

**Written Testimony of
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for

Joint Legislative Executive Budget Hearing on Workforce and Labor

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Thank you to the Committee Chairs, Assembly Member Latoya Joyner and Senator Jessica Ramos, for the opportunity to testify today. My name is Hugh Baran, and I am an attorney at Kakalec Law PLLC, a workers' rights law firm based in Brooklyn and serving workers across New York state. We represent workers in a range of disputes concerning wage theft, discrimination, sexual harassment, forced labor, and other violations of state workplace laws.

I'm here today to testify about the Executive Budget's funding of workplace enforcement, and about why AM Joyner's EmPIRE Worker Protection Act (A1893/S541) needs to be included in the budget as a revenue raiser to fund future DOL enforcement efforts.

My testimony will cover three topics: (1) how New York is failing our workers, from whom \$3 billion in wages are stolen every year, as a result of inadequate enforcement of the Labor Law; (2) how inadequate enforcement of the Labor Law undermines other proposed Labor Law reforms, including a potential increase in the minimum wages; and (3) how the EmPIRE Act would address the enforcement gap in the Labor Law while providing a dedicated revenue stream for the Department of Labor's enforcement efforts for years to come.

New York's \$3 Billion Wage Theft Crisis and the Current Enforcement Gap

In the eight decades since Congress enacted the Fair Labor Standards Act, our federal wage and hour law, private litigation has been critical in establishing a national minimum wage floor to protect employees.¹ The same has been true since New York enacted its own minimum wage and overtime laws, as state and federal labor departments cannot enforce the law alone.

Workers' access to the courts to enforce workplace rights has only become more important in recent decades due to the growing problem of wage theft in lower-paid service-based jobs. A 2008 study by the National Employment Law Project (NELP) found that 68% of 4,387 workers in low-wage industries in Chicago, Los Angeles, and New York City had experienced at least

¹ See J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1150 & n.42 (2012) (discussing critical role of private enforcement in statutory design of the Fair Labor Standards Act).

one pay-related violation in the prior week.² A 2014 report by the Economic Policy Institute (EPI) estimated that U.S. workers lose over \$50 billion annually due to wage theft.³

Most directly for our state, a 2018 report in New York found that workers here are losing \$3 billion annually to wage theft violations.⁴ That means \$3 billion in income isn't reaching our communities every single year.

New York legislators, recognizing the growing epidemic of wage theft in this state, have taken important steps to strengthen the state's private enforcement mechanisms. The Legislature passed the groundbreaking Wage Theft Prevention Act, creating new wage notice requirements and stiff penalties for not providing them, in order to prevent wage theft before it happens. New York also amended the liquidated damages provision of the Labor Law to provide for 100% liquidated damages in Labor Law actions. And finally and most significantly, New York significantly increased the minimum wage over the past decade, to \$15/hour.

But several trends have jeopardized New York workers' ability to exercise their rights under these new laws. On the public enforcement side, caseloads have risen at DOL, but staffing levels have declined. The current investigatory staffing levels of the DOL actually represent a major decrease from decades ago. In fact, the DOL has fewer than half the investigators than it had several decades ago. In 1966, the DOL had over 300 labor inspectors. As of the end of 2017, the DOL had 115 investigative officers handling 16,400 open cases.⁵

On the private litigation side, fear of retaliation has posed a significant hurdle to enforcement efforts. Workers in low-wage jobs face a significant risk of retaliation from their employer for reporting employment law violations. In a 2009 NELP study of more than 4,000 workers in low-wage jobs, 43% of those who "reported that they had made a complaint to their employer or attempted to form a union" in the prior year had faced one or more forms of illegal retaliation—including having their pay or hours cut, being harassed or subjected to increased workloads, being threatened with immigration consequences, and being fired or suspended.⁶ In a more recent study by the Raise the Floor Alliance and the National Economic and Social Rights Initiative, 61% of workers who made a complaint to their employer faced retaliation, as did 80%

² Annette Bernhardt et al., National Employment Law Project, Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities, at 20–21 (2009), <https://www.nelp.org/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf>.

³ Brady Meixell & Ross Eisenbrey, Econ. Policy Inst., An Epidemic of Wage Theft is Costing Workers Hundreds of Millions of Dollars A Year 2 (2014), <https://www.epi.org/files/2014/wage-theft.pdf>.

⁴ Center for Popular Democracy, By a Thousand Cuts: The Complex Face of Wage Theft in New York, November 2016, <https://populardemocracy.org/sites/default/files/WageTheft%2011162015%20Web.pdf>.

⁵ Make the Road NY, Center for Popular Democracy, Coming Up Short: The State of Wage Theft Enforcement in New York (2017), https://maketheroadny.org/wp-content/uploads/2019/04/Coming-Up-Short_-The-State-of-Wage-Theft-Enforcement-in-NY-4_8_19.pdf.

⁶ See Annette Bernhardt, et al., National Employment Law Project, Broken Laws, Unprotected Workers 24–25 (2009), <https://www.nelp.org/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf>.

of workers who made a complaint to a government agency and 89% of those who took group action to challenge employer practices.⁷

This risk of retaliation is even higher for immigrant workers, particularly given the current anti-immigrant climate. The recent Trump administration conducted multiple high-profile workplace raids. The administration has also increasingly deployed ICE agents to make arrests at courthouses—making undocumented workers fear that bringing a civil action that requires them to appear at court could lead to arrest and deportation. Such actions appear to be emboldening employers. California’s DOL, for example, reported a surge in complaints of immigration-related retaliation by employers in 2017. And fear of immigration-related retaliation has unfortunately not diminished during the Biden administration, as right-wing attacks on immigrants continue to reverberate in national media.

While New York has strong anti-retaliation laws and recently expanded them to include new protections against immigration-related retaliation, a NELP 2019 study found that such strong anti-retaliation laws “remain under-utilized by low-wage workers” and are still “difficult and time-consuming to enforce.”⁸ While these laws “can address retaliation after the fact,” “they continue to expose workers to immediate financial and emotional consequences that dissuade workers from holding employers accountable.”

It is particularly scary for workers to come forward as named plaintiffs in employment law claims. Making matters worse, most courts do not allow workers to proceed anonymously (i.e., under a pseudonym) in wage theft cases, absent concrete evidence that they face much greater retaliation than the typical plaintiff.⁹ Because the typical plaintiff in employment law cases faces such a high risk of retaliation already, meeting this extra hurdle is quite difficult.

In addition to retaliation, other hurdles, including the difficult economics for private attorneys in pursuing low-dollar violations, have posed obstacles to workers trying to address violations of their rights through private enforcement.

How the EmPIRE Act Closes the Enforcement Gap

New York can act to address the state’s lack of public enforcement capacity by passing the EmPIRE Act (A1893/S541). Inspired by California’s Private Attorneys General Act (PAGA), the EmPIRE Act would allow workers and labor organizations to stand in the shoes of the state and seek civil penalties, declaratory, and injunctive relief to address wage & hour violations, health & safety violations, and retaliation violations of the Labor Law.

⁷ See Raise the Floor Alliance & National Economic & Social Rights Initiative, *Challenging the Business of Fear* 13 (2016), <https://www.raisetheflooralliance.org/report>.

⁸ See Laura Huizar, National Employment Law Project, *Exposing Wage Theft Without Fear* 21 (2019), <https://www.nelp.org/wp-content/uploads/Retal-Report-6-26-19.pdf>.

⁹ See, e.g., *Agerbrink v. Model Service LLC*, No. 14 Civ. 7841 (JPO)(JCF), 2016 WL 406385, at *10 (S.D.N.Y. Feb. 2, 2016) (“[C]ommonplace concerns over termination or blacklisting will not ordinarily justify anonymity unless the victim would suffer exceptional repercussions The plaintiff’s worries of ‘termination and blacklisting’ do not rise to the level of extraordinary consequences meriting anonymity.”); *Doe I v. Four Bros. Pizza, Inc.*, No. 13 CV 1505 (VB), 2013 WL 6083414, at *10 (S.D.N.Y. Nov. 19, 2013) (denying motion to proceed anonymously despite workers’ evidence that Defendants had “repeatedly threatened to ‘call the police or immigration on any one of their employees’ and have, in fact, followed through on those threats in certain instances.”).

Claims brought under the EmPIRE are public in nature. The people or labor organizations filing claims do so on behalf of the state government, not in the name of any private party.

EmPIRE encourages robust enforcement of the Labor Law, awarding the workers affected by violations of the Labor Law a share of the civil penalties recovered. Where the state chooses not to intervene in the action, relators (i.e., those filing EmPIRE claims) who succeed are awarded 40% of all civil penalties they enforce, to be equitably distributed among affected workers. The remaining 60% goes to the state Department of Labor to fund public enforcement efforts. Where the state chooses to intervene in the action, 30% of the penalties recovered would be distributed among affected workers, while the remaining 70% would go to the Department of Labor. Prevailing relators would also be able to win injunctive and declaratory relief that brings lawbreaking employers into compliance with the Labor Law, as well as reasonable attorney's fees and costs for bringing the EmPIRE action.

The EmPIRE Act does not create any new requirements for employers. It simply expands public enforcement of labor laws already on the books here in New York.

How the EmPIRE Act Raises Revenue

The EmPIRE Act thus incentivizes more workers to play an active role in Labor Law enforcement and, in so doing, generates revenue for the New York State Department of Labor. The Act specifies that civil penalties recovered for the Department of Labor are to be used for the “enforcement of [the Labor Law] and education of employers and employees about their rights and responsibilities under [the Labor Law], to be continuously appropriated to supplement and not supplant the funding to the agency for those purposes.”

Right now, the state leaves millions of dollars on the table in penalties against law-breaking employers. These penalties have already been authorized by New York statutes to deter companies from breaking the law, but the state rarely collects them to the full extent permitted by law. And more importantly, the DOL simply does not have the resources to enforce the Labor Law in every single workplace, and it never will even if the agency's funding is temporarily increased in this budget, or any given budget.

By contrast, when a relator brings a lawsuit under EmPIRE, 60% to 70% of the penalties recovered (depending on whether the state intervenes in the action) go to the state. The revenue will more than cover any administrative costs to the state associated with EmPIRE.

The Private Attorney General's Act (PAGA) in California has generated an average of \$67 million per year from 2016 to 2021.¹⁰ It is estimated that the EmPIRE Act would generate close to \$30 million per year once attorneys have become familiar with this new mechanism.

Because the revenues generated for DOL must be continuously appropriated to supplement and not supplant the funding of the agency for enforcement of the Labor Law, a permanent revenue stream for DOL's enforcement efforts would be created and protected.

¹⁰ Rachel Deutsch, Rey Fuentes, Tia Koonse, California's Hero Labor Law: The Private Attorneys General Act Fights Wage Theft and Recovers Millions from Lawbreaking Corporations. (2020) Center for Popular Democracy, UCLA Labor Center, and Partnership for Working Families.
https://www.populardemocracy.org/sites/default/files/PAGA%20Report_WEB.pdf

Conclusion: Add the EmPIRE Act to this Year's State Budget

This session there has been much talk about raising the minimum wage in New York, and it appears likely that this might be done through the State Budget. However, increases to the minimum wage will be undermined if the current Labor Law enforcement crisis continues unabated.

For this reason, and for all the reasons explained above, it is critical that the Legislature pass a budget that includes the EmPIRE Worker Protection Act – to close the enforcement gap and create a dedicated revenue stream for future enforcement efforts for years to come.