

# **STOLEN WAGES IN THE NATION'S CAPITAL**

**FIXING DC'S BROKEN WAGE THEFT CLAIMS PROCESS**

Employment Justice Center  
Lawyers' Committee for Civil Rights Under Law  
Washington Lawyers' Committee for Civil Rights & Urban Affairs

February 6, 2014

Stolen Wages in the Nation's Capital: Fixing DC's Broken Wage Theft Claims Process  
Published February 6, 2014

Authors:



Employment Justice Center: Ari Weisbard, Deputy Director; Hannah Kane, Employment Justice Organizer; Geoff Leonard, Law Clerk

Lawyers' Committee for Civil Rights Under Law: Erandi Zamora, Associate Counsel; Alejandro T. Reyes, Counsel; Tanya Clay House, Public Policy Director

Washington Lawyers Committee for Civil Rights & Urban Affairs: Matthew Handley, Equal Employment Opportunity Project Director; Alicia Danze, Immigrant and Refugee Rights Paralegal

Report design by Lindsey Needham

© 2014 by the Employment Justice Center, Lawyers' Committee for Civil Rights Under Law and Washington Lawyers' Committee for Civil Rights & Urban Affairs. This report may be reproduced in its entirety as long as authors are credited, a link to the publication is provided, and no charge is imposed. This publication may not be reproduced in part or in altered form, or if a fee is charged, without the authors' permission.

# Table of Contents

I.	Introduction to Wage Theft.....	1
II.	Worker Stories.....	2
A.	Gregorio Hernandez.....	2
B.	Yvonne Johnson: “It’s really frustrating for me and my family.” .....	3
C.	Viviane Leung: “I can smile now.” .....	4
D.	Eliseo Hernandez: “What was done to me is theft.” .....	5
E.	José Ramirez and Yohan Perez.....	6
III.	Summary of the Wage Theft Prevention Act of 2014.....	7
IV.	A Closer Look at the Wage Theft Prevention Act of 2014 .....	10
A.	Formal Hearings and Enforceable Judgments .....	10
1.	Right to Prompt, Formal Hearing .....	10
2.	Prompt and Reliable Resolution of Claims .....	11
3.	Administrative Law Judges with Authority to Issue Subpoenas.....	13
4.	Administrative Orders Enforceable by Worker or Attorney General .....	14
5.	Informal Mediation Option with Both Parties’ Consent .....	15
B.	Increased Penalties.....	16
1.	Administrative Penalties .....	16
2.	Criminal Penalties .....	17
3.	Litigation Costs Recoverable and Dedicated to Future Wage-Hour Enforcement.....	18
4.	Additional Award for Failure to Comply with Final Judgment or Executed Settlement Agreement 19	
5.	Suspended Business Licenses for Non-compliance.....	19
C.	Greater Rights for Workers.....	20
1.	Written Notices.....	20
2.	Retaliation and Oral Testimony .....	21
3.	Tolling .....	22
4.	Consent of the Complainant in Settlements .....	22
5.	Subcontractors / Contractors.....	23
D.	Better Access to Representation for Victims.....	23
1.	Class Actions and Interested Parties .....	23
2.	Attorneys’ Fees .....	23
V.	Conclusion .....	24

---

# I. Introduction to Wage Theft

Today in the District of Columbia (“the District” or “DC”), low wage workers are being shortchanged. Policies currently in place make it very difficult, to nearly impossible, for victims of wage theft to hold employers accountable for failing to pay wages owed. The Wage Theft Prevention Act of 2014, co-introduced on February 4, 2014 by Councilmembers Vincent Orange, Jim Graham, and Mary Cheh, would provide needed accountability and stronger protections to ensure that those working an honest day receive honest pay for their labor.

This document provides an introduction to the current barriers affecting workers in the District, and presents an overview of the ways in which the Wage Theft Prevention Act of 2014 would ameliorate these problems; thereby making the District a better place for workers and responsible businesses.

## What is wage theft?

Wage theft occurs when an employer refuses to pay part, or all, of a worker’s regular wages or overtime. The authors have found that wage theft occurs in all industries, but is especially prevalent in construction, restaurants, security, and domestic work. Victims may be U.S. citizens and immigrants; men and women of every race and ethnicity; and both full-time and part-time workers.

## How much does wage theft affect workers and the District as a whole?

For workers who are often living paycheck to paycheck, wage theft can result in incredibly severe consequences, like large fees for missed payments, high-interest loans, and even foreclosures, evictions, and repossessions. A 2008-2009 survey of more than four thousand low-wage workers in American cities found that 68% experienced wage theft in the prior week. Twenty-six percent of those were paid under the legal minimum wage and 76% were denied overtime. On average, each low-wage worker lost \$51 per week to wage theft, or \$2,634 per year. That amounts to 15% of their annual income.<sup>1</sup>

**Wage theft not only harms underpaid individual workers, it also reduces District and federal revenues by millions of dollars per year due to tax and payroll fraud, places law-abiding employers at a competitive disadvantage, and depresses the consumer spending needed to fuel economic growth.**

## How is the District doing at combating wage theft?

Last year, a national report titled “Where Wage Theft is Legal” compared states’ wage laws and **the District was awarded a grade of F due to the inadequate safeguards we provide for workers.**<sup>2</sup> While stealing from your own employees isn’t technically legal in the District, the report’s title is essentially correct. Lack of effective deterrents, as well as woefully inadequate enforcement of DC’s wage and hour laws, make it painfully easy for an employer to commit wage theft and face no repercussions. In order to make sure that workers get paid what they’re owed, wage theft must be addressed on a structural level.

### What can we do?

If we want to stop wage theft in the District we need stronger worker protection laws, a better administrative process that allows workers to recover their wages, and greater penalties for individual employers who commit these violations.

## II. Worker Stories

The District's current administrative process for wage theft claims is insufficient to protect vulnerable workers and their families. As the stories below illustrate, some workers' claims linger indefinitely without resolution or are dismissed without notification to the worker or an explanation of the reasoning behind the decision. The Office of Wage-Hour's failure to subpoena evidence from uncooperative employers or to move forward with the resolution of a case when the employer refuses to appear at the fact-finding conference creates incentives for bad behavior and leaves workers without meaningful administrative recourse. The Wage Theft Prevention Act of 2014 will ensure that stories like those that follow cease to take place by creating a transparent and efficient administrative process that protects workers and holds unscrupulous employers accountable for stealing wages.

### A. Gregorio Hernandez



Gregorio Hernandez has been a resident of Ward 1 for the past eight years. His experience demonstrates the DC Office of Wage-Hour's ("OWH") minimal enforcement power and limited ability to protect workers. Gregorio's fact-finding conference was postponed at his former employer's request and was never rescheduled. His case remains unresolved.

In August, 2012, Gregorio was hired by DA Contractors to do demolition and construction at the Shaw Hospital. Over a period of four months, he worked in several construction projects throughout DC and Virginia. Although he worked more than 40 hours every week, his paycheck failed to reflect all the hours worked and he was never paid overtime. Gregorio began recording his hours worked to document his unpaid wages, and by the time he visited the Employment Justice Center's ("EJC") Workers' Rights Clinic, he had been terminated and was owed over \$8,000. The EJC helped Gregorio file a claim with OWH.

Gregorio had to return to OWH multiple times to amend his claim. Although the EJC had advised Gregorio to file his claim against DA Contractors, OWH instructed Gregorio to file against Kosmos LLC, a company that Gregorio describes as an "associate" of DA Contractors. However, a few days later, the OWH investigator called Gregorio to inform him that he would have to return to OWH and file his claim against DA Contractors. Although Gregorio and his employer made an oral contract that he would be paid \$15 per hour, DA Contractor paid him only \$11 per hour and OWH refused to consider enforcing payment of the \$4 per hour difference between the amount Gregorio was promised and the amount he was actually paid.

Since Gregorio was forced to amend his claim multiple times, his initial fact-finding conference, set for June 27, 2013, was first delayed to July 15, 2013, then postponed again, and ultimately canceled. Gregorio's former employer requested additional time to review his records before scheduling a fact-finding conference; however, the conference was never rescheduled. Ultimately, Gregorio learned that the OWH investigator closed his case with no resolution and no contemporaneous notice to Gregorio simply because Gregorio mentioned that he was considering filing in small claims court because of the delay in the resolution of his claim through the administrative process.

To this day, Gregorio still continues in the struggle to recover his wages.

**If the Wage Theft Prevention Act of 2014 had been in effect, Gregorio would have had the right to a prompt hearing with an Administrative Law Judge, rather than an informal conference that was indefinitely postponed and surreptitiously canceled. Gregorio could also have established the actual rate of pay he was promised through credible testimony.**

## **B. Yvonne Johnson: “It’s really frustrating for me and my family.”**



Yvonne Johnson's experience with the DC Office of Wage-Hour highlights the lack of transparency and due process surrounding administrative decisions.

On February 8, 2013, Yvonne Johnson, a long term resident of Ward 8, was not paid for her work as a special police officer for Code 3 Protective Services on her regularly scheduled payday. Though she was paid her wages three days later, not being paid on time meant that Yvonne did not have bus fare to get to work for the next three days. When she did not go to work, she was fired.

In addition, although Yvonne worked 8 hour shifts without a lunch break for six years, her employer nonetheless deducted half an hour from her pay for a lunch break that she was never allowed to take.

Yvonne visited EJC's Workers' Rights Clinic and was referred to the OWH. Code 3 sent a human resources representative to a fact-finding conference with OWH Director Pam Banks. The company's representative denied that they owed Yvonne any additional wages, and that all late wages had already been paid. Director Pam Banks requested that the company provide additional pay stubs and time sheets to verify their claims.

When Yvonne called Director Banks to check on her case, Director Banks told her that the company had sent over the information she had requested, and that OWH's determination was that Code 3 no longer owed Yvonne any wages. Yvonne asked to see the information that Code 3 had submitted, but Pam Banks refused to give her access.

Yvonne’s case was simply closed. She was never provided with the evidence used to justify the adverse decision nor was she provided with the opportunity to rebut that evidence or informed of any possibility for an appeal. She was never able to recover the wages she alleges she was owed.

**Yvonne would have greatly benefited from the Wage Theft Prevention Act of 2014. She would have had the right to request a formal administrative hearing before an Administrative Law Judge, she would have had the opportunity to examine and respond to all evidence considered, and she would have had the opportunity to appeal an adverse decision. She may also have succeeded in recovering the liquidated damages she was owed due to late payment.**

### **C. Viviane Leungue: “I can smile now.”**



When Viviane Leungue’s employer refused to pay her \$4,200 of her wages, Viviane chose to defend her rights by filing a claim with OWH. Fifteen months later, with no help from OWH, Viviane recovered her wages thanks only to her own willingness to publicize her case to the media.

In January 2010, Viviane began to work as a home health aide for Ultra Home Health Agency, earning \$10.50 per hour. Over the next two years, Viviane received her paychecks only sporadically, initially six weeks to two months apart and longer over time. This was less frequent than required under the District’s Wage Payment and Collections law. The late payments continued until Viviane became fed up and quit her job in January, 2012. She had not received five of her last seven paychecks. Viviane called her

former supervisor every week, but the supervisor only made excuses about not having the money to pay Viviane’s wages.

Frustrated, Viviane went to EJC’s Workers’ Rights Clinic for advice and then filed a claim with OWH. Viviane met with an OWH investigator in April, 2012 and showed the investigator her timesheets and bank statements to show how much the company owed. The investigator told Viviane that she would be in touch soon. Viviane called the investigator every two weeks for an entire year. Each time, the investigator told Viviane that she had sent a letter to Ultra Home Health Agency, but had been unable to get in touch with them. For over a year, the investigator never informed Viviane of changes in the status of her case, and never contacted her to provide any updates.

In June, 2013—more than a year after the filing of her claim with OWH—Viviane decided she had waited long enough. She contacted her former supervisor and asked when she would be paid. The supervisor claimed to not even know who Viviane was. However, Viviane told her that she would call the media to tell them about the wage theft. The strategy worked and after twenty-one months, Viviane was handed a check for the full amount of her unpaid wages.

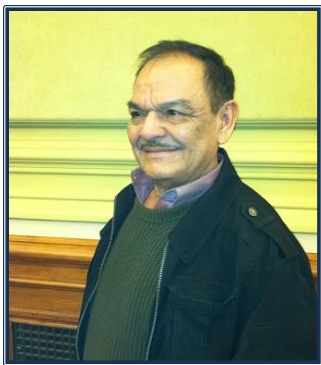
Viviane’s story demonstrates that employers are able to get away with wage theft with remarkable impunity. “I am very disappointed in the Office of Wage-Hour, because when someone goes to that office to get help with their problems, the office needs to do more to stand up and defend the workers,” says Viviane. “They need to stand up and help those who need it the most. They need to stand up and investigate what is going on at companies like mine, and all the other employers who



are doing the same thing.” In addition, Viviane’s experience of wage theft plagued her for over a year, as she was consumed with thoughts of the disrespect from her employer and OWH. “This situation has been very stressful for me, to work and not get my pay,” she says. “I thought about it all the time because I know it is so much money that I was owed.” Now that the case is closed, Viviane feels relieved. “I can smile now,” she explains.

**With the Wage Theft Prevention Act of 2014, an Administrative Law Judge would have had the power to issue an enforceable default judgment against subpoena Vivian’s employer when it failed to appear. Her employer would have faced real penalties beyond the wages owed, which would serve as a larger deterrent from committing wage theft in the future than merely having to pay the wages owed back without interest after years of delay.**

#### **D. Eliseo Hernandez: “What was done to me is theft.”**



Eliseo Hernandez’ story shows that the Office of Wage and Hour is not effective in protecting workers from wage theft due to its lack of enforcement power. “What was done to me is theft,” says Eliseo, who is a resident of Ward 1. “The Office of Wage-Hour needs to take the responsibility for making employers of the city follow the law like they should. The office needs stronger laws to accomplish their mission.”

In February 2011, Eliseo began working with Gryphon Tile installing tiles on the walls of Wilson High School. They did not pay him anything until three weeks after he started working, and even then, they only paid him for one week. As a result, he stopped working six weeks after he started. By then, he was owed more than \$2,500.

Eliseo tried to settle with the owner of the company. The owner only answered one of Eliseo’s many calls, and claimed he did not owe Eliseo anything. Eliseo went to EJC for advice and was referred to the OWH. After filing a claim with OWH, Eliseo attended a fact-finding conference with the owner of the company and OWH Director Pam Banks. In the conference, the owner agreed to pay Eliseo what he was owed. When Eliseo did not hear back for three weeks, he went back to OWH and an investigator explained that the owner had said he sent another check for Eliseo, which had already been cashed. But Eliseo had never received a check.

From there, the OWH told Eliseo that he would himself have to investigate to find out who cashed the check. He went to two different banks before he found out that the owner of the company had cashed the check himself in Middletown, Virginia. Eliseo went to Middletown to investigate, seeking police assistance. A Middletown detective called the owner, who told the detective that he had cashed the checks in order to pay Eliseo in cash. The detective agreed to get a video from the bank to verify who had cashed the check and send it to OWH. He never did.

In September, 2011, the OWH investigator explained that they had passed Eliseo’s case to the Office of the Attorney General, and that it could take a very long time to resolve. Two years later, Eliseo’s case still had no resolution because the Attorney General has not yet begun to prosecute. Eliseo was able to find a group of law students who helped him file in small claims court, and he was able to eventually recover \$1,300 of the wages he was owed. He never recovered the rest of his wages, and received no compensation for the two year delay in obtaining his wages.



With the Wage Theft Prevention Act of 2014, Eliseo's employer would have been unable to ignore the adverse decision rendered by the Office of Wage-Hour. Eliseo would have been able to promptly seek a formal hearing with an Administrative Law Judge, which could have issued an enforceable decision and subpoenaed the employer to compel them to appear. Eliseo would have saved a great deal of time, effort, and money spent investigating his case on his own. He would have been able to recover the full amount of wages he was owed with liquidated damages and his employer would have owed penalties to the District.

## E. José Ramirez and Yohan Perez

José Ramirez, a resident of Ward 2, and Yohan Perez, a resident of Ward 1, both worked for a popular restaurant until mid-2011 when they experienced wage theft. Yohan was fired in May, 2011, and was still owed four weeks' wages. José Ramirez lost his job when the restaurant suffered a fire, and was still owed three weeks' wages. Both of them made repeated attempts to contact the restaurant owner to ask for their wages. The restaurant owner ignored their phone calls, pretended he wasn't in the restaurant when they showed up, and insisted that he would pay them, but never did.



Both José and Yohan filed separate wage claims with the DC Office of Wage-Hour. Yohan, who filed his claim in July, 2011, went to OWH for a scheduled fact-finding conference, but the restaurant owner did not show up. The OWH investigator first rescheduled the conference and then ultimately told Yohan not to bother coming in to the rescheduled conference either because the employer wasn't going to show.

José's fact-finding conference was never scheduled. The investigator instructed José to call OWH in a month to ask if there was news on his case. José called many times over the next several months, but the investigator always said that there was no news on the case because the restaurant owner would not take his calls.

Eventually, all cases against the restaurant owner were referred to the Office of the Attorney General. However, the Attorney General never litigated the case. Ultimately, José and Yohan united with other workers who were owed wages by the same restaurant owner. Through a combination of

public demonstrations and media pressure, they arrived at a settlement agreement with the owner. Two years later, they recovered some of the wages they were owed.

“I had no result and decided not to bother the investigator again,” said José, reflecting on his experience with OWH. “I feel that with their inability to find a solution to my case, the DC Office of Wage-Hour demonstrated their inability to enforce the laws of Washington, DC.”

**José and Yohan’s case demonstrates that without the power to issue enforceable judgments, the DC Office of Wage-Hour is unable to resolve cases where the employer refuses to even appear and participate in the process. The Wage Theft Prevention Act of 2014 would have allowed the workers to win a default judgment if their employer refused to participate and to enforce that judgment, leading to a much quicker resolution of their cases. José and Yohan might not have felt the need to turn to public protest in order to recover their wages.**

## **III. Summary of the Wage Theft Prevention Act of 2014**

The Wage Theft Prevention Act of 2014 (“The Act”), co-introduced on February 4, 2014 by Councilmembers Vincent Orange, Jim Graham, and Mary Cheh, is designed to strengthen and expand safeguards against wage theft in the District. The Act would combat wage theft by establishing formal procedures to enable victims of wage theft to recover unpaid wages and damages; increasing the penalties for those responsible for committing wage theft; providing greater protection for workers who stand up for their rights; making it easier for wage theft victims to get legal representation; and making it easier for workers to collect awards from businesses that steal their wages. Ultimately, the Act would not only benefit workers, but also responsible employers who now have to compete with businesses that profit by engaging in unlawful business practices such as wage theft.

### **Formal Hearings and Enforceable Judgments**

The current administrative process for challenging wage theft only allows workers to pursue stolen wages through informal meetings mediated by an investigator. These meetings are not held on the record, do not result in a formal judgment for or against the employer, do not involve sworn witness testimony, can take months to schedule and often do not reach a resolution at all. Under the Wage Theft Prevention Act of 2014:

- Claimants would be able to choose between formal hearings held by Administrative Law Judges where wage claims would be fully adjudicated and informal mediation by the Office of Wage-Hour.
- Formal hearings would be held within 45 days of a request and default judgments would be issued against businesses that fail to appear.

- Administrative judges would have the authority to issue subpoenas, weigh the veracity of witness testimony and other evidence, and issue formal appealable and enforceable judgments.

### **Increased Penalties**

Under the existing law, penalties for wage theft are so low that the costs the OWH would incur in holding hearings to determine penalties would be higher than the penalty that might ultimately be collected. Because penalties are small and rarely if ever assessed, there is little to deter unscrupulous employers from breaking the law. Under the Wage Theft Prevention Act of 2014:

- Maximum administrative penalties for non-payment of wages would be increased to \$50 per day for the first violation and \$100 per day for subsequent violations and between \$100 and \$500 for failing to provide workers with notice of their rights or similar violations.
- Minimum and maximum criminal fines would be set to reflect the amount of wages stolen as well as a business's level of culpability and history of misconduct.
- OWH and the Office of Attorney General, like private attorneys, would be entitled to recoup enforcement costs from defendants found liable for wage theft.
- When business owners are delinquent in complying with administrative or judicial orders in wage theft cases, the Department of Consumer and Regulatory Affairs would suspend their businesses licenses. The businesses would also be required to post public notices of their non-compliance.

### **Greater Rights for Workers**

Under the current law, employers do not have to inform workers in writing of how much or when they will be paid. The lack of a written record makes it difficult to adjudicate any subsequent wage dispute. Workers are also inadequately protected from retaliation, especially when they demand their unpaid wages without filing a formal complaint with the District. Under the Wage Theft Prevention Act of 2014:

- Employers would be required to provide a simple form to workers that would include the employer's business name and contact information and the rate and method for calculating the worker's pay. When employers fail to keep required records, the worker's testimony about an agreement would be presumed true.
- Workers would be better protected from retaliation for exercising their rights.

- The Statute of Limitations would be tolled when employers fail to post notices of worker rights.
- Workers would be able to bring class actions or have their rights supported in court by labor or community organizations.
- Workers' consent would be required before their complaints could be settled by the District or a third party.
- General contractors would be jointly responsible when their subcontractors commit wage theft.

### **Better Access to Representation for Victims**

Currently, finding representation in actions to recover unpaid wages is difficult, because individual claims are often small and judges sometimes award less than an attorney's usual hourly fee even, when claims are found meritorious. Under the Act:

- Workers with similar claims against the same employer would be allowed to choose whether to bring a class action or a collective action, making representation of multiple workers easier.
- Judges would be given clearer instructions on how to calculate and award attorneys' fees, lowering the risk that successful attorneys would lose money even when they successfully prosecute meritorious claims.

## **IV. A Closer Look at the Wage Theft Prevention Act of 2014**

The Wage Theft Prevention Act of 2014 seeks to reduce the incidence of wage theft in the District by creating a process that will be fair, transparent, and reliable. The Act would establish formal procedures to enable victims of wage theft to recover unpaid wages and damages; increase the penalties for unscrupulous employers engaged in wage theft; provide greater protection for workers who stand up for their rights; make it easier for wage theft victims to get legal representation; and make it easier for workers to collect awards from businesses that steal their wages.

### **A. Formal Hearings and Enforceable Judgments**

Workers and employers need a process for resolving claims for unpaid wages that is fair, efficient, and transparent. As it now stands, the District's process is informal, unpredictable, and subject to delays that often leave many workers' claims in limbo. To strengthen the District's current program, the Wage Theft Prevention Act of 2014 will create a formal hearing process, which will be used when a party believes that informal meetings are insufficient to resolve a complaint. Administrative Law Judges will preside over formal hearings, which unlike the fact-finding conferences held in the current system, will take place on the record and result in formal orders with findings of fact and conclusions of law. This streamlined process will facilitate the enforcement of orders and permit both employers and workers the opportunity to appeal findings. Although the Wage Theft Prevention Act of 2014 will leave in place a process that encourages parties to informally resolve wage disputes without requiring them to immediately commence formal proceedings, this conciliation process will be optional.

#### **1. Right to Prompt, Formal Hearing**

Under the current administrative process, workers are denied the opportunity to present their claims at a formal administrative hearing.<sup>3</sup> The denial of this opportunity creates tremendous uncertainties for all parties. As the process currently stands, workers file wage complaints with the Office of Wage-Hour ("OWH"), which is part of the District's Department of Employment Services ("DOES"). An OWH investigator then informs the employer about the complaint and schedules an informal meeting between the parties in the hopes of resolving the wage dispute. This informal meeting is referred to as the "fact-finding conference."

Current law mandates no specific time frame for the scheduling of this conference and there are no regulations governing how the OWH investigators develop and preserve a complete record or base their decisions on that record. In fact, because there is no requirement for written determinations with factual findings and conclusions of law, there is no way to be certain what evidence was considered and found to be credible or what the basis for a legal decision is. Rather, after an

informal discussion with the parties, the investigator simply tells both parties what the investigator thinks should happen, with no written record of the decision or clear enforcement mechanism.

The uncertain and informal nature of these proceedings makes it difficult, if not impossible, for parties to challenge the legal or factual basis on which these decisions are reached. Without a public and written factual record and final order, proceedings cannot be reviewed for accuracy and completeness or for soundness of legal reasoning and basis in fact. Additionally, because fact-finding conferences are informal, even the procedure for challenging their outcome—such as the requisite legal standard of review, or what court to seek review in—is unclear. This is particularly a problem for workers who cannot obtain private representation and have few alternatives to the administrative process, but often cannot even find out the status of their case, let alone how to resolve it. Employers, on the other hand, often simply ignore adverse decisions unless and until the case is referred to the Office of Attorney General and a claim is filed in court, at which point they can usually raise new legal defenses or settle the case with little if any cost beyond what they owed initially.

The Wage Theft Prevention Act of 2014 will dramatically improve this process by creating greater transparency and safeguards for all parties. When parties cannot resolve their differences through the fact-finding conference overseen by an OWH investigator, either party will be able to obtain a formal administrative hearing.<sup>4</sup> The formal hearings will be presided over by an Administrative Law Judge who will hear testimony presented under oath, receive and examine evidence, and ensure the creation of a complete and public record.<sup>5</sup> Hearings must take place promptly within 45 days of a request for the hearing, and upon conclusion of the hearing, the Administrative Law Judge must issue a written final order that will include the findings of fact and conclusions of law that form the basis of the final order.<sup>6</sup> The order will be enforceable in court and can also be challenged in court by either party under the substantial evidence standard set out in the D.C. Administrative Procedure Act.<sup>7</sup>

This policy is similar to the administrative process in California, which provides for wage theft cases to be adjudicated through an evidentiary hearing when the claim cannot be resolved through an informal conference.<sup>8</sup> As proposed in the Wage Theft Protection Act, California's hearings are held on the record, parties and witnesses testify under oath, and orders can be appealed.<sup>9</sup> Similarly, DOES unemployment and workers' compensation hearings, as well as the Department of Consumer and Regulatory Affairs hearings on unfair business practice complaints, follow similar formal procedures.

Such procedures foster trust in the administrative process by ensuring that both employers and workers are given the opportunity to fully and accurately present their case; are provided with written findings supported by the facts and law; and receive clear instructions as to how such findings may be contested.

## **2. Prompt and Reliable Resolution of Claims**



Under the current law, there is no definite time frame within which an informal fact-finding conference must be held. Moreover, once a conference is scheduled, the employer can proactively pay the alleged wages owed, present oral or written counter claims, or appear at the informal conference to dispute the claims. Unfortunately, the current system makes it very easy for employers to do none of the above. This is because the Office of Wage-Hour does not exercise authority to require the employer to appear at fact-finding conferences and there are no clear consequences or penalties for employers who ignore OWH investigators or fail to appear at the fact-finding conference. Even in cases where employers decide to dispute alleged claims, they are often able to postpone the fact-finding conference indefinitely by using various delay tactics.<sup>10</sup> D.C.'s current system only emboldens unscrupulous actors. For workers who live paycheck to paycheck, the delay in obtaining a resolution unnecessarily worsens an already unjust situation.

Another problem with D.C.'s current wage dispute system is that employers face no consequences if they fail to respond to a complaint or fail to attend a scheduled informal conference. There are no clear statutory fines, no use of subpoena power on the part of the Office of Wage-Hour, and no mechanism for administratively adjudicating wage claims unless the employer voluntarily participates. While a default judgment would be issued against an employer that failed to participate in an unemployment or workers' compensation hearing, no similar consequences attach in the OWH's process. The Office of Wage-Hour's inability to keep employers accountable results in a great imbalance of power and nullifies the effectiveness of the administrative process for many workers. Under this system, employers have an incentive to ignore complaints and notices from the Office of Wage-Hour with little risk of adverse consequences.

The Wage Theft Prevention Act of 2014 remedies this in three ways. First, under the Act, formal hearings will be held within 45 days of a request by either party.<sup>11</sup> This policy will ensure that workers have a reliable time frame for resolution of their claims and payment of earned wages and, where applicable, liquidated damages.

Second, employers will be discouraged from simply ignoring rightful claims for unpaid wages filed against them.<sup>12</sup> Once employers receive notice of a complaint as well as their rights and obligations, they will have 15 days to respond by admitting the allegations or denying them and requesting a hearing or conciliation. If the employer does neither, the allegations in the complaint will be regarded as admitted, and a default judgment enforceable in court will be issued in favor of the worker.

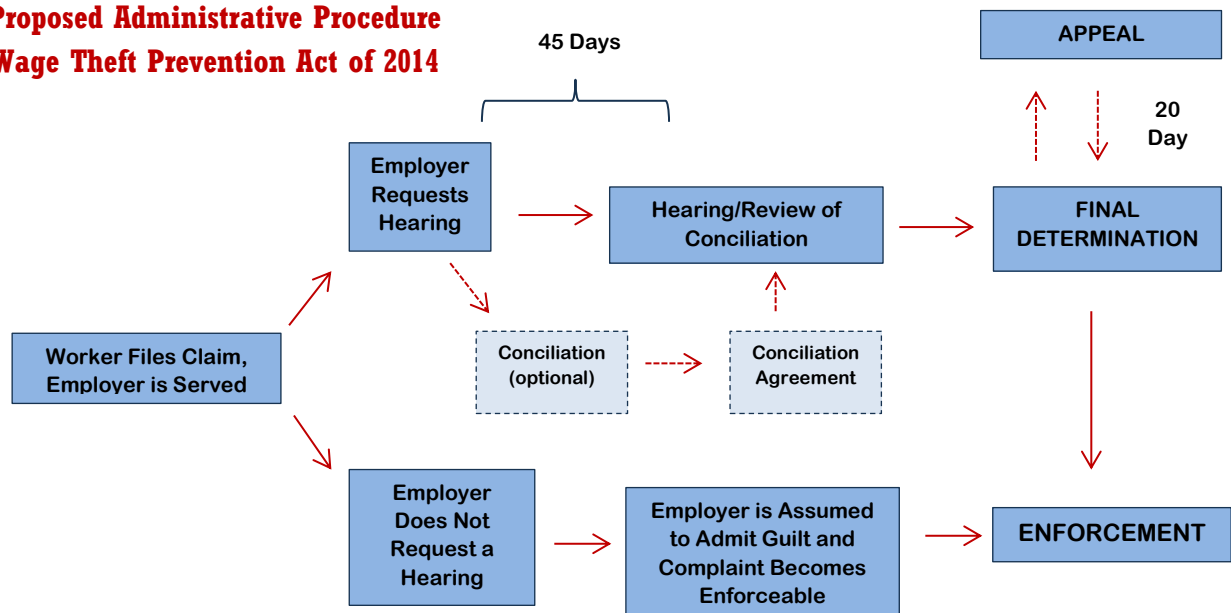
These changes will close a loophole that allowed employers to avoid a determination that they owed wages by simply failing to respond or appear. Just as traffic citations require drivers either to pay or contest their tickets, but cannot simply be ignored with impunity, defendants will have the choice of whether to respond to a wage theft complaint or have their failure to respond construed as an admission of liability. This policy is also similar to the citation procedures used in Washington State,<sup>13</sup> where departments tasked with enforcing wage and hour laws can issue citations for non-compliance. In both jurisdictions, if not appealed, such citations become final and binding. Similarly,

the New Mexico Day Labor Act provides that if the defendant fails to respond to the complainant's claim within 10 days, a finding will be made in favor of the complainant.<sup>14</sup>

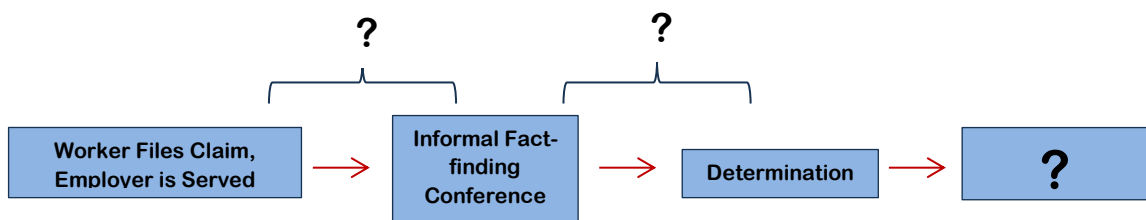
Third, employers will not be able to stall the process by failing to appear at the administrative hearings. If the employer denies the allegations in the complaint, but fails to appear at the scheduled hearing, the worker will nonetheless be allowed to present evidence. The Administrative Law Judge will then issue a judgment based on the evidence presented.<sup>15</sup> This policy will ensure that claims are resolved even where there is a deliberate lack of cooperation by employers. California employs a similar policy: if the employer fails to appear, "the Labor Commissioner must nonetheless hear the evidence offered and issue an order, decision, or award in accordance with the evidence."<sup>16</sup>

In short, the Act will close loopholes that are allowing employers to derail the process and avoid liability by simply failing to participate in the administrative process. Moreover, both parties will have access to a fair process that gives meaning to the substantive protections of the law.

**Proposed Administrative Procedure  
Wage Theft Prevention Act of 2014**



**Current Wage-Hour  
Administrative Procedures**



**3. Administrative Law Judges with Authority to Issue Subpoenas**

Granting adjudicators clear authority to obtain evidence and weigh its veracity is important for the transparency and efficacy of the wage claims process. Under the current legal framework, the OWH investigators have failed to issue subpoenas to compel employers and witnesses to appear at hearings. This is a problem because, by its own admission, “[c]laims requiring the most processing time are cases where the employer simply refuses to fully cooperate [with OWH].”<sup>17</sup> Some employers fail to cooperate by ignoring all of the notices sent by OWH to attend conferences and by failing to open their payroll records for investigation.<sup>18</sup> As a result, workers’ claims can linger without resolution both before and after they are referred to the Office of the Attorney General (“OAG”). The OAG then determines which cases to litigate, but due to limited resources, the OAG does not assume representation in most referred cases. As a result, most claims for unpaid wages that are referred are simply left unresolved, effectively shielding some unscrupulous employers from liability and denying some workers their rightfully earned pay.

The Wage Theft Prevention Act of 2014 will grant definite subpoena authority to the Administrative Law Judges that will be conducting formal hearings, allowing them to compel the cooperation of parties whose participation is essential to resolve claims.<sup>19</sup> If a person subject to the subpoena refuses to obey it, the Administrative Law Judge, or one of the parties, will be able to seek enforcement in court. Importantly, if a person willfully ignores the subpoena, he or she will face consequences, including a fine of up to \$500 or 60 days in prison, or both. Other jurisdictions like California, Kansas, New Mexico, and Miami-Dade County also allow hearing officers to issue subpoenas to compel attendance and the production of evidence to resolve wage claims.<sup>20</sup>

This policy will ensure that both employers and workers have access to relevant evidence and are given a fair chance to present or defend their case. This will allow Administrative Law Judges to make determinations based on a complete record. Additionally, issuing enforceable subpoenas will provide a strong disincentive to employers who, under the current policy, could simply ignore requests for information without facing clear consequences.

#### **4. Administrative Orders Enforceable by Worker or Attorney General**

The success of the administrative process is largely dependent on the ability of workers to enforce final orders and ultimately obtain payment for wrongfully withheld wages. Unfortunately, even where the OWH investigator finds that wages are owed, the informal nature of the current system leaves workers without a clear process to enforce the informal finding. Under current law, the OWH investigator is not required to issue formal findings or determinations, or provide any findings in writing at the conclusion of the fact-finding conferences. Consequently, the success of the current process hinges on the employers’ willingness to comply with the informal resolution agreed upon at the fact-finding conference. If an employer fails to comply, OWH refers the case to the Office of the Attorney General, where, after substantial delay, a decision is made on whether to litigate or drop the case. Some cases remain without resolution for months, or even years, with little communication with claimants whose statutes of limitations are continuing to run. Even where the

OAG does decide to litigate, there is no administrative record or factual findings to review, and no final written order to enforce. Each case must begin from scratch in Superior Court.

The Act will remedy this by requiring that final, written orders be issued at the conclusion of the formal administrative hearings.<sup>21</sup> The orders must contain findings of fact, conclusions of law, the remedy ordered, and the reasoning upon which the decision is based. This will make the process more fair and transparent for all the parties involved. The order will be enforceable in court and can also be appealed in court by either party.<sup>22</sup> Similarly, other jurisdictions, including California, Kansas and Miami-Dade County also require the issuance of enforceable final orders, as well as findings of fact and conclusions of law.<sup>23</sup> In California for example, the order—including a summary of the hearing and the reasoning that forms the basis of the order—must be filed within 15 days of the hearing date. If the parties do not file a timely appeal, the order becomes final and enforceable as a judgment by the Superior Court.<sup>24</sup>

These policies will ensure that the wage claims process works as intended by increasing the likelihood of workers obtaining payment for their wages and providing a clear process for both workers and employers to protect their interests.

## **5. Informal Mediation Option with Both Parties' Consent**

The preservation of an informal process to resolve wage claims will ensure the efficient use of resources. Under the current system, workers' claims for unpaid wages are evaluated during an informal fact-finding conference, run by an OWH investigator. However, as described above, the current process is so informal that it fails to safeguard the rights of the very workers it is meant to protect. The Wage Theft Prevention Act of 2014 will strengthen the current process by (1) providing for a conciliation process upon the written consent of both parties, (2) allowing both parties to withdraw from conciliation at any point and proceed to the formal hearing before an Administrative Law Judge, and (3) giving weight to any settlement agreement by reducing it to an administrative order that can be enforced in court.<sup>25</sup> In order to encourage settlement, no statements made during the conciliation process would be allowed as evidence in a subsequent proceeding (except to interpret a settlement agreement) without the written consent of the parties.

Other jurisdictions with a comparable process are California and Miami-Dade County. In California, the wage claims process similarly provides for informal conferences. If a matter cannot be resolved informally, an administrative hearing is held and a final determination is made.<sup>26</sup> In Miami-Dade, where a conciliation conference is available, if parties cannot arrive at a resolution through informal means, the claim is referred for a formal hearing. Like in the Wage Theft Prevention Act of 2014, nothing said in the informal conference can be used in a formal hearing without the parties' agreement.<sup>27</sup>

Allowing parties to pursue informal conciliation will avoid the overburdening of the formal hearing process with claims that could have been resolved outside of the formal setting. Additionally,

reducing settlement agreements to enforceable orders will ensure the effectiveness and enforceability of these agreements.

## **B. Increased Penalties**

Under current law, businesses that withhold workers' wages face minimal penalties and risk of prosecution. Without any threat of facing substantial penalties for noncompliance, businesses have little incentive to comply with wage and hour laws in the first instance. Instead, it is actually profitable to engage in wage theft. Even if a business is found liable and eventually forced to pay some or all of the wages owed, it has in effect received what amounts to an interest-free loan.

The Wage Theft Prevention Act of 2014 addresses this by (1) increasing both administrative and criminal penalties to levels commensurate with the severity of an employers' violation, (2) allowing OWH and the Attorney General to recover the cost of enforcing wage claims, including attorneys' fees, (3) dedicating awards for costs and penalties to fund future enforcement, (4) requiring additional payments when employers fail to comply with final orders or agreements, and (5) requiring that the Department of Consumer and Regulatory Affairs suspend the business license of business owners who are delinquent in complying with orders to pay wages or other damages.

### **1. Administrative Penalties**

The administrative penalties that in theory may be assessed against businesses that violate wage and hour laws are paltry. Maximum penalties for failure to pay wages owed to workers are \$300 for initial violations and \$500 for subsequent violations or \$1,000 for paying less than the minimum wage. Moreover, because these penalties are discretionary and involve substantial additional administrative processes (including a hearing), the Office of Wage-Hour has never imposed administrative penalties in recent years. Indeed, according to testimony by Department of Employment Services Director Lisa Mallory, DOES has not yet even enacted hearing procedures that would enable penalties to be assessed.<sup>28</sup>

While this deprioritization of administrative penalties may appear logical from a purely budgetary perspective because the cost of holding a hearing is greater than the penalties that might be collected, the net result is a strong economic incentive for businesses to commit wage theft. Businesses also have little incentive to respect legal requirements to post notices, provide information to their workers, maintain records, or allow inspection of their records because, in those cases, there would be no direct monetary damages and the fine is the only money the employer might be required to pay.

Under the Wage Theft Prevention Act of 2014, administrative penalties would be calculated based on the type of violation, the history of violations by the business, and the amount of time the violation has gone un-remedied.<sup>29</sup> Where the violation involves the nonpayment of wages, first-time violators would be fined \$50 for every day that wages go unpaid, while subsequent violators would be fined \$100 per day. Businesses would face separate fines for failing to post required notices of

Wage-Hour investigations or non-compliance (\$500); failure to maintain payroll records, failure to allow inspection of payroll records by the Office of Wage-Hour (\$500); failure to inform workers of their wages and pay rates (\$500); and failure to post notice of minimum wage laws (\$100 per day). These penalties resemble similar daily<sup>30</sup> and offense-specific<sup>31</sup> administrative penalties in San Francisco.

While these penalties begin small, they increase with time. This makes collecting penalties more financially feasible for the Office of Wage-Hour because employers would have an incentive to pay what they owe promptly and to participate fully in the adjudicatory process to avoid further fines. Additionally, offense-specific penalties not only make enforcing notice and record-keeping requirements more viable for OWH, they encourage businesses to comply with wage and hour laws in their entirety.

## **2. Criminal Penalties**

Current law also provides for criminal penalties for violations of wage and hour laws. The penalties are only occasionally relevant, however, because the Office of Attorney General does not appear to prioritize criminal enforcement of wage and hour laws and because, in cases where the employer does not maintain adequate records, it is difficult to prove violations beyond a reasonable doubt, as would be required for criminal convictions. Nevertheless, adequate criminal penalties are important to express the public's strong condemnation of businesses stealing from their workers and to contribute to public awareness of the seriousness of the crime when particularly serious cases are prosecuted.

Under the current law, if the employer is convicted of willfully failing to pay wages owed for the first time, the maximum criminal fine is only \$300 in fines and up to 30 days in jail. Even repeat willful offenders face a maximum criminal fine for withholding wages of only \$1,000 and, in theory, up to 90 days in jail. If an employer violates the Minimum Wage Revision Act, potentially larger fines of up to \$10,000 or, for subsequent offenders, imprisonment of up to 6 months is possible, but few if any employers have actually been fined or imprisoned for anywhere near the maximum amount. Furthermore, fines are only available if a worker can prove beyond a reasonable doubt that the wage theft was willful, which is extremely difficult. Finally, while these amounts represent maximum penalties, there are no minimums. The Office of Wage-Hour and the Office of Attorney General have broad discretion to reduce fines or to impose no fines at all, which they typically do in order to settle cases.

Current law allows businesses to withhold wages from their workers with little risk of serious consequences. Employers get significant savings when their violations go unreported by workers who fear retaliation, get a free loan during the enforcement process when violations are reported, and face minimal, if any, additional costs even when they are found guilty of violating the law. The Wage Theft Prevention Act of 2014 encourages compliance with wage and hour laws by calibrating minimum and maximum penalties to be proportionate to the amount of wages stolen, whether the business was a repeat violator, and whether the violation was willful.



Criminal penalties are commonly imposed for non-willful wage theft in many jurisdictions, including Connecticut,<sup>32</sup> New York<sup>33</sup> and Massachusetts.<sup>34</sup> This ensures that employers cannot escape liability by pleading ignorance where willfulness is likely, but difficult to prove. It also encourages self-policing by employers, allowing employers who commit good faith errors to promptly correct them and avoid substantial penalties.

Under the proposed law, criminal fines for non-willful first-time violators would be set to be no less than the amount of wages owed, but no greater than \$10,000.<sup>35</sup> For violators who are repeat offenders or engaged in willful violations, the criminal fine would be at least double the amount of wages owed, but no greater than \$25,000. Finally, for violators who both acted willfully and repeatedly violated the law, the fine would be at least triple the wages owed, but no greater than \$50,000.

These maximum fines are similar to those already employed in Massachusetts,<sup>36</sup> which received one of the highest ranks for wage theft prevention laws by the Progressive States Network,<sup>37</sup> and the tiered system of fines that are proportionate to wages owed is already employed in New York State with significant success.<sup>38</sup> By allowing for judicial discretion within the range set out in the statute, the Act would ensure those who commit wage theft face real consequences for their attempts to exploit vulnerable workers and that those consequences are proportionate to the severity of their crime. Under this system, the risk of unlawfully withholding wages would be commensurate with any potential gains, short-circuiting the incentive to commit wage theft.

The Wage Theft Prevention Act of 2014 creates serious consequences for wage theft in order to encourage better compliance with District workplace protection laws. It does so by imposing minimum penalties in proportion to the amount of wages stolen, setting maximum penalties comparable to those in other states, and making it harder for employers to escape punishment by claiming ignorance.

### **3. Litigation Costs Recoverable and Dedicated to Future Wage and Hour Law Enforcement**

Under the current law, judges are required to determine and award “reasonable” attorneys’ fees and costs when the Office of the Attorney General sues to enforce wage and hour laws. Judges are often reluctant to award the actual full costs of litigation, however, especially when they are much greater than the amount of unpaid wages recovered. Thus, even if the number of hours spent enforcing the District’s wage and hour laws are reasonable and no more than necessary to successfully prosecute a claim, the attorneys’ fees actually awarded may not always reflect a typical hourly rate for that number of hours. In addition, there is no method for the District to recoup any of its costs for investigating or adjudicating administrative claims that do not lead to litigation in court. With the limited availability of funding for OWH, this creates an incentive to reduce enforcement in response to budgetary pressure and may explain why no penalty hearings have been held to date.

The Wage Theft Prevention Act of 2014 ensures that the Office of Wage-Hour and the Office of Attorney General can afford to enforce wage and hour laws by allowing both to recoup the costs of enforcement and dedicating any attorney fees, penalties, fines, or costs recovered to the future enforcement of wage and hour laws.<sup>39</sup> It also clarifies that judges are required to base attorneys' fees on the actual costs of litigation, even though they may often be larger than the amount of wages recovered. This would allow the Attorney General or private attorneys to recoup the costs of enforcing violations of the minimum wage and wage payment laws, whether the amount of wages is large or small. Second, under the new administrative claims procedure, Administrative Law Judges could award the costs of enforcement to the Office of Wage-Hour. Such fee-shifting structures are important tools for enforcement of strong wage and hour laws and can be found in many jurisdictions, including New York,<sup>40</sup> Connecticut,<sup>41</sup> and San Francisco.<sup>42</sup>

Finally, all criminal fines and administrative penalties would be dedicated to the Office of Wage-Hour to use for enforcing wage and hour laws. This provides the Office of Wage-Hour with an important financial incentive to aggressively enforce wage and hour laws, as well as the guaranteed means to do so. Connecticut dedicates administrative penalties to an enforcement fund and is recognized as a national model for its enforcement efforts.<sup>43</sup> The National Employment Law Project noted that dedicating penalties to future enforcement is a best practice in the field.<sup>44</sup> By guaranteeing funding for enforcement, the Wage Theft Prevention Act of 2014 ensures resources are consistently available to protect workers and their wages.

#### **4. Additional Award for Failure to Comply with Final Judgment or Executed Settlement Agreement**

Under the current law, businesses face no additional consequences for failing to pay wages, damages, or penalties ordered by the Office of Wage-Hour. This means that even when the Office of Wage-Hour believes a worker is owed wages, the employer can avoid paying unless and until the Office of Attorney General separately sues them in Superior Court. This makes compliance more costly for the Office of Wage-Hour and lengthens the amount of time workers must go without the wages they have earned.

Under the Wage Theft Prevention Act of 2014, businesses that refuse to comply with orders to pay wages, damages or penalties will see their total liability increase by 10% for each month they fail to comply.<sup>45</sup> Such increases will continue until all liabilities, including the 10% additional payments, are paid. This incentive structure already exists in San Francisco<sup>46</sup> and serves to encourage quick compliance with administrative orders, saving the enforcing agency the costs of protracted enforcement, while making workers whole as soon as possible.

#### **5. Suspended Business Licenses for Non-compliance**

Businesses that fail to comply with administrative or judicial orders issued in response to wage theft violations are currently allowed to continue operating their business, competing unfairly with responsible and fair employers who comply with the law. Under the Wage Theft Prevention Act of

2014, the Department of Consumer and Regulatory Affairs would suspend businesses licenses of business owners who are delinquent in complying with administrative or judicial orders.<sup>47</sup> The businesses would also be required to post public notices of their non-compliance. As noted above, under the current law, there are limited incentives for businesses to comply with administrative orders to pay wages. To further encourage prompt compliance, if businesses fail to comply with final orders to pay wages, they would be given 30 days to come into compliance before the Department of Consumer and Regulatory Affairs would suspend their business license. This policy, modeled on a similar policy from San Francisco,<sup>48</sup> would give businesses a strong incentive to comply with orders to pay wages.

## **C. Greater Rights for Workers**

Although federal law forbids employers from underpaying their workers, it does not provide enough systematic enforcement of workplace rights. States such as California and New York have already taken steps to close the gaps by increasing workers' rights and legal protections. These states' laws require greater clarity in wage agreements and wage calculations and expand the means by which workers can obtain justice for unpaid wages.<sup>49</sup>

In order to adequately enforce wage and hour laws, the District must enact similar laws to help create avenues for workers to engage in wage theft prevention themselves. Increasing workers' awareness of and participation in wage recovery measures gives them greater leverage to defend their rights in the workplace. By encouraging employer-worker dialogue about agreed upon wages and increasing workers' ability to seek administrative remedies, the Act would help the most vulnerable workers become their own advocates in the fight for fair employment.

Specifically, the Act would (1) require employers to give written notices to workers indicating their expected pay, overtime rate, pay dates and the business's contact information; (2) create greater protections for workers from retaliation; (3) extend the time period in which wage theft victims may make a claim where the employer has failed to provide required notices; (4) grant complainants greater agency in settling their wage disputes in the administrative process; and (5) broaden accountability for wage theft to include general contractors as well as subcontractors.

### **1. Written Notices**

Under the current law, employers do not have to inform workers how much or when they will be paid, creating a disparity in power in what should be a mutually beneficial transaction – the exchange of pay for services. Without a written record confirming the rate and date of payment, workers have difficulty resolving disputes and holding employers accountable for unpaid wages.

Immigrant workers, who are overrepresented in the District's low-income job market, are especially vulnerable to this type of exploitation. They are often disconnected from broader community networks that educate workers about their rights. Because of this marginalization, immigrant

populations often suffer wage theft silently, without the hope of seeking administrative remedies or confronting their employers about receiving correct payment.

On behalf of all marginalized workers, D.C. lawmakers must ensure that there is both adequate understanding as well as enforcement of wage agreements. Following the example of other states with high immigrant populations – such as New York and California - D.C. should require employers to provide written notice of expected payment upon hiring workers, thereby ensuring that all workers in the District have the leverage necessary to settle subsequent wage disputes.<sup>50</sup>

Notices would indicate the rate of a worker's pay, the basis of that pay (if it is determined by the hour, shift, day, week, salary, piece, commission, etc.), any allowances to the minimum wage (such as meals, tips, or lodging), the exact overtime rate of pay, and the expected date of payment.<sup>51</sup> Furnished with this calculation of the expected pay and overtime rates upon accepting employment, workers can compare this primary agreement of expected pay with the paystubs they later receive, and, when necessary, self-advocate when incorrect payment occurs.

Also, because many employers do not give their office address, name or telephone number upon hiring, some workers, especially day laborers, have difficulty contacting their employers in order to receive timely and correct payment for their work. To prevent fly-by-night businesses from cheating workers out of their wages, this law would require all employers to provide up-to-date contact information to their workers upon hiring them.<sup>52</sup> The written notice of expected wages would include the employer's business name, aliases, physical and mailing address and telephone number. For employers' convenience, DOES would make a template form available that could be used to share the wage agreement and contact information with their workers.

## **2. Retaliation and Oral Testimony**

In addition to providing greater support for internal advocacy and resolution of wage theft disputes, the Act also provides several new protections to workers who seek legal remedies regarding wage theft claims: it clarifies that workers can give oral accounts as testimony of wage theft, and it further protects them from retaliation when they engage in protected activity covered in the proposed law. The Act would protect wage theft victims who file internal complaints regarding underpayment of wages and also encourage them to seek administrative or legal remedies if their employer is unwilling to reconcile the wage dispute internally, thereby granting them greater agency in the complaint process.

Under the current enforcement process, workers who are victims of wage theft have difficulty proving that they were denied proper wages. Even though it is employers who often fail to comply with record-keeping laws, it is usually workers who suffer the consequences by facing difficulties in proving their claims. To better enforce wage and hour standards, the proposed provisions would create greater incentives for compliance with record-keeping regulations by crediting workers' oral testimony in wage disputes where employers have not provided the notice of terms and maintained records of wages paid or time worked. This will force wage theft violators to bear the consequences

of their bad payment practices and failure to maintain records of hours worked and wages paid, rather than shifting the burden to the workers. New York recently passed a comparable law that exposes employers to penalties for failure to keep records and shifts the burden of proof to the employer.<sup>53</sup> Workers who are victims of wage theft will also be protected from losing their ability to file complaints due to the statute of limitations because the faulty practices of their employers prevented them from filing timely claims.

Fear of retaliation also deters victims of wage theft from complaining about payment violations. Many workers do not even report wage theft because doing so might put them at risk of losing their job, suffering discriminatory treatment at work, or—in the case of immigrants—even being deported.<sup>54</sup> Workers should be able to request written notices of payment and the employer’s contact information without any subsequent penalization or discriminatory treatment. The proposed law would increase penalties against employers who threaten, intimidate or take any other adverse action against wage theft complainants,<sup>55</sup> thereby encouraging wage theft victims to come forward to report violations, and rebalancing the disparity of power between employers and workers with regard to correct wage payment. The anti-retaliation provisions would encourage workers to advocate for their rights within the workplace and to resolve wage disputes internally, before turning to external legal measures.

### **3. Tolling**

Aside from the fear of retaliation or the lack of adequate proof, another deterrent to stopping wage theft is the time limitation during which victims of wage theft may make claims. Currently, D.C. Wage-Hour law provides that the time period of three years for filing a complaint begins when the illegal action occurs. However, because employers currently are not required to provide written notice of the rate of an worker’s pay, the basis of that pay (if it is determined by the hour, shift, day, week, salary, piece, commission, etc.), the exact overtime rate of pay, and the expected date of payment, many victims of wage theft are unaware of the scope of their employer’s wrongdoing.

Acknowledging that many wage theft victims are unaware of these fundamental details concerning their wages, this bill would toll the period to file claims if an employer fails to adhere to the current requirement to provide notice explaining workers’ rights under District employment laws or the proposed requirement to give written notice of the details of a worker’s wages.<sup>56</sup> Without such written notice, the statute of limitations would not begin to run until the worker becomes aware or should reasonably have become aware of their rights under the law. This provision strikes a balance between merely extending the statute of limitations (as New York has recently done) and encouraging employers to be diligent and transparent with their wage practices.

### **4. Consent of the Complainant in Settlements**

The Act not only aims to give workers greater ability to resolve wage disputes with their employers, but it also enhances their agency and participation in the legal process, even when enforcement actions are initiated by the Office of Wage-Hour rather than the complainant. By requiring the

consent of wage theft complainants in the settlement of claims brought by the Office of Wage-Hour,<sup>57</sup> the new law would grant these marginalized members of the workforce greater authority in the decision-making process of administrative offices. Complainants would also be allowed to inquire and receive status updates of the enforcement of the decisions. Allowing for this participation in the justice system would empower those who had previously suffered exploitation and disenfranchisement.

## **5. Subcontractors / Contractors**

In many cases, culpability for wage theft extends beyond one bad actor—a general contractor can often be just as responsible for the failure to pay workers the wages due as those workers’ direct employer. For day laborers especially, wage theft can usually be linked to a chain of poor practices that begins with the general contractors. Many times, when subcontractors withhold wages from their workers it is because they in turn did not receive payment from their contractors for commissioned work. If the subcontractors lack the financial resources to pay workers, holding them exclusively accountable for wage theft will not fully compensate victims of wage theft or adequately deter future wrongdoing.

Under the Act, contractors would be jointly responsible when their subcontractors fail to pay their workers.<sup>58</sup> This would encourage general contractors to pay their subcontractors in a timely manner, and to only work with subcontractors who follow the District’s laws. By broadening accountability, the most vulnerable workers in the industry—day laborers and other low-income workers—would have greater protection from bad practices.

## **D. Better Access to Representation for Victims**

### **1. Class Actions and Interested Parties**

While the proposed law certainly tries to encourage all victims of wage theft to file complaints for bad payment practices, it anticipates that there will continue to be victims who will not seek administrative or legal remedy because they lack the resources, knowledge or security to execute such procedures.<sup>59</sup> To better incorporate disenfranchised workers into the justice-seeking process, the proposed law would allow class action groups, community or labor organizations, and other interested parties to advocate on behalf of individuals who may not always do so themselves.<sup>60</sup> Such a legal measure would broaden the impact of litigation and administrative decisions to support those who had previously found justice inaccessible; it will generate community support against wage theft by supporting smaller, more localized networks that might advocate on behalf of the most vulnerable workers.

### **2. Attorneys’ Fees**



Requiring an employer found liable for wage theft to also pay a worker's legal fees and costs is the only way to ensure adequate representation and full compensation of victims. The victims of wage theft are often low-income wage earners without the financial means or incentives to make payment of the fees and costs associated with vindication of their rights worthwhile (or even possible). The fact that quality legal counsel carries a significant expense should not bar victims from enforcing their rights.

Under current law, a worker's costs and fees associated with successful litigation of a violation of District wage theft laws are potentially borne by the defendant employer. However, the law only provides that a court may "allow" such costs and fees to be borne by the Defendant and offers very little guidance as to the proper measure of fees or appropriate costs to be awarded.<sup>61</sup> In contrast, the Wage Theft Prevention Act of 2014 would require that such fees and costs be borne by the defendant employer and provides needed guidance on how such fees are to be calculated and what costs are appropriately paid by the defendant.

The Act provides that the presiding judge "shall award" fees and costs to the attorneys of workers where there has been an order in favor of the worker.<sup>62</sup> Specifically, such fees are to be computed pursuant to the matrix approved in *Salazar v. District of Columbia*, 123 F.Supp.2d 8 (D.D.C. 2000) and updated to account for the current market hourly rates for attorney's services. Such matrices are regularly used in cases involving fee-shifting statutes, and provide a reasonable basis upon which to calculate an appropriate fee by taking into account an attorney's years of practice, the market rate in the affected area and adjusting yearly for inflation.<sup>63</sup>

Additionally, recoverable costs in the proposed bill are specifically defined to include expert witness fees, depositions fees, witness fees, juror fees, filing fees, certification fees, the costs of collecting and presenting evidence, and any other costs incurred in connection with obtaining, preserving or enforcing the judgment or administrative order. The clarifications and examples concerning fees and costs provided in the Act will help courts accurately and adequately compensate victims of wage theft and ensure that victims have better access to representation.

## **V. Conclusion**

The Wage Theft Prevention Act of 2014 provides an opportunity to fix DC's broken wage theft claims process. Currently, workers in the District who experience wage theft must go through an uncertain, inefficient and unreliable process to claim stolen wages. Some claims linger unresolved indefinitely, and the resolution of claims is often up to the mercy of unscrupulous employers who refuse to cooperate with the process while facing no real consequences. For workers whose wages are stolen and their families, each day without proper pay can mean a day without money for bus fare, food, rent or other basic needs. At the same time, responsible employers have to compete with unscrupulous ones who cut costs by refusing to pay rightfully earned wages. The District of Columbia can do better. The Wage Theft Prevention Act of 2014 would provide a transparent,

efficient, and reliable process to file and resolve wage claims and it would keep unscrupulous employers accountable, therefore making DC a better place for workers and responsible employers.

## Endnotes

<sup>1</sup> Annette Bernhardt et. al, “Broken Laws, Unprotected Workers Violations of Employment and Labor Laws in America’s Cities,” National Employment Law Project, 2009 (at page 5).

<sup>2</sup> Tim Judson & Cristina Francisco-McGuire, “Where Theft is Legal: Mapping Wage Theft Laws in the 50 States,” Progressive States Network. June 2012 (at page 7).

<sup>3</sup> While current law empowers the Mayor to hold hearings for the payment of wages, no hearings have been held. In practice, employees can only pursue their claims through informal conferences held by an investigator. D.C. CODE § 32-1306(a) (2001) (“The Mayor...may hold hearings...to investigate actions for the payment of wages . . . .”); *See Department of Employment Services, Fiscal Year 2012-2013 Performance Hearing Responses* 104 (2013).

<sup>4</sup> Wage Theft Prevention Act of 2014, §2(g) amending D.C. CODE §32-1308 by striking § 32-1308 and inserting § 32-1308(e),(f).

<sup>5</sup> Wage Theft Prevention Act of 2014, §2(g).

<sup>6</sup> *Id.*, amending D.C. CODE § 32-1308 by striking the section and inserting § 32-1308(g).

<sup>7</sup> *Id.* amending D.C. CODE § 32-1308 by striking the section and inserting § 32-1308(k).

<sup>8</sup> CAL. LAB. CODE §§ 98(a), 98.3; *See also* CA STATE LAB. COMM’R, POLICIES AND PROCEDURES FOR WAGE CLAIM PROCESSING, [www.dir.ca.gov/dlse/Policies.htm](http://www.dir.ca.gov/dlse/Policies.htm), accessed on August 16, 2013, [hereinafter CALIFORNIA POLICIES AND PROCEDURES].

<sup>9</sup> CAL. LAB. CODE § 98.2; CALIFORNIA POLICIES AND PROCEDURES.

<sup>10</sup> Some claims are resolved within six weeks, however, claims for which employers fail to respond or to cooperate with the administrative process can be severely delayed, lingering unresolved for multiple years from the time of filing. *Department of Employment Services, Fiscal Year 2012-2013 Performance Hearing Responses* 104 (2013).

<sup>11</sup> Wage Theft Prevention Act of 2014, §2(g), amending D.C. CODE § 32-1308 by striking the section and inserting § 32-1308(f).

<sup>12</sup> *See id.*, amending D.C. CODE § 32-1308 by striking the section and inserting § 32-1308(d)(4).

<sup>13</sup> WASH. REV. CODE ANN. § 49.08.084(1) (West).

<sup>14</sup> N.M. ADMIN. CODE 11.6.8(C).

<sup>15</sup> Wage Theft Prevention Act of 2014, §2(g), amending D.C. CODE § 32-1308 by striking the section and inserting § 32-1308(g).

<sup>16</sup> CAL. LAB. CODE § 98(f).

<sup>17</sup> *Department of Employment Services Fiscal Year 2012-2013 Performance Hearing Responses* 104 (2013).

<sup>18</sup> *Id.* at 107-108.

<sup>19</sup> Wage Theft Prevention Act of 2014, §2(g), amending D.C. CODE § 32-1308 by striking the section and inserting § 32-1308(n).

<sup>20</sup> CAL. LAB. CODE § 92; KS ADC §49-21-3(a); N.M. ADMIN. CODE § 11.6.8(C); MIAMI-DADE COUNTY, FLA., CODE OF ORDINANCES § 22-4 (7)(a) (2010).

<sup>21</sup> Wage Theft Prevention Act of 2014, §2(g) amending the D.C. CODE § 32-1308 by striking the section and inserting § 32-1308(g).

<sup>22</sup> *Id.* amending D.C. CODE § 32-1308 by striking the section and inserting § 32-1308(k)

<sup>23</sup> CAL. LAB. CODE § 98.1; KS ADC 49-21-3(a)(3), (d)(2)(B); MIAMI-DADE § 22-4 (7)(a), (e).

<sup>24</sup> CAL. LAB. CODE § 98.1(a); 98.2 (d), (e).

<sup>25</sup> *See* Wage Theft Prevention Act of 2014, §2(g), amending D.C. CODE § 32-1308 by striking the section and inserting § 32-1308(e), (k).

<sup>26</sup> CALIFORNIA POLICIES AND PROCEDURES.

<sup>27</sup> MIAMI-DADE §§ 22-4 (6)(c), (d).

<sup>28</sup> In her response, Ms. Mallory merely stated that if a hearing was requested, the Mayor would issues a final order following the hearing. *Department of Employment Services, Fiscal Year 2012-2013 Performance Hearing Responses* 109 (2013).

<sup>29</sup> Wage Theft Prevention Act of 2014, § 3(f)(4)(C), amending the Minimum Wage Revision Act of 1992; D.C. LAW 9-248; D.C. CODE §32-1001 et. seq. by replacing §32-1011(d).

<sup>30</sup> S.F.A.C. § 12R.7(b).

<sup>31</sup> S.F.A.C. § 12R.16.

<sup>32</sup> For minimum wage law violations. C.G.S. § 31-69(b).

<sup>33</sup> N.Y. LAB. LAW §§ 198(1-a), 662(1).

<sup>34</sup> MASS. GEN. LAW 149 § 27C(a).

<sup>35</sup> Wage Theft Prevention Act of 2014, §2(f), amending D.C. CODE § 32-1307(a).

<sup>36</sup> MASS. GEN. LAW 149 § 27C.

<sup>37</sup> TIM JUDSON & CRISTINA FRANSISCO-MCGUIRE, PROGRESSIVE STATE’S NETWORK, WHERE WAGE THEFT IS LEGAL: MAPPING WAGE THEFT LAWS IN THE 50 STATES 25 (2012),

<http://www.progressivestates.org/pubs/reports/where-theft-legal-mapping-wage-theft-laws-in-the-50-states>.

<sup>38</sup> N.Y. LAB. LAW § 218(1).

<sup>39</sup> Wage Theft Prevention Act of 2014, §2(g)(b), amending D.C. CODE § 32-1308; *Id.* at §2(f) amending D.C. CODE § 32-1307; *Id.* at §3(f), amending D.C. CODE § 32-1011.

<sup>40</sup> N.Y. LAB. LAW §§ 198(1-a), (4) 663.

<sup>41</sup> C.G.S. § 31-72.

<sup>42</sup> S.F.A.C. 12R.14

<sup>43</sup> C.G.S. § 31-69a.

<sup>44</sup> NATIONAL EMPLOYMENT LAW PROJECT, WINNING WAGE JUSTICE: AN ADVOCATE’S GUIDE TO STATE AND CITY POLICIES TO FIGHT WAGE THEFT 44 (2011). <http://www.nelp.org/page/-/Justice/2011/WinningWageJustice2011.pdf?nocdn=1>.

<sup>45</sup> Wage Theft Prevention Act of 2014, §2(g), amending the D.C. CODE § 32-1308 by adding § 32-1308(i).

<sup>46</sup> S.F.A.C. 12R.17(b).

<sup>47</sup> Wage Theft Prevention Act of 2014, §2(g), amending D.C. CODE § 32-1308 by adding § 32-1308(j).

<sup>48</sup> S.F.A.C. 12R.7(b)

<sup>49</sup> Press Release, New York State Senate, Majority Press, Legislature Passes Historic Wage Theft Prevention Act (Nov. 30, 2010). Retrieved from <http://www.nysenate.gov/press-release/legislature-passes-historic-wage-theft-protection-act>, Aug. 22, 2013.

<sup>50</sup> *Compare* N.Y. LAB. LAW § 195; CA LAB. CODE § 2810.5.

<sup>51</sup> Wage Theft Prevention Act of 2014, § 3(c), amending D.C. CODE § 32-1008 (c).

<sup>52</sup> *Id.*

<sup>53</sup> N.Y. LAB. LAW § 196-a.

<sup>54</sup> “According to one major study, 43% of workers who raised complaints faced employer retaliation such as termination or suspension, cuts in wages or hours, and threats to call – or actual calls – to immigration authorities.” *Winning Wage Justice: Talking Points on the Need for Stronger Anti-Wage Theft Laws*, citing Amy Traub and Andrew Friedman, “Workers Deserve to be Paid,” Albany Times Union, April 5, 2010.

<sup>55</sup> Wage Theft Prevention Act of 2014, §2(h), adding new section § 32-1311 to the D.C.CODE.

<sup>56</sup> Wage Theft Prevention Act of 2014, § 3(c), amending D.C. CODE § 32-1008(c).

<sup>57</sup> Wage Theft Prevention Act of 2014, §2(g), amending D.C. CODE § 32-1308 by adding § 32-1308(e).

<sup>58</sup> Wage Theft Prevention Act of 2014, § 2(c), amending D.C. CODE § 32-1303.

<sup>59</sup> “Insecure employment arrangements, threats of employer retaliation, insufficient knowledge of employment laws, immigration status, little confidence that government enforcement agencies will safeguard workers’ rights, and plain economic necessity: together these conspire to raise the potential costs of worker

activism in defense of employment rights. As a result, employers have the upper hand in low-wage industries – and the problem of wage theft deepens.” Dept. of Urban Planning, University of Chicago. *The Movement to End Wage Theft: A Report to the Discount Foundation*. pp. 4 (2011).

<sup>60</sup>Wage Theft Prevention Act of 2014, §2(g), amending D.C. CODE § 32-1308 by adding § 32-1308(e).

<sup>61</sup>The language of the current law only provides that “[t]he court . . . allow costs of the action, including costs or fees of any nature, and reasonable attorney’s fees, to be paid by the defendant.” § 32-1308(b)

<sup>62</sup>Wage Theft Prevention Act of 2014, §2(g), amending D.C. CODE § 32-1308 by adding § 32-1308(b).

<sup>63</sup>See, e.g., *Laffey v. Northwest Airlines, Inc.*, 572 F.Supp. 354, 371 (D.D.C. 1983) (ruling that hourly rates for attorneys practicing civil law in the Washington, DC metropolitan area could be categorized by years in practice and adjusted yearly for inflation. *McDowell v. District of Columbia*, Civ. A. No. 00-594 (RCL), LEXSEE 2001 U.S. Dist. LEXIS 8114 (D.D.C. June 4, 2001); *Ricks v. Barnes*, No. 05-1756 HHK/DAR, 2007 U.S. Dist. LEXIS 22410, at \*16 (D.D.C. Mar. 28, 2007) (finding Updated Matrix rates reasonable); *Smith v. District of Columbia*, 466 F. Supp. 2d 151, 156 (D.D.C. 2006).