



**Senate Labor and Industry Committee Hearing on  
Raising the Minimum Wage**

**Written Testimony of Michael Hollander, Staff Attorney  
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**The Importance of Combatting Wage Theft**

**May 5, 2015**

The following testimony is submitted by the Employment Unit of Community Legal Services, Inc (“CLS”) of Philadelphia. I thank you for the opportunity to present this testimony on behalf of the hundreds of wage theft victims that come to CLS each year seeking help.

In this testimony, I will address wage theft, a problem that should be considered hand-in-hand with raising the minimum wage, and will discuss potential solutions that the legislature can take to combat wage theft. To this end, **CLS supports the important anti-wage theft measures taken in Senator Tartaglione’s bills: SB 195, 198, and 199. We urge you to pass these bills as well as SB 196 and 197, which deal with other aspects of the minimum wage.**

Wage theft—the failure to pay workers the wages owed to them—is a widespread problem in Pennsylvania. Although most employers properly pay their employees, many do not. Each week, upwards of two-thirds of low-wage workers experience wage theft.<sup>1</sup> Raising the minimum wage alone is ineffectual if we do not also ensure that the minimum wage is paid to workers.

**Wage theft directly harms workers** by leaving them without pay, **hurts businesses who are trying to comply with the law**, but are undercut by competitors who unfairly cut costs by not paying workers, **also robs taxpayers**, as taxes to state and local governments go unpaid when workers go unpaid.

There are a number of ways to that Pennsylvania can combat wage theft:

- **Increase the penalties for wage theft**, to make wage theft a bad business decision
- **Streamline the Department of Labor and Industry’s enforcement capabilities.** Currently the Department has to go to court in the jurisdiction where the wage theft occurred in order to get a judgment against an employer. The Department should be able to adjudicate wage theft internally, as other Departments can with violations of the law.

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<sup>1</sup> Annette Bernhardt et al., Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America’s Cities (New York: Center for Urban Economic Development at UIC, National Employment Law Project and UCLA Institute for Research on Labor and Employment, 2009), available at <http://www.nelp.org/brokenlaws>



- **Increase the Department’s funding to investigate and combat wage theft through increased penalties.** Penalties paid as part of the Department’s enforcement activities should come back to the Department to fund further enforcement.
- **Make misclassification more difficult.** Many workers are misclassified as independent contractors and then are paid sub-minimum wages or are not paid overtime. The law should be strengthened to presume a worker to be an employee unless certain strict factors are met showing that the individual runs a truly independent business.

Although these solutions will not end wage theft completely, they will go a long way towards combatting a problem that harms workers, taxpayers, and businesses.

### **I. Pennsylvania workers are regularly the victims of wage theft**

Wage theft is the failure of an employer to pay a worker her proper wages. National surveys show that wage theft affects a large swath of the economy.<sup>2</sup>

Wage theft is different from other sorts of commercial disputes. Whereas a business likely can survive losing a contract or not getting paid for a particular job, individuals—from the richest among us to the poorest—rely on regular paychecks to coverage our basic costs from food to housing to discretionary spending. Missing one or two paychecks can easily send a middle class family into a financial spiral; for a poor family, a missing paycheck can be devastating.

In a 2009 survey of low-wage workers in Chicago, New York, and Los Angeles, **more than two-thirds suffered wage theft in the past week.**<sup>3</sup> 26% of workers suffered minimum wage violations, 76% of those that worked overtime were not paid the overtime premium, and 12% of tipped workers had some of their tips stolen by their employer.<sup>4</sup> The study estimates that **the average low-wage worker loses roughly \$2,634 annually due to wage theft, out of total earnings of \$17,616.**<sup>5</sup> This is an astounding figure and should be a call to action to redouble our efforts to combat wage theft.

The experiences of workers around the country are also felt by workers in Pennsylvania. Preliminary estimates from a report soon to be released by Temple University’s Sheller Center for Social Justice studying wage theft in Pennsylvania show that each year,

- **397,673** low-wage Pennsylvania workers **experience a minimum wage violation**

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<sup>2</sup> See footnote 1.

<sup>3</sup> *Id.* at 5

<sup>4</sup> *Id.* at 2-3

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



- **326,749** low-wage Pennsylvania workers **experience an overtime violation**
- **257,204** low-wage Pennsylvania workers **are not paid for off the clock work** before and after their shift

Virtually every day, the Employment Unit at CLS sees victims of wage theft. In the last year alone, CLS has opened over one hundred fifty new cases where the client was the victim of wage theft. ***Wage violations represent the second most frequent reason why clients come to CLS seeking employment representation.*** These one hundred fifty-five plus cases are only the tip of the iceberg: many employees either do not know their rights or abstain from exercising their rights for lack of time or fear of losing their job.

Some common forms of wage theft that we see in Pennsylvania include:

- **Unpaid and Underpaid Wages.** Some employers outright fail to pay their workers whereas others pay their workers less than they are owed. Workers in this situation are put in the untenable position of deciding whether to continue working for a bad employer in hopes that they will eventually be paid or abandon their missed pay to search for a job that actually pays. According to a 2001 study by the United States Department of Labor, ***wage violations occur at a rate of between 25% and 100% in low wage industries.***<sup>6</sup>
- **Unpaid Minimum Wage.** The minimum wage sets a floor, below which no workers should be paid. Many employers flaunt this law, paying their workers less than minimum wage or improperly asking their workers to work for tips and nothing else.
- **Unpaid Overtime.** The law requires many workers to be paid overtime for their hours in excess of 40 in a given week. Unfortunately, many employers fail to pay overtime, instead paying workers a lump sum per day or week, regardless of the number of hours worked, or pay straight time for each hour worked, even if the worker has overtime hours.
- **Misclassification of Workers.** Workers that are misclassified are often not covered by workers compensation insurance, do not receive job benefits, and may not be able to rely on Unemployment Compensation in the eventuality that they lose their job.<sup>7</sup>

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<sup>6</sup> *1999-2000 Report on Initiatives (2001)*, United States Department of Labor, available at <http://www.nelp.org/page/-/EJP/US%20DOL%20Enforcement%20Report%201999-2000.pdf>

<sup>7</sup> *Employment Arrangements: Improved Outreach Could Help Ensure Proper Worker Classification*, GAO-06-656 (July 2006), at p. 25. See also NELP, *Testimony of Catherine K. Ruckleshaus to the United States House of Representatives Committee on Education and Labor's Subcommittee on Workforce Protections* (March 2007). <http://www.nelp.org/page/-/Justice/IndependentContractorTestimony2007.pdf>, stating that independent contractor misclassification occurs at a high rate in the following industries: construction, day labor, janitorial and building services, home health care, child care, agriculture, poultry and meat processing, high-tech, delivery, trucking, home-based work, and the public sectors.



- **Workers Paid “Off the Books” in Cash.** By paying workers off the books and in cash, employers are able to further avoid paying taxes and into the Unemployment Compensation Trust Fund for their workers.
- **Time Shaving.** Some employers cheat their workers out of wages by asking them to work off the clock or by not counting certain activities as paid work.

Wage theft touches all workers, not only those workers who directly suffer them. The widespread nature of wage theft depresses the wages and working conditions of all Pennsylvanians, even if they personally suffer no wage violations as they must compete in a landscape replete with exploitation.

## II. Wage theft is bad for business and bad for the Pennsylvania economy

Wage theft is bad for businesses and the economy as well as workers. **When an unscrupulous employer undercuts his competition by misplaying workers, he takes business away from the vast majority of businesses that follow the law.** CLS recently dealt with a cleaning contractor who underbid his competition by paying his workers below minimum wage and was able to win many contracts. No reputable business could match his prices. Reputable businesses should not suffer for following the law.

As well, by stealing wages from employees, wage theft takes money out of the economy that could be spent in local communities, robbing local businesses of revenue and robbing local governments of taxes.

If the average low-wage worker loses \$2634 annually to wage theft, that is \$2634 that is removed from that individual’s local community. **Aggregated over the hundreds of thousands of Pennsylvanians who suffer wage theft, hundreds of millions of dollars are removed from the local economy annually.**

As well, wage theft weakens our safety net and tax revenue. By misclassifying workers as independent contractors, employers are able to avoid paying local, state, and federal taxes on their employees and avoid paying into the state Unemployment Compensation Trust Fund. By underpaying workers, requiring off the clock work, or paying workers in cash, unscrupulous employers cause Pennsylvania to lose out on this money twice—once when the employers fail to pay taxes on the money originally and again when employees fail to pay income taxes on the money.

## III. The Commonwealth’s laws to prevent wage theft are woefully inadequate



The Commonwealth's current laws to prevent wage theft are woefully inadequate. If a worker is the victim of wage theft and wants to seek recourse, he only has two options: complain to the state Department of Labor and Industry or file a lawsuit in court. Neither option is a significant deterrent to employers.

The maximum penalty allowed under the Pennsylvania wage laws is 25% of the unpaid wages. What that means is that an individual who was not paid \$2000 can potentially win in court \$2500—the original \$2000 owed plus a \$500 penalty. **In contrast to Pennsylvania, at least 38 other states, including all of Pennsylvania's neighbors but Delaware, allow for penalties equal or greater than the unpaid wages.**<sup>8</sup>

From a practical standpoint, a 25% penalty makes wage theft a rational business decision. To illustrate this point, imagine an employer with 10 employees, each of whom he fails to pay \$2000. In total, the employer has stolen \$20,000 from his employees. If 8 of the 10 employees sue in court and win, the employer will have to pay out  $8 * \$2500$  ( $\$2,000 + \$500$  penalty) = \$20,000. In other words, even if 8 of 10 employees are victorious in court, the employer pays out no more than he would have paid were he to have paid originally. **Only if 9 of 10 employees successfully sue an employer for wage theft does the employer suffer any economic penalty.**

In reality, it is rare that 90% of employees would sue an employer. Most must move on rather than take off from work to go to court. According to Dr. David Weil, a Harvard economist who is now the Administrator of the Wage and Hour Division of the US Department of Labor, employers likely choose to violate wage and labor laws because “costs of complying may seem too high relative to the expected costs of being found in violation of the law.”<sup>9</sup>

Similarly, the Department of Labor and Industry is limited in its ability to enforce the wage laws. The Department only has approximately 20 investigators statewide to enforce a myriad of laws, not limited to just laws concerning wages.

As well, **unlike the Department of Welfare and other Commonwealth agencies, the Department of Labor and Industry cannot adjudicate wage claims internally.** If the Department believes that an employer has committed wage theft, it has to file a lawsuit in the jurisdiction where the wage theft occurred. The few Department lawyers responsible for this work do not have the capacity to file but a few lawsuits each year throughout the Commonwealth.

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<sup>8</sup> Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Washington DC, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Mexico, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Texas, Vermont, West Virginia

<sup>9</sup> See, David Weil, *Crafting a Progressive Workplace Regulatory Policy: Why Enforcement Matters*, 28 Comp. Labor Law & Pol'y J. 125, 128 (2007). [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=996901](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=996901).



These two remedies—a private lawsuit with a 25% penalty and a Department that does not have the capacity to take bad actors to task—are not enough to prevent unscrupulous employers from cheating workers out of their wages. There needs to be increased protections for workers.

#### IV. Penalties must be increased and Department must have better enforcement tools

There are a number of best practices developed in states throughout the country that should be implemented in Pennsylvania to help combat wage theft. **Senator Tartaglione has included a number of these ideas into her slate of wage bills, SB 195, 196, 197, 198, and 199. We wholeheartedly support these improvements and Sen. Tartaglione’s bills.**

- **Increase Monetary Penalties for Violations of the Pennsylvania Wage Laws to Two Times the Wages Owed.** At least 38 states allow penalties equal to or greater than the unpaid wages for a failure to pay the minimum wage or overtime.<sup>10</sup>
- **Improve Laws So That it is Harder for Employers to Misclassify Their Employees.** Some states have made it hard to misclassify workers by creating a presumption that a worker is an employee in wage cases.<sup>11</sup> Other states have gone further, stating that workers in specific industries that have a history of misclassification schemes are automatically employees.<sup>12</sup> Pennsylvania took the first step in the right direction with Act 72 of 2011, the Construction Workplace Misclassification Act.
- **Increase Criminal Penalties for Wage Theft.** While violations of the wage laws can carry criminal penalties, such violations, regardless of their monetary value, are only summary offences. *Without real teeth to criminal sanctions for wage theft and other wage violations, employers will have no incentive to comply with the law nor will local District Attorneys have any real incentive to prosecute.* Wage violations should be graded based on the amount of money involved and the number of previous offenses.
- **Allow the Pennsylvania Department of Labor and Industry to Impose Administrative Fines.** Rather than require the Department of Labor and Industry to go to court to enforce wage laws, allow the Department to impose administrative fines for wage theft. This would reduce the costs of enforcement and would fund future enforcement activity.

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<sup>10</sup> See footnote 8.

<sup>11</sup> See definition of “worker” in the WA state workers’ compensation act as an example: <http://apps.leg.wa.gov/RCW/default.aspx?cite=51.08.180>. At least 10 states (AZ, CA, CO, CT, DE, HI, NH, ND, WI, WA) have a general presumption of employee status in their workers’ compensation acts (regardless of what job the injured worker has). Massachusetts and Arizona’s wage laws also create the same presumption.

<sup>12</sup> See, *Combating Independent Contractor Misclassification in the States: Models for Successful Reform*, NELP, December 2005, [http://nelp.3cdn.net/a7199e02c9a2dff987\\_g4m6bhinn.pdf](http://nelp.3cdn.net/a7199e02c9a2dff987_g4m6bhinn.pdf)



- **Use Administrative Fines to Fund Increased Enforcement Activity.** By imposing administrative fines and aggressively pursuing employers, the Department of Labor and Industry can increase enforcement in a self-sufficient manner.
- **Target Key Industries Where Wage Violations are Rampant.** Studies show certain industries are worse than others when it comes to wage theft. For example, 67% of child care workers experience weekly minimum wage violations compared with only 16% of security guards. By targeting high violation industries, the Department of Labor and Industry can increase the effectiveness of its operations.<sup>13</sup>
- **Engage in Innovative Enforcement Methods by Working With Other Agencies.** Through the creation of inter-agency enforcement task forces and data sharing among the state Department of Labor, Revenue, and other related agencies, the results of audits by one department can trigger enforcement actions by other agencies. Sharing data reduces the burden on and increases the effectiveness of all agencies.
- **Engage in Innovative Enforcement Methods by Working with Community-Based Groups** – Pennsylvania should follow the success of other states by introducing partnerships between the state Department of Labor and community based organizations to combat wage violations. In New York, for example, the Department of Labor created “Wage Watch,” a partnership that empowers community groups to conduct outreach, provide employers information about wage law compliance, and distribute literature to workers.<sup>14</sup>
- **Promote Enforcement Against Joint Employers** – Many employers attempt to insulate themselves from liability by outsourcing or contracting core responsibilities. By holding these joint-employers responsible for the actions of their subcontractors, as allowed by law, the state will ensure that employers do not try to shirk responsibility through complex business structures meant to hide money and responsibility.

## V. Conclusion

In addition to raising the minimum wage, the Commonwealth needs should pass measures to strengthen and enforce our laws against wage theft. SB 195-199 directly tackle wage theft by increasing penalties and giving the Department of Labor and Industry the tools it needs to efficiently and effectively combat unscrupulous employers. We urge this committee pass SB 195-199 and support workers, businesses, and the Commonwealth.

Thank you very much for considering my remarks.

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<sup>13</sup> Broken Laws Report, p31. See footnote 1.

<sup>14</sup> See, e.g. *Labor Department Initiative Empowers Ordinary People to Join the Fight Against Wage Theft*, New York State Department of Labor [http://www.labor.ny.gov/pressreleases/2009/Jan26\\_2009.htm](http://www.labor.ny.gov/pressreleases/2009/Jan26_2009.htm)



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