NATIONAL EMPLOYMENT LAW PROJECT

Model Bill to Protect Workers Who Experience Wage Theft from Retaliation

Bill Language	Commentary
Section 1. Definitions (a) "Employer" means any individual, partnership, association, corporation, business trust, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee. (b) "Employee" means any individual employed by an employer, including temporary employees and part-time employees. (c) "Employ" includes to suffer or permit to work. (d) "Commissioner" means the commissioner of labor or attorney general or district attorney. (e) "Complaint" includes but is not limited to any written or oral complaint, claim, or assertion of right by an employee, regarding the payment of wages as required under a local, state, or federal law, that is discussed with or made to: (1) the employer or a supervisor; (2) manager; (3) foreman employed by the employer; (4) an individual with apparent authority to alter the terms or conditions of the complainant's employment;	• This bill language is drafted to address retaliation against employees who have not been paid according to local, state, or federal laws governing the payment of wages. Advocates and policymakers can consider expanding coverage to include protection for independent contractors and gig economy workers who may not be covered under traditional wage payment laws. • The definitions for "employer," "employee," and "employ" are drafted to reflect the broad understanding of these terms under the current federal Fair Labor Standards Act and many state laws governing wages. NELP recommends adopting this language in order to ensure a broad understanding of these terms and proper accountability. • States may differ when it comes to which enforcement agencies or offices should have jurisdiction to address retaliation and labor issues. Because many state agencies are under-resourced or may not be able to prioritize retaliation complaints at any given point or may differ in their enforcement strategy, advocates and policymakers should consider giving more than one entity enforcement authority.

(5) a local, state, or federal agency; (6) a court; and (7) an elected official or their staff. (f) "Adverse action" means: (1) discharge; (2) demotion; (3) willfully preventing or attempting to prevent an individual from securing other employment by word, writing, or any other action; (4) harassment; (5) reduction in employee hours; (6) reduction in employee pay; (7) reporting an employee or former employee's suspected immigration or work authorization status, or the suspected immigration or work authorization status of a family member of the employee or former employee, to a federal, state, or local agency; (8) any other action taken against an employee or any other person for exercising or attempting to exercise any right to the payment of wages as required under a local, state, or federal law if that action would dissuade a reasonable employee from making a complaint, bringing an action or proceeding, or participating in an action or proceeding, concerning the right to the payment of wages as required under a local, state, or federal law; (9) the threat to subject an employee or any other person to any of the above actions in paragraphs (1)-(8) because the employee or person has exercised, or is expected to exercise, any right to the payment of wages as required under a local, state, or federal law.	• "Complaint is carefully defined here to include both written and oral complaints, something not all courts or states may agree upon currently. It also specifically covers complaints made to people or entities other than enforcement agencies to capture the reality of how workers exercise their rights and ensure that as many workers as possible receive the protection they need. • "Adverse action" is defined more specifically in this model than in most state retaliation laws. This language is meant to ensure that the statute's retaliation protections apply clearly to the common forms of retaliation that workers face. A detailed definition like this one grounded in workers' experiences can help avoid long and costly court fights over the meaning of "retaliation" or "adverse action," such as whether the statute covers "threats" of retaliation or whether it applies to unforeseen types of retaliation that would nevertheless dissuade a reasonable employee from exercising their rights.
Section 2. Retaliation Prohibited (a) An employer or other person may not take an adverse action against an employee or other person because: (1) the employee makes a complaint that the employee	• As drafted, this provision makes retaliation unlawful when it arises out of an employee's attempt to exercise their *wage payment* rights. It could be expanded to cover retaliation when a worker exercises other basic workplace rights, such as those tied to health and safety, discrimination, and child

has not been paid in accordance with local, state, or federal laws governing the payment of wages, or the employer or other person believes that the employee has made or plans to make such a complaint; (2) the employee or person has participated, or is preparing to participate, in an investigation, action, or proceeding related to the employer's payment of wages as required under local, state, or federal law, or the employer or other person believes that an employee or person has participated or is expected to participate in such an investigation, action, or proceeding; (3) the employee or person assisted any employee in making a complaint related to violations of local, state, or federal laws governing the payment of wages, or the employer or other person believes that an employee or person has provided or intends to provide such assistance; (4) the employee has been informed by or has informed another employee about their rights under local, state, or federal laws governing the payment of wages, or the employer or other person believes that an employee has been informed or may be informed about such rights, or the employer or other person believes that an employee has informed or may inform another employee about such rights; (5) an employee or person has opposed any practice of the employer that the employee or person reasonably believes is unlawful under local, state, or federal laws governing the payment of wages, or the employer or other person believes that an employee or person has or may oppose such practices; (6) an employee has served on or testified before a wage board or has been active in its formation;	labor. It could also be expanded to cover situations involving independent contractors. • This provision describes in more detail than most current state retaliation laws what kind of conduct will trigger the law's retaliation protection. This detailed language is meant to expressly cover the conduct that workers often engage in, or want to engage in, but that workers fear will result in retaliation. Some of this conduct, such as the filing of a complaint, is protected by most existing state retaliation laws, but a court or agency may not consider other types of conduct to be protected unless it is clearly spelled out here (e.g., educating other employees about their rights or participating in a government hearing, such as a city council hearing, on a proposed workplace policy). • In addition, this language clearly covers situations where an employer "believes" that an employee "may" engage in the protected conduct. Various state retaliation laws already include this type of language, reflecting the importance of protecting workers even when they have not technically yet engaged in the protected conduct but their employer retaliates in anticipation of it. *See, e.g.*, Cal. Lab. Code § 1102.5 (West 2019); Colo. Rev. Stat. Ann. § 8-6-115 (West 2019); Conn. Gen. Stat. Ann. § 31-69 (West 2019); Mass. Gen. Laws Ann. ch. 151, § 19 (West 2019); Mich. Comp. Laws Ann. § 408.421 (West 2019); N.D. Cent. Code Ann. § 34-06-18 (West 2020); 43 Pa. Stat. Ann. § 333.112 (West 2019); Vt. Stat. Ann. tit. 21, § 348 (West 2019).

(7) an employee has participated in or intends to participate in any hearing, proceeding, or public event related to laws or proposals concerning the payment of wages or mandated workplace protections; (8) an employee or person has otherwise exercised or attempted to exercise their rights under local, state, or federal laws governing the payment of wages, or the employer or other person believes that the employee or person has otherwise exercised, attempted to exercise, or will exercise such rights. (b) The protections afforded by this act shall apply to any person who mistakenly but in good faith alleges violations of local, state, or federal laws governing the payment of wages.	
Section 3. Presumption of Retaliation If an employer or other person takes an adverse action against an employee or person within 90 days of the employee or person's engagement or attempt to engage in the activities protected by Section 2, such conduct shall raise a presumption that the action is retaliation, in violation of this act. The presumption may be rebutted by clear and convincing evidence that the action was taken for other permissible reasons.	• Proving retaliation is very difficult for workers. Courts and enforcement agencies generally engage in a detailed, fact-specific inquiry where the burden often shifts from the employee initially, to the employer, and back to the employee. • To make it easier for workers who experience retaliation to bring a complaint against their employer as well as easier for enforcement agencies to investigate, NELP recommends including a presumption of retaliation in the retaliation protection law. With this presumption, as long as a worker alleges that retaliation occurred within 90 days of the worker engaging in protected conduct, it is the employers and not the workers who must carry the principal burden of proof at the outset. • Arizona, New Jersey, and the District of Columbia have adopted presumption of retaliation provisions. Ariz. Rev. Stat. Ann. § 23-364(B)(2019); N.J. Stat. Ann. § 34:11-4.10 (West 2019); D.C. Code. Ann. § 32-1311(b) (West 2019). Various local laws have similarly adopted presumption of retaliation language. *See, e.g.*, San Francisco, Cal., Admin. Code, ch. 12R,

	§12R.6 (2019); Santa Fe, N.M., Code, ch. XXVIII, § 28-1.6(B) (2019); Los Angeles, Cal., Mun. Code, ch. XVIII, art. 8, § 188.03 (2019); Berkeley, Cal., Code, tit. 13, ch. 13.99, § 13.99.070 (2019); Flagstaff, Ariz., Code, tit. 15, ch. 15-01, § 15-01-001-0005 (2019); Minneapolis, Minn., Code, ch. 40, art. V, § 40.590 (2019); Seattle, Wash., Code tit. 14, ch. 14.19, § 14.19.055 (2019).
Section 4. Civil Enforcement **(a) Administrative Enforcement.** (1) On the request of an individual by phone, online, in person, or in writing, the commissioner may conduct an inspection or investigation concerning alleged violations of this act. The commissioner may also, with or without receiving a complaint, commence investigating an employer or person that it suspects to have violated this act. (2) An aggrieved employee or other person may bring an administrative complaint to enforce this act no later than three years after the party knows or should have known a violation occurred, and such action may encompass all violations that occurred as part of a continuing course of employer conduct regardless of their date. However, the limitations period does not run during the pendency of any administrative proceeding brought pursuant to Section 4(a) of this act. (3) The commissioner, during the course of an investigation pursuant to this act, upon finding reasonable cause to believe that any person has engaged in or is engaging in a violation, may petition the court with jurisdiction over the area in which the violation in question is alleged to have occurred or in which the person resides or transacts business, for	• It is important to create a strong and effective civil enforcement process for workers who experience retaliation, including access to both an administrative agency and the courts. For more information on why access to both of these enforcement options is crucial for workers, see Laura Huizar, NELP, *Exposing Wage Theft Without Fear: States Must Protect Workers from Retaliation* (June 2019). • Enforcement agencies should be required to accept retaliation complaints, whether written or submitted by phone, orally, or online. Enforcement agencies should also clearly have the power to investigate a case even without receiving a complaint. This enables strategic enforcement where an agency can act based on evidence of wrongdoing even when workers are unable or too scared to come forward (e.g., by relying on industry reports, worker advocate reports, etc). For more information on strategic enforcement, see, for example, Tanya L. Goldman, CLASP, *Tool 4: Introduction to Strategic Enforcement* (Aug. 2018). • A statute of limitations is a deadline within which to bring a legal action or complaint. Oftentimes, workers do not know their rights when they have been violated or hesitate to file claims for fear of retaliation. Many employers also continually make false promises to pay workers their owed wages or correct another violation, leading workers to delay complaints. NELP recommends giving workers at least three years to file a retaliation complaint. *See, e.g.*, Ariz. Rev. Stat. Ann. § 23-364 (2019) (2 or 3 years); Colo. Rev. Stat. Ann. § 8-4-122 (West 2019) (2 or 3 years); Fla. Const. art. X, § 24 (4 or

appropriate temporary or preliminary injunctive relief, or both temporary and preliminary injunctive relief. Upon filing of a petition pursuant to this paragraph, the commissioner shall cause notice of the petition to be served on the person, and the court shall have jurisdiction to grant temporary injunctive relief as the court determines to be just and proper. In addition to any harm resulting directly to an individual from a violation of this act, the court shall consider the chilling effect on other employees asserting their rights under local, state, and federal laws governing the payment of wages in determining if temporary injunctive relief is just and proper. (4) If an employee or person has been retaliated against, discriminated against, or faced adverse action for raising a claim of retaliation prohibited by this act, a court shall order appropriate injunctive relief on a showing that reasonable cause exists to believe that an employee has been retaliated against, discriminated against, or faced adverse action for raising a claim of retaliation or asserting rights under this act. The temporary injunctive relief shall remain in effect until the commissioner issues a determination or citations or at a time set by the court. Afterwards, the court may issue a preliminary or permanent injunction if it is shown to be just and proper. Any temporary injunctive relief shall not prohibit an employer from disciplining or terminating an employee for conduct that is unrelated to the claim of retaliation. (5) Notwithstanding any other law, injunctive relief granted pursuant to this section shall not be stayed pending appeal. (6) The name(s) of the complainant and any employee identified in a complaint to the commissioner shall be kept confidential unless the commissioner	5 years) (2019); 735 Ill. Comp. Stat. Ann. 5/13-206 (West 2019) (10 years); Mass. Gen. Laws Ann. ch. 151, § 20A (West 2019) (3 years); N.H. Rev. Stat. Ann. § 275-E:2 (2019); N.J. Stat. Ann. § 34:11-56a25.1 (West 2019) (6 years). • Speed is critical when addressing retaliation. Advocates and enforcement officials around the country understand this from extensive experience. Taking action to correct retaliation as soon as possible after it happens is understood to lead to better outcomes for workers. As a result, it is important to ensure that enforcement agencies have the power they need to stop retaliation as soon as possible. Enforcement agencies should not have to wait until after they have conducted their entire investigation into retaliation and issued an order finding retaliation to order critical relief for workers. This model bill incorporate language adopted by California in 2017 to expressly give the California Labor Commissioner the power to go to court as soon as the agency believes that retaliation has occurred in order to ask the court for preliminary injunctive relief, such as reinstatement or an order to stop the retaliatory conduct. See California Legislative Information, SB-306 Retaliation action: complaints: administrative review (Oct. 4, 2017). Advocates and policymakers focused on strengthening retaliation protections should assess their particular enforcement agency's powers to ensure that the agency can pursue swift relief for workers, and they may consider model language like that adopted through California's SB 306 bill. • Workers often fear coming forward with wage theft as well as retaliation claims. Even if some retaliation has occurred, workers may fear additional retaliation. Enforcement agencies handling retaliation complaints should allow workers to file anonymously and also allow third parties, such as a worker advocacy organization, to file a complaint and alert the agency of wrongdoing. In addition, agencies should allow workers to keep their identities confidential as long as possible during an investigation. This language aims to do that while ensuring that the worker who filed the

determines that the employee's name must be disclosed in order to investigate a complaint further, and it may do so only with the employee's consent. (7) An employer or other person found by the commissioner to have violated this act shall be required to pay: i. compensatory damages payable to the aggrieved employee(s) or person(s) equal to twice the actual damages, including but not limited to unpaid wages and benefits; ii. punitive damages payable to each aggrieved employee(s) or person(s) of no less than $10,000; and iii. a civil fine payable to the state of not less than $1,000 per aggrieved employee or person. (8) The commissioner shall have the authority to order any other appropriate legal or equitable relief for violations of this act. (9) The commissioner may bring an action in a competent court to enforce this act. **(b) Civil Actions.** (1) An aggrieved employee or other person may bring a civil action to enforce this act no later than three years after the party knows or should have known a violation occurred, and such action may encompass all violations that occurred as part of a continuing course of employer conduct regardless of their date. However, the limitations period does not run during the pendency of any administrative proceeding brought pursuant to Section 4(a) of this act.	complaint is given an opportunity to consent to disclosure of their identity. For additional discussion of the importance of confidentiality and anonymity, see National Employment Law Project, Winning Wage Justice: An Advocate's Guide to State and City Policies to Fight Wage Theft 57 (Jan. 2011). • As discussed in more detail in NELP's 2019 report on retaliation, an effective retaliation protection law must include meaningful remedies and mechanisms deterrence. Crucially, workers should be able to recover more than just the amount of wages they may have been owed. This model language ensure that every worker is entitled to both compensatory and punitive damages in meaningful amounts. The compensatory damages are to be calculated as twice the actual damages incurred, such as lost wages, lost benefits, and other actual losses. It also requires agencies to impose a civil fine. For additional discussion of essential remedies and penalties, see Laura Huizar, NELP, *Exposing Wage Theft Without Fear: States Must Protect Workers from Retaliation* (June 2019). • See discussion of statutes of limitation above.

(2) In any civil action or administrative proceeding brought pursuant to Section 4 of this act, an employee or individual may petition the state court where the retaliation in question is alleged to have occurred, or wherein the person resides or transacts business, for appropriate temporary or preliminary injunctive relief as follows: i. Upon the filing of the petition for injunctive relief, the petitioner shall cause notice thereof to be served upon the person, and thereupon the court shall have jurisdiction to grant such temporary injunctive relief as the court deems just and proper. ii. In addition to any harm resulting directly from the violation of this act, the court shall consider the chilling effect on other employees asserting their rights under that section in determining whether temporary injunctive relief is just and proper. iii. Appropriate injunctive relief shall be issued on a showing that reasonable cause exists to believe a violation has occurred. iv. The order authorizing temporary injunctive relief shall remain in effect until an administrative or judicial determination or citation has been issued or at a time certain set by the court. Thereafter, a preliminary or permanent injunction may be issued if it is shown to be just and proper. Any temporary injunctive relief shall not prohibit an employer from disciplining or terminating an employee for conduct that is unrelated to the claim of the retaliation.	• In civil actions brought by workers, speed is as crucial as in agency actions to try and secure a successful outcome for workers. This language is adapted from SB 306, a California bill adopted in 2017. See discussion above regarding SB 306 for more details on the importance of this language.

v. Notwithstanding any other provision of law, injunctive relief granted pursuant to this section shall not be stayed pending appeal. (3) An employer or other person found by the court to have violated this act shall be required to pay the aggrieved employee(s) or person(s): i. compensatory damages equal to twice the actual damages, including but not limited to unpaid wages and benefits; and ii. punitive damages payable to each aggrieved employee(s) or person(s) of no less than $10,000. (4) The court shall have the authority to order any other appropriate legal or equitable relief for violations of this act. (5) In any judgment in favor of an employee or person under this act, and in any proceeding to enforce such a judgment, the court shall award reasonable attorney's fees and costs to a prevailing plaintiff. (6) An employee or person bringing an action under this section shall not be required to exhaust administrative remedies before bringing an action. (c) **Use of Pseudonyms.** An employee or other person alleging a violation of this act may use a pseudonym instead of the employee's or person's name in all court proceedings and records, both civil and criminal, and in all administrative records.	• See the discussion above of the importance of including strong remedies and penalties in retaliation protection laws. • Workers often fear reporting retaliation because their employer may retaliate in additional ways and/or they fear that other employers will learn of their complaint and refuse to hire them in the future. As a result, workers sometimes seek to file complaints in court using a pseudonym (e.g., Jane Doe 1) so that public court records do not disclose their identity. However, courts often deny those requests to use pseudonyms, failing to recognize the real fear that workers experience and the real threat that blacklisting poses for their

	ability to assert their rights and hold employers accountable. This language will eliminate ambiguity for workers and courts in retaliation cases, ensuring that workers have an express right to file their retaliation complaints using a pseudonym for public records. State laws in other contexts already do this. *See, e.g.*, Cal. Civ. Code § 1708.85 (West 2019) (allowing for the use of pseudonyms in cases involving certain claims of distributing without consent material that a person had a reasonable expectation would remain private and other circumstances); Nev. Rev. Stat. Ann. § 41.1396 (West 2019) (allowing the use of a pseudonym in certain cases involving pornography and minors); Colo. Rev. Stat. Ann. § 13-21-1405 (West 2019) (allowing the use of pseudonyms in certain civil cases involving the unauthorized disclosure of intimate images); Tex. Crim. Proc. Code Ann. § 57.02 (West 2019) (allowing the use of a pseudonym for certain victims of sexual offenses).
Section 5. Notice of Rights (a) Employers shall give notice to each employee at the time of hiring and on an annual basis that employees are entitled to protection from retaliation under this act. (b) The commissioner shall create and make available to employers a poster and written notice, hereinafter referred to as the "notice," which contains the information required under subsection (a) of this section for their use in complying with this section. The poster shall be printed in English, Spanish, and all languages spoken by more than five (5) percent of the workforce in the state (as calculated by the commissioner), and any other language that the commissioner determines is needed to notify employees of their rights under this act. (c) Employers may comply with this section by displaying the poster in a conspicuous and accessible place in each establishment where employees are employed, if applicable. An employer that provides an employee handbook to its	• In order to ensure that workers understand their right to be protected from retaliation, the law should require notice to employees of those rights.

employees must include in the handbook the notice of rights required under this section.	
Section 6. Criminal Penalties (a) An employer or person who willfully violates this act shall be punished by a fine of not more than $25,000 or by imprisonment for not more than one year for a first offense, or by both such fine and imprisonment, and for a subsequent willful offense a fine of not more than $50,000, or by imprisonment for not more than two years, or by both such fine and such imprisonment.	• Advocates and policymakers may wish to consider including a criminal provision making retaliation unlawful under criminal law, in addition to civil law. This language is modeled generally after Mass. Gen. Laws Ann. ch. 149, § 27C (West 2019).

NELP is available to work with advocates in developing specific language for any retaliation protection statute or local ordinance. Please contact nelp@nelp.org.