project, *Iced Out: How Immigration Enforcement Has Interfered with Workers' Rights* (Oct. 2009), https://s27147.pcdn.co/wp-content/uploads/2015/03/ICED_OUT.pdf.

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