

**Testimony of Laura Huizar, Senior Staff Attorney, to the U.S. House of Representatives
Committee on Appropriations, Subcommittee on Labor, Health and Human Services,
Education, and Related Agencies
April 9, 2019**

Thank you for the opportunity to testify today. The National Employment Law Project (NELP) is a non-profit, non-partisan research and advocacy organization specializing in employment policy. We partner with federal, state, and local lawmakers, as well as community-based worker centers and other organizations on a wide range of workforce issues, including labor standards enforcement. My testimony today aims to shed light on the problem of wage theft and the importance of ensuring that the U.S. Department of Labor (“USDOL”) has sufficient resources to adequately enforce this country’s basic labor protections. “Wage theft” refers broadly to a failure to pay the minimum wage, failure to comply with overtime pay requirements, worker misclassification, requiring employees to work off-the-clock, failing to provide required meal or rest breaks, stealing tips, and the many other ways employers violate basic fair pay standards.

Wage Theft: A National Problem Depriving Workers of Billions of Dollars Annually

The Fair Labor Standards Act (“FLSA”) provides minimum wage, overtime pay, and other protections to workers nationwide. While state and local laws may offer a higher minimum wage or more robust overtime protections, the FLSA sets an important baseline. Unfortunately, for many workers, the FLSA’s protections exist only in theory. Wage theft is widespread across the country and across industries, costing workers and local economies billions of dollars annually.¹ A groundbreaking 2009 study by NELP, the Center for Urban Economic Development of the University of Illinois at Chicago, and the UCLA Institute for Research on Labor and Employment surveyed over 4,000 workers and found that 26 percent were paid less than the required minimum wage in the previous work-week, and nearly two thirds experienced at least one pay-related violation, such as failure to pay overtime, not being paid for all hours worked, and stolen tips.²

The report estimates that workers surveyed lost an average of 15 percent, or \$2,634, of their annual wages due to workplace violations.³ Dozens of industry-specific studies have uncovered similar rates of wage-related violations. For example, a recent NELP study of business outsourcing found that the restructuring of employment arrangements through multi-layered contracting, the use of staffing or temp firms, and other means can result in poor working conditions and a lack of corporate responsibility.⁴ It highlighted non-compliance in some of our largest and fastest-growing sectors. In the fast food industry, for instance, according to a 2014 nationwide survey, nearly 90 percent of workers suffered wage theft on the job.⁵ In the warehouse and logistics industry, 25.2 percent suffered minimum wage violations and 44.3 percent suffered overtime violations for packaging and warehousing.⁶ About 80 percent of port truck drivers are classified as independent contractors, but about 80 percent are misclassified and suffer persistent wage theft.⁷

A 2017 study by the Economic Policy Institute (“EPI”) looked at data from the ten most populous states and concluded that in those ten states, 2.4 million workers—or approximately 17 percent of the eligible low-wage workforce—lose \$8 billion each year in unpaid minimum wages.⁸ Based on these findings, EPI estimates that “the total wages stolen from workers due to minimum wage violations exceeds \$15 billion each year.”⁹ We also know that wage theft does not only happen in fly-by-night businesses. A 2018 report by Good Jobs First analyzed more than 4,000 wage and hour cases, and their research found wage theft at some of the largest corporations—more than half of the cases involved Fortune 500 companies or Fortune Global 500 companies.¹⁰

Wage theft is a racial and gender justice issue. The 2009 survey of low-wage workers found that “[w]omen were significantly more likely than men to experience minimum wage violations, and foreign-born workers were nearly twice as likely as their U.S.-born counterparts to have a minimum wage violation.”¹¹ Among U.S.-born workers, there exist significant racial differences:

the rate of minimum wage violations for African-American workers was three times higher than that of white workers.¹² EPI has explained that “[y]oung workers, women, people of color, and immigrant workers” experience higher rates of minimum wage violations than other workers “primarily because they are also more likely than other workers to be in low-wage jobs,” but “low-wage workers experience minimum wage violations at high rates across demographic categories.”¹³ Overall, “the majority of workers with reported wages below the minimum wage are over 25 and are native-born U.S. citizens, nearly half are white, more than a quarter have children, and just over half work full time.”¹⁴

Low-wage workers who experience wage theft face myriad hurdles in accessing justice. For example, labor agencies across the country are under-resourced and under-staffed.¹⁵ Based on a recent Politico investigation, “six states have no investigators to handle minimum-wage violations, while 26 additional states have fewer than 10 investigators.”¹⁶ Retaliation remains rampant and the fear of retaliation keeps countless workers from coming forward to file complaints or otherwise try to report a workplace violation. Workers know that reporting unlawful activity could result in their immediate firing, demotion, harassment, deportation, blacklisting, discrimination, and more.¹⁷ The growing use of non-compete agreements and no-poaching agreements¹⁸ between employers has also made it more difficult for low-wage workers to find work and likely discourages workers from coming forward and risk getting fired. The Treasury Department has estimated that about 30 million workers are subject to non-compete agreements,¹⁹ many of them in low-wage jobs like janitorial services, home care, and fast food.²⁰

Workers who do come forward find that accessing legal assistance can be difficult and extremely costly. Legal aid programs struggle to meet demand,²¹ and hiring a private attorney costs an average of \$200 to \$300 per hour.²² Finally, the recent U.S. Supreme Court’s recent decision in

Epic Systems added yet another barrier for workers seeking to protect their rights by allowing employers to force workers to sign arbitration agreements that bar collective action and essentially close the courthouse doors.²³ For more than 60 million workers subject to mandatory arbitration,²⁴ the only recourse may be agencies like USDOL that are not bound by such agreements.

The Importance of a Strategic Enforcement Approach to Wage Theft

An enforcement agency must, at a minimum, be able to issue rules and regulations; conduct thorough audits and investigations; perform outreach and education geared to both workers and employers; resolve complaints in a timely manner from start to finish; and recover the wages owed to workers. Enforcement agencies like USDOL should also pursue a strategic enforcement strategy to more effectively leverage limited resources. Some experts have defined strategic enforcement as an agency's ability to be "selective about where and how they use resources" so that it can "prioritize and direct efforts to where the problems are largest, where workers are least likely to exercise their legal rights, and where the agency can impact industry-wide compliance."²⁵ Five key components of strategic enforcement include:

1. An enforcement approach that targets actors at the top of industry structures: Companies operating at the top of industry structures can exert valuable influence on companies operating throughout the industry, and enforcement agencies can seek their cooperation and even participation in comprehensive enforcement agreements.²⁶ The FLSA has long recognized that two or more companies may share responsibility for the treatment of their workers, and it has allowed workers to hold lead companies accountable for their role in wage theft.²⁷

2. Enforcement that enhances deterrence: An enforcement agency should consider available information on how employers in different industries react to enforcement to better understand how an investigation may "ripple" through an industry or geographic area to deter additional

actors.²⁸ In addition, an enforcement agency should carefully consider what type and level of penalties are likely to deter employers from violating the law in the first place.²⁹

3. A complaint-based approach that leverages impact with “directed investigation activity”:³⁰ An enforcement agency should respond to complaints with an eye towards how those complaints fit into the agency’s broader initiatives and priorities. An agency should also analyze complaints, which can help reveal patterns, high-violation industries, high-violation regions, and more.³¹ This type of information can then lead to other “more targeted strategies.”³²

4. Enforcement that changes employer behavior beyond the investigation:³³ In order to “create sustainable and systemic change” through strategic enforcement, an enforcement agency should “promote ongoing compliance beyond the boundaries of one firm.”³⁴ Potential mechanisms may include monitoring agreements and settlement agreements that address future behavior.³⁵

5. Partnerships with community groups: Experts recommend that enforcement agencies form strategic partnerships with community groups.³⁶ Community-based organizations have ties to workers in specific industries and sectors, as well as roots in certain racial or ethnic communities. Such ties can significantly improve outreach and education; detection of violations; filing of complaints; and identification of high-violation industries and employers.

Conclusion

Given the magnitude of the problem of wage theft and the crucial role that USDOL plays in upholding the FLSA’s basic labor protections, Congress must ensure that USDOL has the resources and staff it needs to carry out its work strategically. Thank you for the opportunity to submit testimony today. I look forward to your questions.

¹ DAVID COOPER & TERESA KROEGER, EMPLOYERS STEAL BILLIONS FROM WORKERS’ PAYCHECKS EACH YEAR 2–3 (May 10, 2017), <https://www.epi.org/files/pdf/125116.pdf>.

² ANNETTE BERNHARDT ET AL., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA’S CITIES 2, 5 (2009), <https://www.nelp.org/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf>.

³ *Id.* at 50.

⁴ CATHERINE RUCKELSHAUS ET AL., NATIONAL EMPLOYMENT LAW PROJECT, WHO’S THE BOSS: RESTORING ACCOUNTABILITY FOR LABOR STANDARDS IN OUTSOURCED WORK (May 2014), <http://www.nelp.org/content/uploads/2015/02/Whos-the-Boss-Restoring-Accountability-Labor-Standards-Outsourced-Work-Report.pdf>.

⁵ *Id.* at 11 (citing Memorandum from Hart Research Associates to Interested Parties (Apr. 1, 2014), <https://big.assets.huffingtonpost.com/NationalWageTheftPollMemo.pdf>).

⁶ *Id.* at 17.

⁷ *Id.* at 22 (citing REBECCA SMITH ET AL., NATIONAL EMPLOYMENT LAW PROJECT AND CHANGE TO WIN, THE BIG RIG: POVERTY, POLLUTION, AND THE MISCLASSIFICATION OF TRUCK DRIVERS AT AMERICA’S PORTS: A SURVEY AND RESEARCH REPORT (2010), <http://teamster.org/sites/teamster.org/files/povertypollutionandmisclassification.pdf>). In addition, “in audits of employers in 1999 and 2000, the US Department of Labor (USDOL) found high rates of minimum wage, overtime and other violations across the country, including in 50 percent of Pittsburgh restaurants, 74 percent of Georgia day care centers, 50 percent of St. Louis nursing homes, 38 percent of Reno hotels and motels, and 47 percent of adult family homes in Seattle, to name just a few.” NATIONAL EMPLOYMENT LAW PROJECT, WINNING WAGE JUSTICE: AN ADVOCATE’S GUIDE TO STATE AND CITY POLICIES TO FIGHT WAGE THEFT 5–6 (Jan. 2011), <http://www.nelp.org/content/uploads/2015/03/WinningWageJustice2011.pdf>.

⁸ DAVID COOPER & TERESA KROEGER, EMPLOYERS STEAL BILLIONS FROM WORKERS’ PAYCHECKS EACH YEAR 2–3 (May 10, 2017), <https://www.epi.org/files/pdf/125116.pdf>.

⁹ *Id.* at 2.

¹⁰ PHILIP MATTERA, GOOD JOBS FIRST AND JOBS WITH JUSTICE EDUCATION FUND, GRAND THEFT PAYCHECK: THE LARGE CORPORATIONS SHORTCHANGING THEIR WORKERS’ WAGES 8 (June 2018), https://www.goodjobsfirst.org/sites/default/files/docs/pdfs/wagetheft_report_revised.pdf.

¹¹ *Supra* note 2 at 5. Within foreign-born workers, Latina workers experienced minimum wage violations at a rate of 40 percent, while the minimum wage violation rate for male Latino counterparts was 24 percent. *Id.* at 43.

¹² *Id.* at 48.

¹³ *Supra* note 8 at 3.

¹⁴ *Id.*

¹⁵ Marianne Levine, *Behind the minimum wage fight, a sweeping failure to enforce the law*, POLITICO, Feb. 18, 2018, <https://www.politico.com/story/2018/02/18/minimum-wage-not-enforced-investigation-409644>.

¹⁶ *Id.*

¹⁷ NELP’s 2009 survey of workers found that 1 in 5 workers “reported that they had made a complaint to their employer or attempted to form a union in the last year.” *Supra* note 2 at 3. Of those, “43 percent experienced one or more forms of illegal retaliation from their employer or supervisor.” *Id.* Twenty percent of workers surveyed did not make a complaint to their employer “even though they had experienced a serious problem such as dangerous working conditions or not being paid the minimum wage” because they feared retaliation in the form of wage or hours cuts or thought it would not make a difference. *Id.*

¹⁸ *See, e.g.*, MARSHALL STEINBAUM, THE ROOSEVELT INSTITUTE, A MISSING LINK: THE ROLE OF ANTITRUST LAW IN RECTIFYING EMPLOYER POWER IN OUR HIGH-PROFIT, LOW-WAGE ECONOMY 4–5 (Apr. 2018), <http://rooseveltinstitute.org/wp-content/uploads/2018/04/Monopsony-issue-brief.pdf>.

¹⁹ Orly Lobel, *Companies Compete but Won’t Let Their Workers Do the Same*, N. Y. TIMES, May 4, 2017, <https://www.nytimes.com/2017/05/04/opinion/noncompete-agreements-workers.html>.

²⁰ *See, e.g., id.*; *supra* note 18; Sophie Quinton, *These days, even janitors are being required to sign non-compete clauses*, USA TODAY, May 27, 2017, <https://www.usatoday.com/story/money/2017/05/27/noncompete-clauses-jobs-workplace/348384001/>.

²¹ REBECCA BUCKWALTER-POZA, CENTER FOR AMERICAN PROGRESS, MAKING JUSTICE EQUAL 4 (Dec. 8, 2016), <https://cdn.americanprogress.org/content/uploads/2016/12/07105805/MakingJusticeEqual-brief.pdf>.

²² *Id.*

²³ Ceilidh Gao, National Employment Law Project, *The Supreme Court’s Decision in Epic Systems—What You Need To Know* (June 5, 2018), <https://www.nelp.org/blog/supreme-courts-decision-epic-systems-need-know/>.

-
- ²⁴ ALEXANDER J.S. COLVIN, THE GROWING USE OF MANDATORY ARBITRATION: ACCESS TO THE COURTS IS NOW BARRED FOR MORE THAN 60 MILLION AMERICAN WORKERS (Apr. 6, 2018), <https://www.epi.org/files/pdf/144131.pdf>.
- ²⁵ TANYA L. GOLDMAN, THE LABOR STANDARDS ENFORCEMENT TOOLBOX: TOOL 4: INTRODUCTION TO STRATEGIC ENFORCEMENT 2 (Aug. 2018), https://www.clasp.org/sites/default/files/publications/2018/09/2018_introductiontostrategicenforcement.pdf.
- ²⁶ DAVID WEIL, BOSTON UNIVERSITY, IMPROVING WORKPLACE CONDITIONS THROUGH STRATEGIC ENFORCEMENT: A REPORT TO THE WAGE AND HOUR DIVISION 77–80 (May 2010), <https://www.dol.gov/whd/resources/strategicenforcement.pdf>.
- ²⁷ Press Release, National Employment Law Project, DOL ‘Joint Employer’ Proposal Would Upend Decades of Worker Protections (Apr. 1, 2019), <https://www.nelp.org/news-releases/dol-joint-employer-proposal-upend-decades-worker-protections/>.
- ²⁸ *Supra* note 26 at 81.
- ²⁹ *See, e.g., id.*; *supra* note 25 at 4.
- ³⁰ *Supra* note 26 at 3.
- ³¹ *Id.* at 85.
- ³² *Id.*; *see also* NATIONAL EMPLOYMENT LAW PROJECT, WINNING WAGE JUSTICE: STRATEGIES FOR EFFECTIVE LOCAL WAGE LAW ENFORCEMENT 3 (Oct. 2017), <https://s27147.pcdn.co/wp-content/uploads/strategies-for-effective-local-wage-law-enforcement.pdf> (noting how an agency may approach complaints differently based on the potential impact of an investigation).
- ³³ *See, e.g., supra* note 26 at 3; NATIONAL EMPLOYMENT LAW PROJECT, WINNING WAGE JUSTICE: STRATEGIES FOR EFFECTIVE LOCAL WAGE LAW ENFORCEMENT 5 (Oct. 2017), <https://s27147.pcdn.co/wp-content/uploads/strategies-for-effective-local-wage-law-enforcement.pdf>; *supra* note 25 at 5.
- ³⁴ *Supra* note 26 at 87.
- ³⁵ *Id.* at 87–88; *see also* NATIONAL EMPLOYMENT LAW PROJECT, WINNING WAGE JUSTICE: STRATEGIES FOR EFFECTIVE LOCAL WAGE LAW ENFORCEMENT 5 (Oct. 2017), <https://s27147.pcdn.co/wp-content/uploads/strategies-for-effective-local-wage-law-enforcement.pdf>.
- ³⁶ *See, e.g.,* NATIONAL EMPLOYMENT LAW PROJECT, THE TOP 5 ENFORCEMENT TOOLS FOR LOCAL MINIMUM WAGE LAWS (Dec. 2015), <https://s27147.pcdn.co/wp-content/uploads/Policy-Brief-Top-Five-Enforcement-Tools-Local-Minimum-Wage.pdf> (naming “Community Partnerships” as one of the top 5 tools for effective enforcement of minimum wage laws); Janice Fine, *New Approaches to Enforcing Labor Standards: How Co-enforcement Partnerships between Government and Civil Society Are Showing the Way Forward*, UNIV. OF CHICAGO LEGAL FORUM (Vol. 2017, art. 7) (2018), <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1594&context=ucf>; TIA KOONSE ET AL., UCLA CENTER FOR LABOR RESEARCH AND EDUCATION AND UC BERKELEY CENTER FOR LABOR RESEARCH AND EDUCATION, ENFORCING CITY MINIMUM WAGE LAWS IN CALIFORNIA: BEST PRACTICES AND CITY-STATE PARTNERSHIPS 13–14 (Oct. 2015), <http://laborcenter.berkeley.edu/pdf/2015/minimum-wage-enforcement.pdf>; *supra* note 25 at 6–7.