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**National Employment
Law Project**

TESTIMONY
OF
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NATIONAL EMPLOYMENT LAW PROJECT

ON
IMPLEMENTATION OF THE WAGE THEFT PREVENTION ACT

BEFORE THE
NEW YORK STATE ASSEMBLY STANDING COMMITTEE ON LABOR

NOVEMBER 21, 2013

ALBANY, NEW YORK

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Good afternoon Assembly members. Thank you for the opportunity to testify today on the implementation of the Wage Theft Prevention Act. My name is Rebecca Dixon, and I am a staff attorney at the National Employment Law Project. The National Employment Law Project is a non-profit research and advocacy organization specializing in employment policy for low-wage workers and the unemployed. 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. NELP has a more than 40 year history of promoting policies to ensure that workers are properly paid and treated fairly on the job, and that they have access to unemployment insurance benefits when they are separated from their jobs.

Through our work to raise and enforce standards for vulnerable and low-wage workers, we have seen how strong legal protections for workers combined with robust and strategic labor enforcement can go a long way towards ensuring workers get paid what they are owed, while simultaneously encouraging greater compliance throughout the affected industries, returning millions of tax dollars to state coffers, and bolstering the state's economy.

Wage theft – shortchanging workers of the wages they are owed – is an epidemic. It takes many forms, including being paid less than the minimum wage, working “off-the-clock” without pay, getting less than time and half for overtime hours, having tips stolen, being misclassified as an independent contractor instead of an employee, or having illegal deductions taken out of paychecks. Numerous studies document the pervasiveness of wage theft across industries, particularly in low-wage sectors.¹ A seminal 2009 report by NELP and our partners surveying nearly 4,500 low-wage workers found that 26 percent of workers were paid less than the minimum wage in their previous work week, 76 percent of those who worked more than 40 hours a week were not paid overtime, and 70 percent of workers who were required to come in early or stay after their shift ended were not paid for this “off-the-clock” work.²

NELP's research on low-wage workers in New York City³ similarly found pervasive violations of wage and hour laws:

- Fully 21 percent of surveyed workers were paid less than the legally required minimum wage in the previous workweek, and 51 percent of workers were underpaid by more than \$1 per hour.
- Of the surveyed workers who had worked over 40 hours in the previous workweek, 77 percent were not paid the legally required overtime rate by their employer.
- The study found a significant rate of “off-the-clock violations”: nearly one-third (29 percent) of surveyed workers came in early and/or stayed late after their shift during the previous workweek and 69 percent of these workers did not receive any pay at all for the work they performed outside of their regular shift.

- Over two-thirds (70 percent) of workers who were eligible for a meal break received no break at all, had their break shortened, were interrupted by their employer or worked during the break—all of which constitute a violation of meal break law.

Wage theft is seriously depressing conditions in the jobs that make our economy run. Low wage jobs, such as home care and child care workers, dishwashers, food prep workers, construction workers, cashiers, laundry workers, garment workers, security guards and janitors are expected to make up six of the 10 occupations with the largest projected growth through 2020.⁴ These workers, and many others, are cheated of the most basic protections that the rest of us take for granted. Wage theft in New York is not incidental, aberrant or rare, committed by a few rogue employers.

The consequences of wage theft are severe not only for workers, but also for local economies and law abiding businesses, and for taxpayers. When employers rob workers of their wages, bills go unpaid, housing situations are unstable, families have less food on their tables, and New Yorkers are not able to spend as much money to support local business in their communities.

The Wage Theft Prevention Act(WTPA) provided many of the critical tools needed to ramp up the fight against law-breaking employers to mitigate these dangerous trends that threaten our state's well-being.

First, the WTPA raised the costs to employers of violating the law by increasing the amount of liquidated damages due in a wage claim from 25% to 100% of the value of the unpaid wages, significantly (though not sufficiently) raising the stakes for violations. This reform addresses the problem that repercussions for violating the law are often not strong enough to dissuade employers and declining resources and ineffective strategies by government enforcement agencies mean that employers have little fear of getting caught. Even when they are caught, if additional damages are not added to the unpaid wages, employers only pay what they would have paid had they complied with the baseline standards to begin with, often even without interest.

Second, the WTPA has strengthened protections for workers who come forward to assert their rights by enhancing existing legal protections against retaliation. These reforms are crucial. Our national survey found that 43 percent of workers who complained to their employer about their wages or working conditions experienced retaliation.⁵ It also showed that about 20 percent of surveyed workers never made complaints in the first place, often because they fear retaliation or because they do not think it will make a difference.⁶ Employers threaten workers, demote them, or fire them when they complain or ask questions about their pay or hours. This risk is enough to discourage even the most courageous worker from filing a wage theft claim.

Third, the WTPA better arms workers to collect their unpaid wages, by stopping employers from hiding assets and defaulting on judgments.⁷ Right now, it's all too common that a worker successfully brings a wage theft claim, only to see the employer declare bankruptcy, leave

town, close shop or otherwise evade paying up. If we want workers to come forward, we have to show that we can get them their unpaid wages.

Fourth, the WTPA requires employers to produce written notice at the time of hire and annually, and a wage statement at each pay period, in the employees' primary language, with critical information about the employer, wages and benefits, enabling workers to hold employers to the promises that they have made and seek timely action if they break their commitments. Notice at the time of hire, in particular, helps workers carefully consider a job offer and gives them more certainty about their wage rate and benefits before they commit their time to an employer. Wage statements help workers ensure that they are being paid correctly for all the hours they have worked because they can double-check the employer's calculations against their own, and use the statements as support for a claim if they find a discrepancy. Requiring employers to provide contact information in both types of statements enables workers to locate their employer and collect on judgments if a dispute arises.

New York's new notice and wage statement requirements also help guard against a routine employer practice of fabricating documents in order to cover-up violations. Similarly, many employers will misclassify their employees as independent contractors without notifying the employee when he or she is hired. Workers who lack long-term employers and permanent workplaces, such as day laborers, and workers who are paid off the books, in cash, or by personal check are particularly vulnerable to these practices and stand to benefit the most from strong protections. Workers paid a per diem, flat weekly salary, or job rate, a common practice in domestic and home care, are particularly helped by the wage statement provision. Notice of the regular and overtime rate helps these workers determine what overtime premium they are due, while signaling to the workers at the outset of a new job that they are entitled to overtime in the first place.

These provisions of the WTPA and others are some common sense solutions that can turn the tables on wage theft and in the process bring much needed stimulus to our local economies. In New York City alone, more than 300,000 workers are robbed of \$18.4 million every week, totaling close to \$1 billion a year. Extrapolated to the state level, this amounts to a staggering amount of potential stimulus drained from the pockets of working families, local businesses, and state coffers.⁸

Unfortunately, absent robust and strategic enforcement by the New York Department of Labor, the WTPA's promise is at risk, jeopardizing rights for workers in New York. Our work at NELP has shown that when government fails to intervene quickly and for the full amount of wages workers are owed, we send a message to employers that *all laws* are on hold.

While public agencies are by their nature underfunded and understaffed, NY DOL has been particularly under-subsidized in recent years. Workers have paid a heavy price for this shortfall. The agency now has a backlog of 14,000 claims and workers can expect to wait many months for their claims to be processed.⁹ Attempting to address this backlog and wait time by looking back to only three years of the worker's wage history, rather than to the entire 6 year period to

which workers are entitled, as has been proposed, seriously shortchanges workers by letting employers off-the-hook for half of what they have stolen.

In addition, the NY DOL has failed to use its resources strategically, as it has in the past, to have the broadest impact, by collaborating with community and workers' rights organizations, proactively investigating problem industries and workplaces, and coordinating with other state and federal agencies.

NY DOL can more effectively deliver justice to the state's workers by adopting the following policies, many of which it has followed with success in the past:

- Target low-wage industries with persistent violations of bedrock labor standards, like minimum wage and overtime, and health and safety; keep track of violations; conduct audits and investigations not solely based on worker complaints; and report on progress. Construction, day labor, domestic and home care are among the industries in New York with rampant violations. NY DOL has done this in the past, and should return to these strategically targeted enforcement efforts.
- Seek more funding for more investigators, or reallocate existing funding to hire more investigators who speak a language other than English and who can investigate the extent of workplace standards in key sectors to make recommendations on fixing these problems.
- Actively partner with community groups and worker centers that have contacts in the local communities; develop plans for addressing the worst abuses in concert with the groups, who are the "eyes and ears" of the workers and can similarly facilitate information flow to NYDOL. NY DOL has collaborated with worker advocates and should reestablish these partnerships to make efficient use of limited resources.
- Use NY DOL enforcement resources strategically to get at repeat violations, including going after "joint employers" in subcontracting jobs, where multiple levels of potentially responsible employers diffuse lines of responsibility for fair pay.
- Collaborate with US DOL to combat independent contractor misclassification. NY DOL and Attorney General Eric Schneiderman just announced this week that it will become the 15th state to sign a memorandum of understanding with the US DOL to share information and coordinate enforcement efforts to curb the practice of businesses shortchanging employees by misclassifying them as independent contractors. These collaborations have been crucial to stemming independent contractor abuses and should remain a priority for NY DOL and its Joint Enforcement Taskforce.¹⁰
- Reaffirm that in cases where the employer has not kept adequate records of hours worked and pay received, NY DOL will accept credible worker testimony on hours and

pay, as established in the Supreme Court case *Anderson v. Mt. Clemons Pottery Co.*, 328 U.S. 680 (1946). Seek full liquidated damages and back wages for the full six-year statute of limitations so that employers fear getting caught by NY DOL and do not consider nonpayment a risk worth taking. Ensure that workers filing claims with NY DOL can recover the full amount of what they are owed and are not unfairly limited by the recent NY DOL policy of only seeking recovery for two years of back wages, ostensibly due to lack of employer records; records those employers are required to retain under NYLL.

Adopting these policies and vigorously enforcing New York's workplace laws will make a difference in the wage levels of more than just the workplaces it chooses to investigate. Workplace enforcement of basic fair pay laws should be at a level to send a message that New York will not tolerate non-payment and underpayment for work.

¹ Nat'l Employment Law Project, *Winning Wage Justice: A Summary of Research on Wage and Hour Violations in the United States*, National Employment Law Project (January 2012) (compiling dozens of studies from across the country), available at <http://www.nelp.org/page/-/Justice/2012/WinningWageJusticeSummaryofResearchonWageTheft.pdf>.

² Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*, Center for Urban Economic Development at the University of Illinois-Chicago, Nat'l Employment Law Project & UCLA Institute for Research on Labor and Employment (September 2009), available at <http://www.nelp.org/page/-/brokenlaws/BrokenLawsReport2009.pdf?nocdn=1>.

³ Annette Bernhardt et al., *Working Without Laws: A survey of Labor and Employment Law Violations in New York City*, Center for Urban Economic Development at the University of Illinois-Chicago, Nat'l Employment Law Project & UCLA Institute for Research on Labor and Employment (September 2010), available at http://nelp.3cdn.net/990687e422dcf919d3_h6m6bf6ki.pdf.

⁴ U.S. Dept. of Labor, Bureau of Labor Statistics Employment Projections, *Occupations with the largest job growth*, http://www.bls.gov/emp/ep_table_104.htm.

⁵ Bernhardt et al., *Broken Laws, Unprotected Workers*, 25.

⁶ Id., 24.

⁷ See, Eunice Hyunhye Cho, et al., *Hollow Victories: the Crisis in Collecting Unpaid Wage for California's Workers* (2013), available at http://nelp.3cdn.net/f6fc363a30266f0cd3_pzm6id1xa.pdf.

⁸ Bernhardt et al., *Working Without Laws*, 26.

⁹ Jim Dwyer, *Exhausted Workers Recall Minimal Efforts to Enforce a Minimum Wage Law*, New York Times (November 7, 2013), available at <http://www.nytimes.com/2013/11/08/nyregion/exhausted-workers-recall-minimal-efforts-to-enforce-a-minimum-wage-law.html? r=2&>

¹⁰ See, for example, *Annual Report of the Joint Enforcement Task Force on Employee Misclassification* (February 1, 2013), available at <http://www.labor.ny.gov/agencyinfo/PDFs/Misclassification-Task-Force-Report-2-1-2013.pdf>.