

Testimony of Esmeralda Aguilar, Esq.
Before The Senate Judicial Proceedings Committee
In Support of Senate Bill 666
February 28, 2023

My name is Esmeralda Aguilar, and I am a shareholder in the law firm of Sherman Dunn, P.C. I am submitting testimony on behalf of the Foundation for Fair Contracting – Mid-Atlantic Region (“FFC”), a nonprofit labor management organization dedicated to protecting workers on public construction projects from substandard wages and working conditions. The FFC monitors public construction projects for compliance with local, state and federal prevailing wage laws. Its enforcement efforts include interviewing workers on public projects and filing wage theft complaints on their behalf with the appropriate agencies, including the Maryland Department of Labor and U.S. Department of Labor.

On most public projects in Maryland, contractors and subcontractors are required to pay construction workers no less than the locally prevailing wage.¹ In addition, contractors and subcontractors are required to submit certified payroll reports to the government demonstrating and certifying compliance with prevailing wage requirements.² Prevailing wage laws were enacted, in part, to promote high quality standards in construction. Such laws seek to promote responsible contracting in public procurement by ensuring that contractors are able to compete for contracts on the basis of merit, not on the basis of who can assemble the cheapest workforce.

Unfortunately, the construction industry is an industry in which labor laws are too often ignored. According to U.S. DOL data, the construction industry consistently ranks among the top three industries for noncompliance.³ This is because low road employers are able to save 30 percent or more in labor costs by ignoring federal and state labor

¹ See, e.g., MD Code, State Fin. & Proc. Art., §17-201 *et seq.*; Prince George’s County Code, Subtitle 2, Division 14; Baltimore City Code, Art. 5, Subtitle 25; Montgomery County Code, Ch. 11B, Sec. 33C; Charles County Code, Ch. 228.

² See, e.g., MD Code, State Fin. & Proc. Art., §17-220.

³ U.S. DOL Website, WHD by the Numbers 2021, <https://www.dol.gov/agencies/whd/data/charts/low-wage-high-violation-industries>

laws.⁴ As a result, the modus operandi in the construction sector has become one of brazen lawbreaking.⁵

Unfortunately, many aggrieved workers are reluctant to report labor violations. Employee fear of retaliation, including the potential loss of employment, is always of great concern. Enforcement efforts in the construction industry are further complicated by the fact that many aggrieved workers are undocumented immigrants.⁶ Undocumented workers are easy prey for low road contractors because of their reluctance to report illegal activity to government officials for fear of deportation and other reprisals. A frequently cited 2009 study surveyed 4,387 low-wage workers – including workers in residential construction – and found that more than two-thirds had experienced some form of wage theft and most did not complain for fear of losing their job or having their wages or hours cut.⁷

It is therefore critical that third-party stakeholders, such as responsible contractors and workers’ rights organizations, have access to a wide range of enforcement mechanisms to help deter low road contracting practices in public procurement. Prevailing wage law violations can form the basis of a False Claims Act (“FCA”) suit because contractors who violate such laws will, in their certified payroll reports, falsely certify to the government that they are paying workers the proper wage. The FCA is an important deterrence tool because in prevailing wage cases damages may include the value of the construction contract multiplied by three. The State may also recover up to \$10,000 per violation of the Act.

FFC-MAR fully supports Senate Bill 666 which seeks to strengthen the FCA by allowing whistleblowers to proceed with FCA claims even without the participation of a government entity. Senate Bill 666 will bring Maryland’s FCA in line with the federal FCA and every other state FCA law. Currently 30 states, including the District of Columbia, have their own FCA laws and Maryland is the *only* jurisdiction that bars

⁴ National Employment Law Project (“NELP”), *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries* (July 22, 2015); Russell Ormiston, Dale Belman, Julie Brockman, & Matt Hinkel, *Rebuilding Residential Construction, in Creating Good Jobs: An Industry-Based Strategy* 75, 81 & 84 (Paul Osterman ed., MIT Press 2020) [hereinafter Ormiston (2020)].

⁵ Ormiston (2020), *supra* note 4, at 80-81.

⁶ Ormiston (2020), *supra* note 4, at 83-84, 92.

⁷ Annette Bernhardt et al., Broken Laws, *Unprotected Workers: Violations of Employment and Labor Laws in American Cities*, at 24-25 (NELP Sept. 21, 2009).

whistleblowers from proceeding with FCA claims where the government elects not to intervene.⁸

The ability for whistleblowers to unilaterally proceed with such actions has proven to be a useful tool for prevailing wage enforcement. Recently, a labor union secured a judgement of over \$2 million in a federal FCA case stemming from a contractor's violations of the federal prevailing wage law. In *U.S. ex rel IBEW Local 98 v. Farfield Company*,⁹ a union sued under the federal FCA alleging that the Farfield Company – an experienced government contractor – cheated 40 construction workers on a federally assisted rail project out of the wages to which they were entitled under the Davis-Bacon Act (“DBA”). The suit alleged that Farfield violated the FCA by submitting fraudulent payroll reports to the government, falsely asserting its compliance with DBA requirements. The Third Circuit affirmed the district court's order entering judgment against the contractor. The U.S. Department of Justice in that case elected not to intervene. As such, the contractor would not have been brought to justice but for the federal FCA's provision allowing whistleblowers to proceed without government intervention.

Finally, despite the hard work of the dedicated professionals in the Maryland Attorney General's Office, the broad scope of that Office's jurisdiction and its limited resources, make it impossible for the government to intervene in every single FCA action filed. This results in fewer recoveries for the state and a reluctance on the part of whistleblowers to file such claims.

To rectify this, we need a solution that does not draw on the agency's already overextended resources. We need to give private citizens the right to pursue FCA claims on their own. In addition to making aggrieved workers whole, Senate Bill 666 will ensure greater compliance and deterrence across the industry.

Thank you for the opportunity to express these views.

⁸ See, e.g., 31 U.S.C. § 3730(b)(4)(B); Connecticut, C.G.S. § 4-279; D.C. Code § 2-381.03; Florida, F.S. § 68.083; Illinois, 740 ILCS 175/4; Iowa, I.C. § 685.3; Michigan, M.C.L. 400.610a; Nevada, N.R.S. 357.110; New Jersey, N.J. Stat. 2A:32C-5; Virginia, VA Code § 8.01-216.5.

⁹ No. 20-1922 (3d Cir. July 13, 2021).