



**New York State Office of the Attorney General
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Testimony Before the

United States House of Representatives
Committee on Education and Labor
Subcommittee on Workforce Protections

***Standing Up For Workers:
Preventing Wage Theft and Recovering Stolen Wages
May 10, 2022***

Good morning Chair Adams, Ranking Member Keller, and distinguished members of the subcommittee. My name is Karen Cacace, and I am the Bureau Chief for the Labor Bureau in the Office of the New York State Attorney General. Prior to joining the Office of the Attorney General, I was the Director of the Employment Law Unit at The Legal Aid Society in New York City.

I want to thank you for convening this important hearing at such a vital time for workers and for giving our office an opportunity to share our experiences and insight. The Labor Bureau of the New York State Office of the Attorney General enforces federal, state, and local laws effecting workers in New York State. Our office prioritizes enforcement of wage theft against low-wage workers. Our office recently resolved several wage theft investigations, including investigations involving home health aides, restaurant workers, and residential building staff. While I was at The Legal Aid Society, the Employment Law Unit litigated many cases of wage theft in different industries, including for restaurant workers, domestic workers, and residential building services employees.

Wage theft continues to be a devastating issue for low-wage workers across industries. It is an area that requires legislation to increase protections, deter violations, and encourage greater enforcement. There are several potential amendments to the Fair Labor Standards Act (“FLSA”) that would significantly improve the law.

The Fair Labor Standards Act has not increased the minimum wage since 2009 and it provides that workers who are required to be paid the minimum wage be paid \$7.25 per hour. In contrast,

the New York Labor Law provides that within New York City, Long Island, and Westchester, the minimum wage is \$15.00 per hour, and throughout the rest of New York State, the minimum wage is \$13.20 per hour. A worker earning \$7.25 per hour for 40 hours per week for 50 weeks per year earns \$14,500. While the cost of living varies throughout the country, \$14,500 is not enough to support an individual, let alone a family, anywhere.

In addition to a minimum wage increase, there are other important protections that can be added to the FLSA. For instance, as part of New York's Wage Theft Prevention Act, which went into effect in 2011, New York requires that employers provide employees a hiring notice that explains whether they are covered by the minimum wage laws and, if they are, what their hourly wage and overtime rate will be. This notice must be provided in English and in the employee's primary language. Without this protection, workers may not know that there are any wage laws that apply to them or that they are entitled to a specific hourly rate. Because New York employers are required to provide this information at the beginning of an employee's employment, workers are empowered to seek legal assistance if they are not being paid for all the hours they worked, or if they are not being paid the correct rate or the required overtime rate.

Another important provision of New York's Wage Theft Prevention Act is that employers are required to provide employees with paystubs which detail how many hours they worked each week and the amount they are being paid per hour. This provision allows workers to review the number of hours they are being for each week and the rate they are being paid. They can identify and issues with their hours or rate immediately and seek legal assistance if they are not being paid correctly.

Amending the Fair Labor Standards Act to include hiring notice and paystub requirements would ensure that workers throughout the country understand the wages they are entitled to and give them the ability to review a paystub each week to determine if they are being paid accurately for their labor. These requirements will also encourage employers to comply with the substantive provisions of the FLSA as it will force them to give their employees a written accounting each week.

If hiring notice and paystub requirements are enacted, it will also be easier for workers to prove wage theft claims. Sometimes employers report on paystubs that they are paying workers less than the minimum wage and thereby hand the workers strong evidence of a violation.

If employers fail to provide paystubs, employees may prove the violations through their own testimony. The employees' *prima facie* case can be made through credible testimony that provides the court with an approximation of damages "as a matter of just and reasonable inference." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946); 29 C.F.R. §§ 516, 516.2. If the employer fails to keep proper records, and the employee establishes a *prima facie* case of a FLSA violation, the burden shifts to the employer to prove the employee's actual hours worked or that the employee's testimony is not credible. *Id.* Thus, an employer's failure to comply with a paystub requirement will allow workers to prevail in a wage theft claim based on a worker's credible testimony.

Penalties for failing to comply with hiring notice and paystub requirements are also important. In New York, the violations accrue for failure to provide a hiring notice at \$50 per day, with a cap of \$5000 recovery, and failure to provide a paystub at \$250 per week, capped at \$5000. NYLL §§ 195, 198(1-d). These penalties provide an incentive for employers to comply and compensation for employees who worked without receiving the required information about their hours and rate of pay.

The New York Labor Law also provides that workers must be paid their promised wage. If an employer promises to pay an employee a rate above the minimum wage, it is a violation of the New York Labor Law for failing to do so. This is important because additional remedies that are included in the New York Labor Law are available if an employer fails to pay the promised wage, including liquidated damages and attorneys' fees. These additional damages would not be available if only a breach of contract claim existed. The potential for the additional damages increases the chances of a private lawyer taking on this type of wage theft case. This is significant because the volume of wage theft requires enforcement by government agencies, non-profit law firms, and the private bar.

Another issue that is prevalent is the failure of employers to pay employees their last paycheck. This is an area where it is unusual for private lawyers to represent workers because the damages may only be for a few weeks of work. Those wages, however, are significant to the workers. Additional penalties could deter this type of violation and provide an incentive for private lawyers to handle these cases.

Increasing penalties overall may be the most effective method of deterring employers from violating the substantive provisions of the FLSA. For many employers, the cost of having to pay their employees once a wage theft claim is filed is not significant enough to deter them from violating the law. The FLSA currently allows liquidated damages equal to 100 percent of the violation. The amount of liquidated damages could be increased significantly and interest on the unpaid wages could be a separate calculation. It would be a strong deterrent for employers to pay the required minimum wage and overtime premium if they risked having to pay double or triple the amount originally owed plus interest. Increasing the penalties and requiring an interest payment will also provide an incentive for private lawyers to represent low-wage workers in wage theft cases.

It is also essential that workers be allowed to pursue wage theft claims jointly or in groups by bringing a class or collective action. The time and cost of a wage theft litigation is difficult for an individual low-wage worker to bear alone. Proceeding as a group of workers allows the workers to share the cost of the litigation and increases the likelihood that there will be enforcement, either by a non-profit law firm or the private bar.

Finally, lengthening the statute of limitations for wage theft cases is also important. Low-wage workers are often unaware of their rights and of the legal remedies available to them. It may take workers some time to find representation. In New York, the statute of limitations is six years for wage theft claims. This allows workers sufficient time to bring a case and to recover damages for wage theft they may have been experiencing over an extended period of time.

We very much appreciate the opportunity to share our input with you here today and welcome the chance to continue this conversation moving forward.

Thank you.