



## **Testimony of Najah Farley**

National Employment Law Project

# **In Support of Proposed SB 641/HB 1097 Maryland Worker Wage Protection Act**

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## **Hearing before the Maryland House of Delegates**

Committee on House Economic Matters  
6 Bladen Street  
Annapolis, MD 21401

March 3, 2020

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Thank you Chair Delegate Dereck E. Davis and Vice Chair Delegate Kathleen Dumais for this opportunity to submit testimony in support of the Maryland Worker Wage Protection Act. My name is Najah A. Farley and I am a Senior Staff Attorney at the National Employment Law Project (NELP). NELP is a non-profit, non-partisan research, policy and advocacy organization specializing in labor and employment policy. NELP works throughout the country, in partnership with federal, state, and local advocates and lawmakers to improve conditions for workers. 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 theft and wage and hour 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 offer a few suggestions for the legislation being considered.

I. The Proposed Retaliation Provisions Will Protect Maryland Workers through Stronger Anti-Retaliation Provisions and a Private Right of Action

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.<sup>1</sup> In this testimony I will discuss the private right of action and the anti-retaliation protections, which are most relevant to the proposed bill.

Wage theft enforcement laws, because enforcement is built on a complaint model, need to build in protection from retaliation to be effective. Many other retaliation laws allow a worker to complain to government enforcement, but do not provide a private right of action, attorneys fees or costs. Leaving out these provisions makes these cases less attractive to the private bar, where the bulk of wage and hour enforcement takes place.<sup>2</sup> 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.<sup>3</sup> A civil legal needs assessment in Washington State found that

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<sup>1</sup> 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>.

<sup>2</sup> National Employment Law Project, *Winning Wage Justice: An Advocate's Guide to State and City Policies to Fight Wage Theft* (Jan. 2011) at 31-32, available at <http://www.nelp.org/content/uploads/2015/03/WinningWageJustice2011.pdf>.

<sup>3</sup> *Id.*

“only half of low-income people with employment problems were able to get advice or representation from an attorney.”<sup>4</sup> 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.”<sup>5</sup> 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.<sup>6</sup>

Retaliation can take many forms, with employers threatening to cut workers hours, changing their worksites, or even as extreme as firing or calling immigration enforcement.<sup>7</sup> Many workers cite fear of retaliation as the main reason they do not report violations in the workplace. In 2009, NELP surveyed 4,000 workers in multiple cities and found that one in 5 workers made a complaint to their employer or attempted to form a union in the past year and of those 43 percent suffered an unlawful form of retaliation from their employer or supervisor.<sup>8</sup> Another twenty percent of the workers in that study did not report serious issues in the workplace for fear of retaliation and fear that they would not receive anything in return.<sup>9</sup>

The proposed bill goes a long way to address these issues, adopting many of the reforms NELP has seen work in other states. If this bill is enacted, Maryland will also join New Jersey and Oregon in enacting newly strengthened retaliation provisions as part of their state labor laws.<sup>10</sup> The retaliation provisions in the proposed bill name and explain many different types of retaliation violations, including reductions in work hours, changes in schedule, and reporting the suspected citizenship or immigration status of an employee or family member of an employee. These broad provisions will hopefully provide a measure of safety and comfort to workers who want to report workplace violations. The proposed bill also includes private right of action remedies along with attorney’s fees and costs to make the cases attractive to attorneys in the private bar, so that even if the underlying violations are not vindicated, the retaliation case can go forward and a remedy will remain available. And as an added factor, the proposed bill enshrines both confidentiality and a rebuttable presumption for those violations that are close in time to the protected activity.

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Laura Huizar, *Exposing Wage Theft Without Fear: States Must Protect Workers from Retaliation* (June 2019), p. 4, <https://www.nelp.org/publication/exposing-wage-theft-without-fear/>.

<sup>8</sup> Annette Bernhardt, *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America’s Cities* (2009) at. 3, <https://s27147.pcdn.co/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf>.

<sup>9</sup> *Id.*

<sup>10</sup> Evandro Gigante and Arielle Kobetz, *Oregon Aims to Prevent Harassment with the Workplace Protection Act*, June 18, 2019, <https://www.lawandtheworkplace.com/2019/06/oregon-aims-to-prevent-harassment-with-the-workplace-protection-act/>; Noam Goodman and Evan D. Parness, *New Jersey enacts sweeping legislation aimed to combat employee misclassification*, LEXOLOGY, January 30, 2020, <https://www.lexology.com/library/detail.aspx?g=38db0bab-a0db-4664-899f-625a6f2a04be>.

In terms of possible places where the proposed bill could be strengthened, the statute of limitations could be lengthened. Making the statute of limitations longer would help those workers who may not know about a violation time to bring an action once they have uncovered a violation. Also, the civil penalty for repeat violations is very low relative to the harm done by employers that repeatedly violate the anti-retaliation provisions of the law. For those unscrupulous employers, such as those who violate these provisions twice in six years, a civil penalty of \$25,000 would be a more appropriate deterrent.

## II. The Proposed Posting Provisions and Independent Contractor Provisions Will Help Workers Recover Lost Wages

As discussed above, wage theft enforcement is largely dependent on workers making a complaint to the state or a private attorney. Wage theft affects up to 2.4 million workers and those workers lose an estimated \$8 billion per year in unpaid minimum wages.<sup>11</sup> The amount of total wages stolen exceeds \$15 billion each year.<sup>12</sup> Wage theft often occurs in settings where the workplace is structured without a clear employer or with various companies controlling the work, leaving workers confused about who is ultimately responsible for the working conditions. In his book *The Fissured Workplace*, Prof. David Weil, former head of the United States Department of Labor's Wage & Hour Division, describes the process by which many companies have chosen to disaggregate the labor intensive parts of their businesses.<sup>13</sup> Due to this fissuring, workers often work for various companies, and may not be aware of who their employer is, or have issues locating them. These practices leave workers confused about who is ultimately responsible, which makes enforcement on a complaint model challenging for government and workers alike.

The proposed posting requirement will eliminate many of the issues that come with this lack of transparency. Employers listing their names, addresses, and other relevant pay information will assist workers in finding out the relevant information they need to make a complaint and vindicate their rights. Providing a clear delineation of hours worked and the rate of pay for those hours is integral to alerting workers to a possible violation and giving them the information to bolster a complaint.

The incorporation of the unemployment insurance standard into the proposed bill will clarify existing law and increase transparency as well. Workers, with this clarified standard and information will be vital to allow workers to know if they fall within the employee definition more easily. In turn it will allow those who may be misclassified to get access to their full wages and benefits under the law and protect them from future wage theft violations.

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<sup>11</sup> David Cooper and Teresa Kroeger, *Employers Steal Billions from Workers' Paychecks Each Year*, ECONOMIC POLICY INSTITUTE, May 10, 2017, p. 1, <https://www.epi.org/publication/employers-steal-billions-from-workers-paychecks-each-year/>.

<sup>12</sup> *Id.* at 2.

<sup>13</sup> David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* 7-16 (2014).

### III. Conclusion

We would like to thank the Committee on House Economic Matters for the opportunity to testify today and we look forward to continuing to work with you all to protect Maryland's workers.