

## **Testimony of Deborah Berkowitz**

National Employment Law Project

# **An Act to Protect Injured Workers S.1068/H.1670**

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## **Hearing before Massachusetts Joint Committee on Labor and Workforce Development**

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The National Employment Law Project (NELP) submits the following testimony in support of the Act to Protect Injured Workers. NELP applauds this committee for holding a hearing on this important bill.

NELP is a non-profit law and policy organization with 50 years of experience providing research, advocacy and public education to advance the employment and labor rights of the nation's workers. We work together with national, state and local partners to promote policies and programs to create good, safe jobs and ensure that work is an anchor of economic security and a ladder of economic opportunity for all of America's working families.

I am the Safety and Health Program Director at NELP, having previously served as the Senior Policy Advisor and Chief of Staff at the Federal Occupational Safety and Health Administration between 2009-2015.

An Act Protecting Injured Workers (S.1068/H.1670) will assure that the Massachusetts workers' compensation program works for all workers. Workers' compensation benefits are crucial for employees injured on the job, yet current Massachusetts law leaves workers largely unprotected when employers retaliate against employees or try to prevent them from reporting a workplace injury, seeking medical care, or filing a workers' compensation claim. Unlike neighboring states such as Connecticut, no state agency in Massachusetts has any power or ability to investigate retaliation complaints or to enforce the current anti-retaliation law. Under current law, employees subject to retaliation for exercising their rights under the workers' compensation law must file a lawsuit in court. But this remedy is hardly ever used because the hurdles and costs of bringing a lawsuit are prohibitively high for people working in low-wage jobs, and the remedies are limited and ineffective.

An Act Protecting Injured Workers provides injured workers who are retaliated against for filing a workers' compensation claim or exercising their rights under the Massachusetts workers' compensation law with an administrative complaint remedy and investigative process for enforcement. This bill is a major step forward in providing injured workers access to the benefits they are legally due and preventing injured workers and their families from falling into poverty due to a work-related injury.

### **Background on Workers' Compensation in Massachusetts**

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The Massachusetts workers' compensation program, created more than a century ago, provides critical medical and income support to workers injured or made sick on the job. Workers' compensation benefits include coverage for medical care and rehabilitation, reimbursement for a portion of lost wages due to work-related injuries, and compensation for permanent impairment or functional loss. Workers' compensation also provides benefits to families of workers who die from work-related causes. Workers' compensation is a state-run program where employers purchase workers' compensation insurance for their employees (or are self-insured). Because the compensation law presumes that injured workers will be able to easily access medical benefits and income replacement while they recover, covered employers are largely shielded from tort suits by injured workers.

In 2017, more than **65,000** workers suffered a work-related injury in Massachusetts that required medical treatment;<sup>1</sup> **36,000** of those injuries resulted in the worker having to miss work or work on restricted duty.<sup>2</sup> For these workers, the workers' compensation program should provide adequate medical and income support to reduce their risk of falling into poverty because of a workplace injury.

### **Only a Fraction of Injured Workers Ever Receive Benefits**

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National research shows that only a fraction of injured workers ever receives any benefits through workers' compensation. Several studies have shown that fewer than 40 percent of eligible workers apply for workers' compensation benefits.<sup>3</sup> Research funded by the Bureau of Labor Statistics examined reporting of work-related amputations—injuries that should be reported to workers' compensation. These studies found significant underreporting in workers' compensation systems in the three states that were studied.<sup>4</sup>

The workers' compensation system functions especially poorly in the case of low-wage and immigrant workers. Many face additional barriers to filing, including concerns about retaliation for reporting a job injury and requesting medical care. A landmark study of more than 4,000 low-wage workers in Chicago, Los Angeles, and New York revealed that among those workers experiencing a serious injury on the job, fewer than 1 in 10 (8 percent) filed for workers' compensation benefits.<sup>5</sup>

New data released by the Occupational Safety and Health Administration (OSHA) also confirm that retaliation against workers who report injuries is a significant problem. In FY 2018, 451 out of 2,965 discrimination cases investigated by OSHA involved retaliation for injury reporting.<sup>6</sup>

### **Shifting Costs to Taxpayer-Funded Social Benefit Systems**

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Because of these barriers to filing for compensation, employers now provide only about 20 percent of the overall financial cost of occupationally caused injuries and illnesses. Costs are instead shifted away from employers, often to workers, their families, and communities. Other social benefit systems—including Social Security retirement benefits, Social Security Disability Insurance, and Medicare—have expanded our social safety net, while the workers' compensation safety net has been shrinking.

There is now growing evidence that costs of workplace-related disability are being transferred to other programs, placing additional strains on programs at a time when they are already under considerable stress.<sup>7</sup> Because of the weaknesses in state laws, employers now provide, on average, only a small percentage (about 21 percent) of the \$198 billion estimated annual cost of occupational injuries, illnesses, and fatalities. Instead, the costs of workplace injuries are borne primarily by injured workers, their families, and taxpayer-supported components of the social safety net.<sup>8</sup> Workers, their families, and their private health insurance pay for nearly 63 percent of lost wages and medical costs related to work-

related injuries and illnesses, with other public program sources (i.e., taxpayers) shouldering the remaining 16 percent.<sup>9</sup>

As the costs of work-related injury and illness shift onto workers, their families, and other benefit programs, high-hazard employers have fewer incentives to eliminate workplace dangers and to actually prevent injuries and illnesses from occurring. Under these conditions, injured workers, their families, and taxpayers subsidize unsafe employers.

To underscore the importance of reducing barriers for workers to file workers' compensation claims, in 2019, the American Public Health Association adopted a recommendation that state governments must strengthen anti-retaliation protections for workers and make it illegal for any worker to be retaliated against for filing a workers' compensation claim.

## **Conclusion and Recommendations**

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An Act Protecting Injured Workers supports Massachusetts workers, families, and communities by providing an administrative remedy for workers to file a complaint with a state agency if they have been retaliated against for exercising their long-standing rights under the state workers' compensation law. Under current law, injured employees must file a lawsuit in court to access any remedies if they are retaliated against for seeking medical care or filing for workers' compensation. Few workers ever use this option, however, because the hurdles and costs of bringing a lawsuit are so high, and the remedies are limited and ineffective.

Key provisions of the legislation would do the following:

- Ensure that workers are protected when they engage in a comprehensive range of activities to assert their rights (or their co-workers' rights) under the workers' compensation law;
- Clarify the prohibited types of employer misconduct, retaliation, and other efforts to deprive workers of their workers' compensation rights;
- Provide workers with an option for an administrative investigation and resolution of retaliation complaints, using the existing structures at the Massachusetts Commission Against Discrimination;
- Create a rebuttable presumption of employer retaliation when an adverse action against a worker takes place within a defined period of time (similar to unemployment benefits and housing law);
- Ensure that workers are able to obtain appropriate remedies and relief for the harm caused by employer retaliation;
- Enhance the requirements for workers to be provided notice of workers' compensation rights; and
- Require that workers' compensation benefits be paid based on the minimum wages required by law, even where the employer has paid at sub-minimum levels.

Like the law in the neighboring state of Connecticut, this bill would provide injured workers with an administrative complaint mechanism to handle workers' compensation retaliation cases. This bill is a major step forward in providing injured workers access to benefits they are legally due and preventing injured workers and their families from falling into poverty due to a work-related injury. This bill will go a long way to assure that tens of thousands of Massachusetts workers injured on the job will have access to the benefits they are entitled to under the workers' compensation law, so they can recover and rejoin the workforce

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<sup>1</sup> U.S. Department of Labor, Bureau of Labor Statistics, Survey of Occupational Injuries and Illnesses, 2017 private sector only, released Nov. 8, 2018

<sup>2</sup> U.S. Department of Labor, Bureau of Labor Statistics, State Data, Nonfatal Occupational Injuries and Illnesses Requiring Days Away from Work, Job Transfer or Restriction, 2017 private sector only, released Nov. 8, 2018.

<sup>3</sup> Shannon HS, Lowe GS. How many injured workers do not file claims for workers' compensation benefits? *American Journal of Industrial Medicine* 2002; 42:467-473

<sup>4</sup> Spieler, EA, & Burton, JF, The Lack of Correspondence Between Work-Related Disability and Receipt of Workers' Compensation Benefits, 55 *AMERICAN JOURNAL OF INDUSTRIAL MEDICINE* 487 (2012) (citing several studies)

<sup>5</sup> Bernhardt A, et.al. Broken Laws, Unprotected Workers (2009),

<http://www.nelp.org/content/uploads/2015/03/BrokenLawsReport2009.pdf>

<sup>6</sup> Occupational Safety and Health Administration, Whistleblower Investigation Data, Report Period: 10/1/17 to 9/30/18

<sup>7</sup> <https://www.dol.gov/asp/WorkersCompensationSystem/WorkersCompensationSystemReport.pdf>

<sup>8</sup> U.S. Department of Labor, Occupational Safety and Health Administration. Adding inequality to injury: The costs of failing to protect workers on the job, 2015, available at: <https://www.dol.gov/oshareport/20150304-inequality.pdf>

<sup>9</sup> Leigh JP, Marcin JP. Workers' compensation benefits and shifting costs for occupational injury and illness. *Journal of Occupational and Environmental Medicine* 2012;54:445-450

