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STANDING UP FOR WORKERS: PREVENTING WAGE THEFT AND RECOVERING STOLEN WAGES

HEARING

BEFORE THE

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

OF THE

COMMITTEE ON EDUCATION AND LABOR U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTEENTH CONGRESS

SECOND SESSION

HEARING HELD IN WASHINGTON, DC, MAY 11, 2022

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STANDING UP FOR WORKERS: PREVENTING WAGE THEFT AND RECOVERING STOLEN WAGES

Wednesday, May 11, 2022

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON WORKFORCE PROTECTIONS,
COMMITTEE ON EDUCATION AND LABOR,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:15 a.m., 2176 Rayburn House Office Building, Washington, DC, Hon. Alma Adams (Chairwoman of the Subcommittee) presiding.

Present: Representatives Adams, Takano, Norcross, Jayapal, Omar, Stevens, Scott, Keller, Stefanik, Miller-Meeks, Good, Steel, and Foxx (ex officio).

Staff present: Brittany Alston, Staff Assistant; Nekea Brown, Director of Operations; Ilana Brunner, General Counsel; Kyle deCant, Labor Policy Counsel; Scott Estrada, Professional Staff; Daniel Foster, Health and Labor Counsel; Rasheedah Hasan, Chief Clerk; Sheila Havenner, Director of Information Technology; Eli Hovland, Policy Associate; Stephanie Lalle, Communications Director; Andre Lindsay, Policy Associate; Kevin McDermott, Director of Labor Policy; Kota Mizutani, Deputy Communication Director; Max Moore, Staff Assistant; Lorin Obler, GAO Detailee; Kayla Pennebecker, Staff Assistant; Mason Pesek, Labor Policy Counsel; Véronique Pluviose, Staff Director; Robert Shull, Labor Policy Staff; Banyon Vassar, Deputy Director of Information Technology; Sam Varie, Press Secretary; ArRone Washington, Clerk/Special Assistant to the Staff Director; Cyrus Artz, Minority Staff Director; Gabriel Bisson, Minority Staff Assistant; Mini Ganesh, Minority Staff Assistant; John Martin, Minority, Minority Workplace Policy Counsel; Hannah Matesic, Minority Director of Operations; Audra McGeorge, Minority Communications Director; and Ethan Pann, Minority Press Assistant.

Chairwoman ADAMS. Good morning. The Subcommittee on Workforce Protections will come to order. Welcome everyone. I note that a quorum is present. The Subcommittee is meeting today to hear testimony on Standing Up for Workers: Preventing Wage Theft and Recovering Stolen Wages.

This is a hybrid hearing pursuant to House Resolution 8 and the regulations thereto. All microphones, both in the room and on the platform will be kept muted, as a general rule, to avoid unnecessary background noise. Members and witnesses will be responsible

for unmuting themselves when they're recognized to speak or when they wish to seek recognition.

When Members wish to speak or seek recognition, they should unmute themselves and all a pause of 2 seconds to ensure the microphone picks up their speech. I would also ask that Members please identify themselves before they speak.

Members who are participating in person should not be logged onto the remote platform in order to avoid feedback, echoes, and distortion. Members participating remotely shall be considered present in the proceeding when they are visible on camera, and they shall be considered not present when they are not visible on camera.

The only exception to this is if they're experiencing technical difficulty and inform Committee staff of such difficulty. If any Member experiences difficulty during the hearing, you should stay connected on the platform, make sure you're muted, and then use your phone to immediately call the Committee's IT director, whose number was provided in advance.

Should the Chair need to step away for any reason, another majority Member is hereby authorized to assume the gavel in the Chair's absence. In order to ensure that the Committee's five-minute rule is adhered to, staff will be keeping track of time using the Committee's digital timer on the remote platform.

For Members participating in person, the timer will be broadcast in the Committee Room on the television monitor as part of the platform gallery view and visible in its own thumbnail window. The Committee Room timer will not be in use. For Members participating remotely, this will be visible in gallery view in its own thumbnail window on the remote platform. Members are asked to wrap up promptly when their time has expired.

And finally, while the recent guidance from the Office of the Attending Physician has made mask wearing optional at this time, please know that we have in our midst, at both the Member and staff levels, individuals who are immune compromised or who may have immediate family members who are immune compromised, as well as those who might not be vaccinated, either due to medical reasons or because the vaccine is not yet available to children under the age of five.

Therefore, the Committee strongly recommends that masks continue to be worn out of concern for the safety of unvaccinated and immune compromised Committee Members and staff and their families.

So, pursuant to Committee Rule 8(c), opening statements are limited to the Chair and the Ranking Members. This allows us to hear from our witnesses sooner and it provides all Members with adequate time to ask questions. I now recognize myself for the purpose of making an opening statement.

Today we're meeting to discuss the pervasive and serious consequences of wage theft and examine a legislative solution to protect workers' wages and hold unscrupulous employers accountable. Too often, dishonest employers cheat their employees out of wages that they are legally entitled to receive.

This can take many forms, whether by paying workers less than the minimum wage, withholding overtime pay, or forcing them to

work off the clock. Regardless of the form, it allows those employers, who skirt the law, to get richer and pushes the most vulnerable workers deeper into poverty.

This is a multi-billion-dollar problem. Each year dishonest employers steal at least $15 billion from workers' paycheck in minimum wage violations alone with all forms of wage theft possibly exceeding $50 billion annually in stolen compensation. This has serious consequences for workers across the Nation and disproportionally hurts women and people of color who are more likely to work low-wage jobs.

According to a 2016 study conducted by the Economic Policy Institute, hourly workers cost 25 percent of their annual hearings. Now, that's more than $3,000 in stolen wages that could not be used for essential expenses like rent, groceries, or childcare. Ultimately, wage theft prevents workers from taking meaningful steps to enter the middle class.

In fact, workers who suffer a minimum wage violation are more than three times as likely to be in poverty. Moreover, about one in three workers who are victims of a wage theft violation receive some form of Public Assistance.

Although wage theft practices are already illegal under the Fair Labor Standards Act of 1938 or FLSA, the law's trivial penalties and damages provisions have not prevented wage theft. Furthermore, employers use a variety of legal loopholes to evade accountability.

So, today FLSA civil monetary penalties are just $1,100 for wage and hour violations and the Department of Labor's maximum penalty for repeated or willful violators is $2,203. So, let me repeat that. An average hourly worker lost more than $3,000 per year in stolen earnings. Therefore, it certainly looks like it is cheaper to willingly violate the FLSA than it is to pay employees what they are entitled to receive.

Now, this is not only bad for workers, but it put honest businesses that abide by the law at a competitive disadvantage. The FLSA also does not require detailed paystubs or recordkeeping, which are critical for workers to confirm pay accuracy and, if necessary, establish a legal claim for stolen wages.

So, when workers do have the evidence to mount a case, their claims are often stymied by employer-imposed class action waivers and arbitration clauses. Simply put, current law favors dishonest employers over hard-working Americans. So, if we want to raise people out of poverty, if we want to ensure Americans can enter the middle class, and if we believe that workers deserve a decent wage for an honest day's work, then we must enact a meaningful deterrent to wage theft and help workers seek justice.

The Wage Theft Protection and Wage Recovery Act, which I'm proud to co-sponsor, is a responsible solution to deliver on that goal. The legislation increases civil monetary penalties and liquidated damages to meaningfully deter any business considering stealing their workers' wages. It also will help level the playing field for those businesses already playing by the rules.

Further, the bill requires detailed paystubs be delivered to employees regularly and adequate recordkeeping to provide employees

information necessary to hold employers accountable in court for violating the law.

And finally, it prevents employers from exploiting mandatory arbitration and collective action waivers and it protects an employee's ability to pursue remedies for stolen wages under the law.

I'm also pleased that President Biden's Fiscal Year 2023 budget proposes the necessary resources to help restore the Department of Labor's ability to enforce the FLSA after 4 years of staff cuts made under the Trump administration. However, more money cannot fix the deficiencies in the FLSA. If we, as Congress, know better, we should do better. Therefore, I'm committed to working with my colleagues to pass the Wage Theft Prevention and Wage Recovery Act of 2022 to ensure workers receive the wages that they earn.

[The statement of Chairwoman Adams follows:]

STATEMENT OF HON. ALMA S. ADAMS, CHAIRWOMAN, SUBCOMMITTEE ON WORKFORCE PROTECTIONS

Today, we are meeting to discuss the pervasive and serious consequences of wage theft and examine a legislative solution to protect workers' wages and hold unscrupulous employers accountable.

Too often, dishonest employers cheat their employees out of the wages that they are legally entitled to receive.

This can take many forms-whether by paying workers less than the minimum wage, withholding overtime pay, or forcing them to work off-the-clock.

Regardless of the form, it allows those employers who skirt the law to get richer and pushes the most vulnerable workers deeper into poverty.

This is a multi-billion-dollar problem. Each year, dishonest employers steal at least $15 billion from workers' paychecks in minimum wage violations alone, with all forms of wage theft possibly exceeding $50 billion annually in stolen compensation.

This has serious consequences for workers across the Nation and disproportionately hurts women and people of color-who are more likely to work low-wage jobs.

According to a 2017 study conducted by the Economic Policy Institute, hourly workers lost 25 percent of their annual earnings, that's more than $3,000 in stolen wages-money that could not be used for essential expenses like rent, groceries, or child care.

Ultimately, wage theft prevents workers from taking meaningful steps to enter the middle class.

In fact, workers who suffer a minimum wage violation are more than three times as likely to be in poverty. Moreover, about 1-in–3 workers who are victims of a wage theft violation receive some form of public assistance.

Although wage theft practices are already illegal under the Fair Labor Standards Act of 1938, or the F-L-S-A, the law's trivial penalties and damages provisions have not prevented wage theft. Furthermore, employers use a variety of legal loopholes to evade accountability.

Today, F-L-S-A civil monetary penalties are just $1,100 for wage and hour violations, and the Department of Labor's maximum penalty for repeated or willful violators is $2,203.

So, let me repeat that-on average, workers who were victims of wage theft lost more than $3,000 per year in stolen earnings.

Therefore, it certainly looks like it is cheaper to willingly violate the F-L-S-A than it is to pay employees what they are entitled to receive. This is not only bad for workers, but it puts honest businesses that abide by the law at a competitive disadvantage.

The F-L-S-A also does not require detailed pay stubs or recordkeeping, which are critical for workers to confirm pay accuracy and, if necessary, establish a legal claim for stolen wages.

When workers do have the evidence to mount a case, their claims are often stymied by employer-imposed class action waivers and arbitration clauses.

Simply put, current law favors dishonest employers over hard-working Americans.

So, if we want to raise people out of poverty; if we want to ensure Americans can enter the middle class; and, if we believe that workers deserve a decent wage for an honest day's work, then we must enact a meaningful deterrent to wage theft and help workers seek justice.

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This legislation increases civil monetary penalties and liquidated damages to meaningfully deter any business considering stealing their workers' wages. This also will help level the playing field for those businesses already playing by the rules.

Further, the bill requires detailed pay stubs be delivered to employees regularly and adequate recordkeeping to provide employees information necessary to hold employers accountable in court for violating the law.

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However, more money cannot fix the deficiencies in the F-L-S-A. If we as a Congress know better, we should do better!

Therefore, I am committed to working with my colleagues to pass the Wage Theft Prevention and Wage Recovery Act of 2022 to ensure workers receive the wages that they earn.

I now recognize the distinguished Ranking Member for the purpose of making an opening statement.

Mr. KELLER. Thank you. All workers must be paid in full for their work. That is not in question or open for debate. Republicans fully support the enforcement of the Fair Labor Standards Act, FLSA.

What we do not support is weaponizing this Act or any Federal legislation to be used against our country's job creators. Unfortunately, that is exactly what H.R. 7701, Congresswoman's DeLauro's bill, is attempting to accomplish.

First of all, Democrats' approach to employers is wrong. Referring to unintentional technical errors in payroll as wage theft demonstrates Democrats' hostility toward America's job creators. Employers want to do the right thing by their employees and pay them what is owed. People work hard and get the job done every day. I see that across central and northeastern Pennsylvania. Calling our country's job creators thieves is beyond outrageous and should have no place in our policymaker's discourse.

It would be far more productive for the Department of Labor to provide compliance assistance to employers instead of assuming all employers are bad actors, which my Republican colleagues and I know is not the case. Both workers and job creators benefit from clear and concise compliance procedures, but Democrats' proposed changes to the FLSA would make employment and wage regulations even more convoluted.

This legislation would then impose crushing penalties on employers for not being able to effectively navigate the maze of red tape it intends to create. This is nothing short of entrapment. We should be supporting easy to understand wage and hour rules, not impossible compliance burdens. The enforcement penalties are extremely punitive and could severely hinder employers, especially, small businesses. This is not the way to treat those keeping our country's economy running. In fact, it is counterproductive.

Further, the onerous mandates and disproportionate penalties in this bill will have a chilling effect on the ability of employers to offer additional benefits to workers, including greater compensation or flexibility. Employers want to do what is best for their employ-

ees, but the Federal Government is threatening to stand in their way.

Democrats are completely ignoring the adverse consequences that will come from their meddling. In truth, this legislation is a massive power grab meant to substantially increase the Federal Government's control over the workforce. H.R. 7701 would fundamentally alter the FLSA by expanding its jurisdiction to all employer/employee contracts, including collective bargaining agreements.

This legislation will harm America's job creators and workers. Whenever Democrats and Washington bureaucrats expand Federal control over private businesses, it reduces innovation and the ability of businesses to respond to changing economic circumstances. This is not the way our country will recover from the pandemic, the worker shortage, or record-high inflation. This legislation is shortsighted and destructive.

In the case of bad actors, the FLSA already has strong remedies in place for employers who do not comply with the law. Instead of adding burdensome reporting requirements and increasing penalties, the Department of Labor should simply use existing law. Democrats continue to fail to recognize the importance of independent contractors in today's evolving economy and this legislation would have a negative effect on their opportunities.

If Democrats had their way, independent contracting would come to an end; yet independent contractors are serving a vital purpose in many industries and workers seek out the benefits and flexibility these arrangements provide. If Democrats truly care about our people, they will start looking to bolster job creators instead of tearing them down.

The truth is we need more freedom in the marketplace, not less. Thank you and I yield back.

[The statement of Ranking Member Keller follows:]

STATEMENT OF HON. FRED KELLER, RANKING MEMBER, SUBCOMMITTEE ON WORKFORCE PROTECTIONS

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If Democrats truly care about our people, they will start looking to bolster job creators instead of tearing them down. The truth is, we need more freedom in the marketplace, not less.

Chairwoman ADAMS. Thank you very much. Without objection, all of the Members who wish to insert written statements into the record may do so by submitting to the Committee Clerk, either, electronically, in Microsoft Word format by 5 p.m. on May 25th.

I would now like to introduce our witnesses. Ms. Karen—is that Cacace?

Ms. CACACE. It's Cacace.

Chairwoman ADAMS. Cacace. Excuse me. OK, Ms. Cacace is the Labor Bureau Chief of the New York State Office of the Attorney General. As Labor Bureau Chief, Ms. Cacace has extensive knowledge of Federal and New York wage and hour laws and the current realities of wage theft enforcement.

Mr. Francisco Esparza is the representative for the United Brotherhood of Carpenters. Mr. Esparza has been a victim of wage theft himself and he now draws on that experience to educate other workers about their workplace rights with the carpenters.

Ms. Tammy McCutchen is a Senior Affiliate at Resolution Economics. Ms. McCutchen provides expert services to employers on employment law, compliance issues, and previously served as Administrator of the Wage and Hour Division at the U.S. Department of Labor under President George W. Bush.

I'd now like to turn to Representative Omar to introduce the final witnesses. Representative Omar will provide a brief introduction for Daniel Swenson-Klatt. If Representative Omar is—

Ms. OMAR. Yes, thank you, Chairwoman.

Chairwoman ADAMS. You're here. Great. Thank you.

Ms. OMAR. Thank you, Chairwoman. I am honored to introduce Daniel Swenson-Klatt, a small business owner from my district who has been advocating for workers' rights in our community and other communities across the country.

Mr. Swenson-Klatt is former middle school educator turned to small businessperson and has owned and operated the Butter Bakery Café in Minneapolis since 2006. Daniel served as Minneapolis's Workforce Advisory Committee and help launch its small business team and currently serves as the representative of Kingfield Neighborhood for Local Development Projects.

He's a board member of Main Street Alliances Minnesota Chapter and serves on the Steering Committee of Rise, a High Restaurant Employer Association. Daniel's currently assisting the Bloomington City Council to prepare an Earn, Sick, and Safe Time ordinance for their city.

Daniel, thank you for making Minnesota proud through your leadership and tireless advocacy on behalf of working families. I yield back, Chairwoman.

Chairwoman ADAMS. Thank you. Thank you, Representative Omar. So, these are the instructions for the witnesses. We do appreciate you for participating today. We look forward to your testimony but let me remind the witnesses that we've read your written statements. They will appear in full in the hearing record.

Pursuant to Committee Rule 8(d) and the Committee practice, each of you is asked to limit your oral presentation to five-minute summary of your written statement. So, before you begin your testimony, please reMember to unmute your microphone. During your testimony, staff will be keeping track of time and the timer is visible to you at the witness table. Please be attentive to the time, wrap up when your time is over, and re-mute your microphone.

We'll let all of the witnesses make their presentations before we move to Member questions. When answering a question, please remember to unmute your microphone. The witnesses are aware of their responsibility to provide accurate information to the Subcommittee and therefore will proceed with their testimony.

I'd like to first recognize Karen Cacace and Ms. Cacace, you are now ready to give your testimony.

STATEMENT OF KAREN CACACE, LABOR BUREAU CHIEF, THE NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL

Ms. CACACE. Good morning, Chair Adams, Ranking Member Keller, and distinguished Members of the Subcommittee. My name is Karen Cacace and I'm the Bureau Chief of the Labor Bureau at the Office of the New York State Attorney General. Prior to joining the Office of the Attorney General, I was the Director of the Employment Law Unit at the Legal Aid Society in New York City.

I want to thank you for convening this important hearing at such a vital time for workers and for giving our office an opportunity to share our experiences and insight. The Labor Bureau of the Office of the New York State Office of the Attorney General enforces Federal, State, and local laws affecting workers in New York State.

Our office prioritizes enforcement of wage theft against low-wage workers. Our office recently resolved several wage theft investigations, including investigations involving home health aides, res-

taurant workers, and residential building staff. While I was at the Legal Aid Society, the Employment Law Unit litigated many cases of wage theft in different industries, including for restaurant workers, domestic workers, and residential building services employees.

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

The Fair Labor Standards Act has not increased the minimum wage since 2009 and it provides that workers who are required to be paid the minimum wage be paid only $7.25 an hour. In contrast, the New York Labor Law provides that within New York City, Long Island, and Westchester the minimum wage is $15 per hour and throughout the rest of New York State the minimum wage is 13.20 per hour.

In addition to minimum wage increases, there are other important protections that can be added to the Fair Labor Standards Act. For instance, as part of New York's Wage Theft Prevention Act, which went into effect in 2011, New York requires that employers provide employees a hiring notice that explains whether they are covered by the minimum wage laws and, if they are, what their hourly wage and overtime rate will be. This notice must be provided in English and the employee's primary language. Without this protection, workers may not know that there are any wage laws that apply to them or that they are entitled to a specific hourly rate.

Another important provision of New York's Wage Theft Prevention Act is that employers are required to provide employees with paystubs which detail how many hours they worked each week and the amount that they are being paid per hour. This allows workers to review the number of hours they are being paid and to address any issues immediately and seek legal assistance.

If hiring notice and paystub requirements are enacted, it will be easier for workers to prove wage theft claims. Sometimes employers report on paystubs that they are paying workers less than the minimum wage and thereby hand the workers strong evidence of the violation. If employers fail to provide the paystubs, employees may prove their claims through their own credible testimoneys. Penalties for failing to comply with hiring notice and paystub requirements are also important.

In addition, the New York Labor Law provides that workers must be paid their promised wage. And if an employer promises to pay an employee a rate above the minimum, it's a violation of the New York Labor Law. This is important because the New York Labor Law violation allows attorney's fees and it allows liquidated damages, something that a regular breach of contract claim does not allow.

Another issue that is prevalent is for employers to fail to pay employees their last paycheck and so additional penalties for that violation are significant because they will encourage lawyers to take on those cases which can be for a small amount of wages but are still significant to the workers.

Increasing penalties, overall, may be the most effective method of deterring employers from violating the substantive provisions of the Fair Labor Standards Act. For many employers, the cost of having to pay their employees once a wage theft claim is filed, is not significant enough to deter them from violating the law.

It is also essential that workers be allowed to pursue wage theft claims jointly or in groups by bring a class or collective action. The time and cost of a wage theft litigation is difficult for an individual worker to bear alone.

Finally, lengthening the statute of limitations is also important. Low-wage workers are often unaware of their rights, and it may take them time to recognize that there have been violations and to find legal representation. In New York, the statute of limitations is 6 years.

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

[The Statement of Ms. Cacace follows:]

PREPARED STATEMENT OF KAREN CACACE

New York State Office of the Attorney General
Letitia James

Testimony Before the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you.

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Chairwoman ADAMS. And thank you very much. We'll now hear from Francisco Esparza. You're recognized for your testimony.

STATEMENT OF MR. FRANCISCO ESPARZA, REPRESENTATIVE, UNITED BROTHERHOOD OF CARPENTERS

Mr. ESPARZA. Well, good morning, Chair Scott, Ranking Member Fox, and Members of the Education and Labor Committee. I appreciate the opportunity to testify today on my experience and expertise on the issues of workers' rights, wage theft, and the uneven process of wage recovery for victims of wage theft.

I am Francisco Esparza and I am a council representative for the Eastern Atlantic States Regional Council of Carpenters, a union

carpenter, and a former victim of wage theft in the construction industry's underground economy.

I came to the United States 18 years ago when I was 11 years old. I am a Dreamer. As a DACA recipient, I understand that I am fortunate to be able to have a career in this country and the ability to work for all that I earn. To be honest, that realization is not one that comes easily to many people like me.

Countless construction workers, especially, in the District of Columbia, see themselves as voiceless and invisible. In the underground economy of the construction industry, you are told you are lucky to have a job, in general, and will be compensated by the means dictated by your employer or your labor broker. This is not how things should work in this country, but all too often they do.

It takes education, some courage, and self-respect for many to decide that they have been cheated and deserve fair compensation. In 2019, myself and 222 others started to speak up and take action to receive the $618,000 in stolen wages we earned. Our class action lawsuit against Contractor Anning Johnson was for unpaid wages, unpaid overtime, and workplace fraud under Federal and District of Columbia law.

This was a major victory for workers who did not think they have a voice. It was historic because it is so rare. Without the laws put into place in the District of Columbia, we would not have had the ability to take this step. The District of Columbia has stronger than average laws in place to help workers fight back against wage theft.

The District's Minimum Wage Payment and Collection Law and Workplace Fraud Act provide more opportunity for——

Chairwoman ADAMS. Excuse me. Mr. Esparza, can you turn your volume up please, sir. We're having difficulty, some of the Members hearing you. Turn your volume up just a little bit more.

Mr. ESPARZA. How do I do that?

Chairwoman ADAMS. Let's see. It should be at the bottom of your computer, if you move your—can someone give him some instructions about that. Maybe if you could speak up a little bit, maybe that'll help.

Mr. VASSAR. Mr. Esparza, if you could, sir, in the bottom left-hand corner of your screen should be your microphone mute button. In the corner of that microphone button is a little arrow. If you can click on that little arrow and go to audio settings, sir, you should see a separation for mike and speakers and you should see test microphone with a little bar that you can drag to the right. If you can drag the bar to the right to increase your microphone pick-up, sir. Thank you.

Mr. ESPARZA. Better?

Chairwoman ADAMS. Yes, that is. That is. Thank you, sir.

Mr. ESPARZA. I apologize.

Chairwoman ADAMS. We stopped the clock, so you're not going to lose any time. OK. Proceed.

Mr. ESPARZA. OK. The actions workers have taken have now deterred unscrupulous contractors and labor brokers from stealing wages from the most vulnerable workers so that they can profit more. These profits are not only on the backs of workers they victimize, but the honest U.S. taxpayers like me.

Worker's Compensation, funding for American infrastructure, our schools, veterans' programs, and more are not paid into because of these actions. Recent studies and research show the issues are still prevalent and more enforcement and changes to our laws are necessary.

In a national study by researchers and economist from Harvard University, Michigan State University, and Allegany College, it was estimated that we have lost on $8.4 billion in State and Federal tax revenue. Additionally, the study found that possibly 2.60 million construction workers are misclassified or off the books. There's a $1.7 billion shortfall on Worker's Compensation, $725.1 million in unemployment insurance, and $811.1 million in overtime not paid.

The District of Columbia has taken steps to improve our workers ability to fight back against these firms, but studies have found that workers are still victimized in D.C. all the time. A 2021 survey of workers found that nearly 50 percent of those surveyed are part of the underground economy. These workers reported that instead of receiving a paycheck with a paystub and with taxes deducted, they were being paid with a personal or a business check without any payroll deductions or they simply being paid in cash.

After I was educated by the Carpenters Union on my rights, I joined the class action lawsuit against Anning Johnson, I became a union carpenter. I did this to protect myself and earn the fair wages I deserve with the backing of a union that will fight for me. I later was fortunate to become a council representative. I take the responsibility very seriously. I was once a voiceless worker. Now, I am the voice for not only the union carpenters I represent in the District of Columbia, but also the non-union workers looking for help.

I hope my testimony and experience was helpful to you. Congress must act so that the Wage Theft Prevention and Wage Recovery Act is made law. Your actions toward strengthening penalties on violators, improving workers' ability to pursue wage theft claims, expand outreach to workers and businesses on the issues and facilitate the collection of evidence to assist in enforcement can help a worker gain the wage they deserve and hopefully help deter these crimes in the future. Workers deserve better in this country and with your help we will see less victims in the underground economy. Thank you again for your time.

[The Statement of Mr. Esparza follows:]

PREPARED STATEMENT OF FRANCISCO ESPARZA

WILLIAM C. SPROULE
EXECUTIVE SECRETARY-TREASURER

ANTHONY N. ABRANTES
ASST. EXECUTIVE SECRETARY-TREASURER

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May 11th, 2022
House Education and Labor Committee

Testimony of Francisco Esparza;

Good afternoon, Chair Scott, Ranking Member Fox, and members of the Education & Labor Committee. I appreciative the opportunity to testify today on my experience and expertise on the issues of workers' rights, wage theft, and the uneven process of wage recovery for victims of wage theft. I am Francisco Esparza and I am a Council Representative for the Eastern Atlantic States Regional Council of Carpenters, a union carpenter, and a former victim of wage theft in the construction industry's underground economy.

I came to United States 18 years ago when I was 11 years old. I am a Dreamer. As a DACA recipient I understand that I am fortunate to be able to have a career in this country and the ability to work for all that I earn. To be honest, that realization is not one that comes easily to many people like me. Countless construction workers, especially in the District of Columbia, see themselves as voiceless and invisible. They keep their head down go to a job and believe that the business of the underground economy is just the way things are. In the underground economy of the construction industry, you are told you are "lucky" to have a job in general and will be compensated by the means dictated by your employer or your labor broker. This is not how things should work in this country, but all too often they do. It takes education, some courage, and self-respect for many to decide that they have been cheated and deserve fair compensation.

In 2019, myself and 222 others started to speak up and take action to receive the $618,000 in stolen wages we earned[1]. Our class action lawsuit against contractor Anning-Johnson was for unpaid wages, unpaid overtime, and workplace fraud under Federal and District of Columbia law was a major victory for workers who do not think they have a voice. It was historic, because it is so rare. Without the laws put into place in the District of Columbia we would have not had the ability to take this step.

The District of Columbia has stronger than average laws in place to help workers fight back against wage theft. The Districts' Minimum Wage Act, Wage Payment and Collection Law, and Work Place Fraud Act, provide more opportunity for workers like me to fight back. Steps like this taken

[1] (Esparza v. Anning-Johnson Co., 2019)

on the local level mean a lot, and are helpful, but more must be done on the federal level to protect all workers. The Wage Theft Prevention and Wage Recovery Act before this committee is an important step to make this happen and can help workers receive the victory I and 222 other construction workers like me were a part of.

Even with this win, we see wage theft, worker misclassification, and construction industry tax fraud running rampant in the underground economy. The actions workers have taken have not deterred unscrupulous contractors and labor brokers from stealing wages on the most vulnerable workers so that they can profit more. These profits are not only on the backs of the workers they victimize, but the honest U.S. taxpayers, like me. Workers' compensations, funding for American infrastructure, our schools, veterans' programs and more are paid not paid into because of these actions.

Recent studies and research show these issues are still prevalent and more enforcement and changes to our laws are necessary. In a national study by researchers and economists from Harvard University, Michigan State University, and Allegheny College, it was estimated that the we have lost out on $8.4 billion in state and federal tax revenue[2]. Additionally, the study found that possibly 2.16 million construction workers are misclassified or "off the books", there is a $1.7 billion shortfall in workers compensation, there is a $725.1 million in unemployment insurance, and $811.1 million in overtime is not paid.

Also, a study by UC Berkeley Labor Center shows that 39 percent of construction worker families are on public assistance to make ends meet because of low pay, wage theft and misclassification as independent contractors. That compares to 31 percent of all worker families. The cost to state and federal governments of this abuse of construction workers and taxpayers is $28 billion a year.

The District of Columbia has taken steps to improve a worker's ability to fight back against these crimes, but studies have found that workers are still victimized in DC all the time. A 2021 survey of workers found that nearly 50% of those surveyed are part of the underground economy[3]. These workers reported that instead of receiving a paycheck with a paystub and with taxes deducted, tey are being paid with a personal or business check without any payroll deductions, or they are simply

[2] (Ormiston, Belman, & Erlich , 2020)
[3] (Sinyai & Galeas, 2021)

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being paid in cash. The study also found that the union construction workers that were interviewed did not see these actions.

After I was educated by the Eastern Atlantic States Regional Council of Carpenters on my rights, and joined the class action lawsuit against Anning Johnson, I became a union carpenter. I did this to protect myself and earn the fair wages I deserve with the backing of a union that will fight for me. I later was fortunate to become a Council Representative. I take this responsibility very seriously. I was once a voiceless worker. Now I am the voice for not only the union carpenters I represent in the District of Columbia, but also the non-union workers looking for help. Workers need education on their rights. Workers need the ability to fight back. I am proud to be part of an organization that does this work and proud to be before leaders like you today.

I hope my testimony and experience was helpful to you. Congress must act so that Wage Theft Prevention and Wage Recovery Act is made law. Your actions to strengthening penalties on violators, improving workers ability to pursue wage theft claims, expand outreach to workers and businesses on the issues, and facilitate the collection of evidence to assist in enforcement can help a worker gain the wages they deserve and hopefully help deter these crimes in the future. Businesses that play by the rules will also benefit because the cheaters underbid them. Good employers should not be punished for following the law Too many times fines are imposed and bad actors in the industry see them as, “just the price of doing business”. Without stronger enforcement, higher penalties, and education to workers we will never stop these practices. Workers deserve better in this country and with your we will see less victims in the underground economy.

Thank you again for your time.

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Chairwoman ADAMS. And thank you very much. Thank you for your testimony. I want to recognize Tammy McCutchen. Ms. McCutchen, we're ready for your testimony. You have five minutes.

STATEMENT OF TAMMY MCCUTCHEN, SENIOR AFFILIATE, RESOLUTION ECONOMICS

Ms. MCCUTCHEN. Thank you. Chairwoman Adams, Ranking Member Keller, and Members of the Subcommittee, thank you for the opportunity to speak with you today.

Protecting vulnerable, low-wage workers has been the focus of my entire Wage and Hour career. First, by expanding strategic enforcement in low-wage industries while serving as Wage-an-Hour

Administrator and then by conducting audits of employer pay practices as defined and correct as FLSA violations. I believe we all have a common goal. Do what we can to ensure that workers are paid in compliance with the FLSA and receive that pay when they perform the work, not months or years later.

Justice delayed is justice denied. There is nowhere truer than when low-wage workers must wait months or years to be paid. This workforce is often transient and the longer it takes to recover wages the harder it is to find the workers to give them their hard-earned money.

The debate is how best to accomplish our common goal. I bring a unique perspective to the problem. During my career, I have seen the worst of employers and the best of employers. I have seen horrible practices. I have seen fabulous practices. I have seen bad people do bad things. I have seen amazing people do fabulous things, but still miss the compliance mark.

I've thought about this problem for 20 years and these are the conclusions I have reached. We need clear and simple rules. We need swift and certain enforcement. We need to punish the bad, while rewarding the good. Achievement of these goals will require meaningful reform, but I'm afraid that the current bill will not improve protections for low-wage workers.

Let me tell you why. The provisions on disclosures paystubs final pay and the right to full compensation are covered under State law. Adding Federal requirements would add complexity and confusion without actually improving the worker protections. We need to simplify the FLSA, not make it more complex. Making compliance more difficult will decrease compliance and thus harm workers.

State contract laws, union CBAs, and arbitration procedures already ensure workers receive their full compensation. Also, Wage an Hour investigators have no training or experience in enforcing private contracts or CBAs. The heart of the bill focuses on enforcement. New and increased back wages, liquidated damages, civil and criminal penalties. These increases proposed are extreme and I fear will be counterproductive of the goals of this bill.

Increasing the financial consequences for violations makes a great headline, but I urge you to think about the actual impact on low-wage workers. Employers faced with such massive damages and penalties will have only one way to react to violation allegations. Litigate, litigate, and litigate some more. Payment of back wages would be delayed by years. The plaintiff's bar will collect more fees, but low-wage workers, I am afraid, will see nothing at all.

The proposed increases also are inflexible, with no room for discretion based on the size of business or the type of violation. In the increases should be lower for small businesses which have fewer resources to ensure compliance and should be limited to repeat, willful, and retaliation violations.

I don't understand at all why a bill focused on protecting low-wage workers would include provisions on litigation. There are no limits to the ability of employees to unit and pursue lawsuits against employers. The Department of Labor litigates on behalf of all employees. Plaintiffs' attorneys file thousands of Wage and Hour class actions and collective actions every year.

Removing the FLSA opt-in litigation procedures, especially, without any replacement will generate confusion and more litigation, which benefits only lawyers. Arbitration is cost effective, it's quicker with significant protections for workers. Swift resolution of wage claims is essential to protecting low-wage workers and arbitration can do that. Litigation cannot.

Tolling the statute of limitations during agency investigations also would delay payment of back wages. DOL does take too long to resolve complaints. Tolling would remove any incentives of the Wage and Hour Division to move more quickly. A better approach is to set metrics and create incentives in the agency for quick resolution and reduce time for investigations.

I've only time to discuss one of my concerns with the grant program. Deputizing advocates to help conduct investigations would eradicate the long tradition of employers voluntarily cooperating with agency investigations, producing documents, welcoming investigators into their worksite. But if DOL brings along unions and advocates, employers will stop cooperating and insist on search warrants and document subpoenas. After all, the 4th Amendment does apply.

More complexity, longer investigations, more litigation will harm low-wage workers by delaying payment of wages. We need to find a better path. Thank you.

[The Statement of Ms. McCutchen follows:]

Prepared Statement of Tammy McCutchen

Testimony of Tammy D. McCutchen

Before the United States House of Representatives
Committee on Education & Labor
Subcommittee on Workforce Protections

Hearing on "Standing Up for Workers: Preventing Wage Theft and Recovering Stolen Wages"

May 11, 2022

Chairwoman Adams, Ranking Member Keller and members of the Subcommittee:

Thank you for the opportunity to speak with you today about the important topic of "Standing Up for Workers: Preventing Wage Theft and Recovering Stolen Wages."

Let me begin with a brief overview of my background of and commitment to increasing compliance with the Fair Labor Standards Act and state wage and hour laws. From 2001 to 2004, I served as the Administrator of the Department of Labor's Wage and Hour Division (WHD). In that role, I was responsible for oversight of the enforcement of the FLSA, including investigations conducted by field employees in 250 wage and hour offices around the country.

During that time, my enforcement focus was protecting vulnerable low-wage workers. That focus included expanding low-wage industry initiatives – that is, targeted investigations in industries employing workers below, at or just above the minimum wage and with a history of violations as shown in the agency's enforcement database (as opposed to investigations of employee complaints).

When I arrived at WHD, the agency had such strategic initiatives in only three industries: garment, agriculture and health care. We expanded these initiatives to include retail, hospitality, janitorial, security and other industries with vulnerable low-wage workers. We also implemented a process for investigators and managers in the District Offices to suggest initiatives based on their investigative experience, the enforcement data and analysis conducted by outside contractors. The field would identify industries, type of violations, the scope of the proposed initiative and resources needed. Then, staff in the Regional and National offices would review those proposals to plan enforcement for the year. In that way, we ensured that our investigators were going where they knew violations where most likely to be occurring and low-wage workers were most in need of our help.

You may know this approach as "strategic enforcement." Today's strategic enforcement at the Wage & Hour Division grew from the seeds we planted during the Bush Administration.

I remain fully supportive of that approach. Although I also suggest caution as strategic enforcement initiatives should not interfere with agency investigations of complaints. It takes a lot of courage for workers to file complaints with the agency, and those workers deserve to have their complaints quickly and thoroughly investigated.

Compliance with the FLSA continued to be my focus when I returned to private practice in 2004, although now by working with employers to identify and correct violations. In my practice, I conducted internal audits of employers' compliance in the areas of independent contracting, overtime exemptions, minimum wage and other non-exempt employee pay practices. When I found violations, I worked with my clients to correct their practices, including paying back wages.

I also was a founding executive of ComplianceHR where I developed applications to assess FLSA and other employment law compliance using expert system technology. I developed, for example, the Navigator IC and Navigator OT apps which assess independent contractor and overtime exempt status. These applications apply a series of tests and rules, based on federal and state statutes, regulations, case law and agency rulings, to user responses in an on-line questionnaire. With these apps, an employer (or an employee advocate) can quickly determine the likelihood of a violation at a much lower cost than engaging an attorney.

I am here today because I believe we all have a common goal: Increase compliance with the FLSA. We all want to do all we can to ensure that as many workers as possible are paid in compliance with the FLSA – and receive that pay when they perform the work, not months or years later. Justice delayed is justice denied. That is nowhere truer than when vulnerable low-wage workers must wait months or years to be paid. This workforce is often very transient, and the longer it takes to recover wages for these workers, the harder it is to find the workers to give them their hard-earned money.

The debate is how best to accomplish this common goal. I believe I bring a unique perspective to the problem. During my career, I have seen the worst of employers and the best of employers. I have seen horrible practices intentionally designed to violate the law and exploit workers. I have seen fabulous practices designed to ensure compliance, in fact to go far above what the law requires. I have seen bad people do bad things. I have seen amazing people do fabulous things but nonetheless and unintentionally miss the compliance mark.

How can that happen? Because the FLSA is not a simple law. It is not a matter of "just pay 'em." Even an employer committed to complying with all federal and state wage-hour laws can still have violations. A company, for example, who decides to convert independent contractors to employees, may find itself facing an investigation or lawsuit because it failed to recognize that a

pre-shift or post-shift activity is considered work that must be paid, or it provides a reward or bonus to workers without recognizing that providing that extra compensation comes with an overtime obligation. Most folks think that overtime pay is time-and-a-half the hourly rate, but that is a myth. Overtime must be paid at time-and-a-half the "regular rate" of pay as that is defined in the FLSA. That is so much more complicated that employers and employee representatives often get it wrong. My training for attorneys and HR professionals on how to calculate the regular rate is a solid two hours.

I have thought about this problem for 20 years, and these are the conclusions I have reached: We need clear and simple rules. We need swift and certain enforcement of violations. We need to provide incentives for employers to pay back wages without litigation, as litigation is a loss for the transient, low-wage workforce who need those wages now, not a year or two or three years from now. We need to punish bad employers while assisting good employers to achieve compliance.

Achievement of these goals will require meaningful FLSA reform, but I am afraid the current bill cannot achieve these goals and will not improve the lives of vulnerable low-wage workers. Let me tell you why.

State Law Provisions

The bill contains a number of new provisions on topics that have traditionally been regulated by state law only and have never been regulated under the FLSA: disclosures, pay stubs, final pay, and the "right to full compensation." The bill recognizes the "discrepancy" in state wage and hour laws across the United States, with different states having chosen to provide different levels of protections. These provisions appear to be an effort to adopt the most burdensome and complicated of those laws using California and New York as a model.

Every state has its own paystub disclosure requirements, ensuring employees already receive an earning statement that includes hours worked, pay rate, gross and net wages, deductions and more. An additional layer of regulation would not add to the worker protections already there under state and federal law. Plaintiffs' attorneys have made a lot of money from California class actions for minor violations of that state's paystub disclosure violations (for example, listing regular hours and overtime hours, but not adding them together to show the total hours). Perhaps the goal here is to make a federal case out of such minor violations, allowing the plaintiffs' bar to export California litigation to the rest of the country.

State laws also govern the frequency and timing of pay, including final pay: Some shorter than the 14-day standard proposed in the bill, and some longer. Having both federal and state laws on this topic would only lead to more complexity and confusion when employers try to figure

out which law is more protective, the new FLSA provisions or the existing state law provisions. Currently, the law most protective to employees governs. I once spent weeks designing a ComplianceHR application that would list all the disclosures needed on a paystub based on the states in which the form would be used. It turned out to be very complicated, even though I had the advantage of Littler's thorough 50-state survey on the issue, and we never got the app into production. Adding yet another layer of regulation would make compliance more difficult without significantly increasing worker protections beyond most state laws.

Only a few states have adopted laws requiring initial and modified disclosures as proposed in the bill. Requiring additional paperwork burdens can only improve worker protections at the margins, if vulnerable workers will read and understand the information provided. Our efforts to improve worker protections and increase compliance with the FLSA should be focused in more productive areas.

These topics should be left to state laws, allowing the states to determine the level of protections best for their own citizens.

I want to comment separately on the proposal to create a new FLSA right to "full compensation" as specified in an "employment contract or other employment agreement, including a collective bargaining agreement." This is a solution in search of a problem. The findings in the bill state that the "lack of a Federal right for employees to receive full compensation at the agreed upon wage rate … has resulted in workers being able to recover only the applicable minimum wage, or the overtime rate if applicable."

Not true. Employees have a state law contract claim if an employer does not pay all compensation promised in the contract – and the statute of limitations in most states is longer than the current or proposed FLSA limitations period. Union members have the additional option of seeking redress through the arbitration procedures in collective bargaining agreements (a remedy, by the way, which this bill appears to eliminate). In short, workers are fully protected under state contract law and collective bargaining agreements – an additional remedy is unnecessary.

It would also raise more problems than it attempts to solve. What is "full compensation"? What is a "contract"? What is an "other employment agreement." Wage and Hour Division investigators and field management have no training or experience enforcing private contracts or collective bargaining agreements. Contract interpretation would be a completely new duty for WHD and create an entirely new and large body of litigation.

Enforcement

The heart of the bill focuses on enforcement. The table below summarizes the proposed new and increased back wages, liquidated damages, civil penalties, and criminal penalties.

	Current	Proposed
Back Wages	2 years	4 years
Back Wages – Repeat or Willful	3 years	5 years
Interest	Not Available	Required "at the prevailing rate"
Liquidated Damages	Equal to back wages	Two times back wages
Liquidated Damages – Retaliation	Equal to back wages	Three times back wages
Civil Fines – Any Violation	Not Available	$22,030 per employee
Civil Fines – Repeat or Willful	$2,203 per violation	$110,150 per employee
Civil Fines – Tip Credit	$1,234 per violation	$12,340 per employee
Disclosures & Paystubs – Initial Violation	Not Available	$50 per employee per violation
Disclosures & Paystubs – Repeat or Willful	Not Available	$100 per employee per violation
Final Pay – Initial Violation	Not Available	Up to 30 days of additional pay and $50 per employee per violation
Final Pay – Repeat or Willful	Not Available	Up to 30 days of additional pay and $100 per employee per violation
Recordkeeping – Initial Violation	Not Available	$1,000 per employee per violation
Recordkeeping – Repeat or Willful	Not Available	$5,000 per employee per violation
Criminal Penalties	$10,000	$10,000 per employee

I have been sympathetic to increasing the consequences of violating the FLSA. In fact, while serving as Administrator, I proposed increases to the penalties for child labor violations, including higher penalties for repeat or willful violations. In my opinion, it took too long before such changes were made.

However, the increases proposed are very significant, even ridiculous, and I fear will be counter-productive of the goals of this bill. FLSA liquidated damages would increase from an amount equal to back wages to two or three times back wages. Penalties would increase by 900 to 4,900 percent or even higher – as the bill would require payment of penalties per employee rather than per violation. The bill would also extend the statute of limitations from two to four years for all violations and from three to five years for willful violations – longer than any state except for New York. If found in violation of the FLSA, employers faced with such massive damages and penalties, in addition to more years of back wages, will have only one way to react: litigate, litigate, litigate and litigate some more. Payment of back wages would be delayed for years. The plaintiffs' bar will collect more fees, but transitory low-wage workers may see nothing at all.

The proposed new and increased damages and penalties also are inflexible with no room for discretion based on the size of business or the type of violation.

The increases seem designed for large business and could bankrupt small businesses. Larger businesses have professional human resources staff and access to in-house and outside attorneys. Thus, large business should know better or, at least, have the resources to learn what is needed to do to comply with the FLSA. Small businesses do not have such resources and finding clear guidance is often difficult and costly. The Wage & Hour Division recognizes this itself with a practice documented in its Field Operations Handbook of providing lower penalties for small business. If legislation is to increase damages or penalties, any increase should include lower amounts for small business.

Liquidated damages and penalties should not be increased for all violations, as not all violations are created equal. Some violations are clear and serious – "no brainers," as I like to say: failure to pay minimum wage, not paying any overtime, firing employees who complain to DOL. The career professionals in the Wage & Hour Division have seen it all, and they can easily distinguish between the employer making best efforts to comply with the FLSA from the employer who just doesn't care or affirmatively takes actions to hide its violations. I remember so well, for example, the owners of a Chinese buffet-style restaurant in Chicago who walked their employees to the bank to cash their back wage checks and then took the cash back from them. On the other hand, increased damages and penalties for the employer sued for paying off the student loans of employees but not including the cost of that benefit in the regular rate of pay would not further the goal of this reform to better protect the wages of the vulnerable.

If legislation is to increase damages or penalties, any increase should be limited, then, to repeat, willful and retaliation violations. Further, the terms "repeat" and "willful" need to be defined in the FLSA statute. Is it a repeat violation when an employer who miscalculated the

regular rate five or ten years ago then misclassifies an assistant manager as exempt? It took years of litigation before the U.S. Supreme Court settled the issue of whether pharmaceutical sales representatives were exempt. Was it willful for a company to classify its sales reps as exempt before the question was finally settled? Whether WHD seeks damages and penalties to resolve an investigation seems to be more a matter of geography than anything else – whether the WHD or Solicitor region in which the investigation occurred is one that aggressively seeks damages and penalties, or not.

Federal courts should be given the discretion to reduce damages and penalties consistent with the totality of circumstances. In one case in West Virginia, the DOL insisted on, and the court felt compelled to, award full liquidated damages although the employer was paying its unionized employees as required under a multi-employer collective bargaining agreement. The employer was willing to pay full back wages, but significant resources were wasted because DOL insisted on seeking liquidated damages to well-paid employees whose compensation was negotiated by their union. Damages and penalties should not be available at all unless an employer refuses to pay back wages during a WHD investigation; in other words, only employers who force the Labor Department to take them to court should face additional damages and penalties, thus incentivizing early settlement and payment of back wages. To protect vulnerable workers, we need to stop wasting time punishing good faith employers trying to do their best.

The bill also appears to require the Labor Department to refer ("shall refer") any case involving willful violations to the Department of Justice for prosecution. Referral to and prosecution of a criminal case should be left to the discretion of DOL and DOJ.

Collective Actions

I don't understand at all why a bill focused on protecting the wages of vulnerable, low-wage workers would remove the FLSA "opt in" litigation procedures. The findings claim that this "provision limits the ability of employees to unite and pursue private lawsuits against employers." There is no evidence of that. This provision applies only to private litigation, not to litigation by the Labor Department. Plaintiffs' attorneys have no problem filing thousands of federal collective actions and state class actions year after year. The "opt in" process has worked for decades. The bill proposes to remove it but does not address what will replace it. Would the Federal Rules of Civil Procedure apply? Would the standards be the same or something different from other types of class actions filed under those rules? The confusion would generate yet more litigation – which benefits only lawyers, not low-wage workers. In fact, this proposed change seems taken from the plaintiffs' bar Christmas wish list. It will not help low-wage workers in any way as their claims are usually too small to attract the attention

of plaintiffs' attorneys whether for an FLSA collective action or a state law class action. Any reform effort needs to focus the FLSA on protecting wages for vulnerable and transient low wage workers. Changes designed to make life easier for plaintiffs' attorneys should not be a part of reform.

Arbitration

Also in this category of helping plaintiffs' attorneys, but not low-wage workers, is the proposal to ban arbitration.

Low wage workers are best protected by the FLSA when employers comply voluntarily and pay employees what they are due at the time that work is performed. Any delay in wage payments can be a severe hardship for workers who live paycheck to paycheck and are often transitory. As Administrator, I worked to decrease the time necessary to resolve a complaint by including this metric as part of investigator performance standards. It worked; the time to resolve an employee complaint decreased significantly.

Swift and certain resolution of wage payments is essential to the protection of vulnerable, low-wage workers. But this bill will delay worker pay by months even years by banning waivers of the right to bring FLSA wage claims in court. Arbitration is less formal but fair with significant protections for employees. It is more cost-effective; it is less time consuming; and it offers more immediate finality by avoiding years and years of appeals in the courts. What protects the wages of vulnerable workers more: receiving their wages after a two-month arbitration or having to wait through two years of litigation?

Arbitrating wage claims is not the same as in sexual harassment cases, where arbitration was used to hide bad actors from public view, letting those actors violate civil and criminal laws over and over again. Payment of back wages cannot be hidden by arbitration, as such payments are reported to the IRS for tax purposes.

Tolling the Statute of Limitations

Another provision of the bill that could significantly delay the payment of wages to vulnerable workers is the proposal to suspend the statute of limitations "during the period beginning on the date on which the Secretary of Labor notifies an employer of an initiation of an investigation or enforcement action and ending on the date on which the Secretary notifies the employer that the matter has been officially resolved by the Secretary."

The Wage & Hour Division has been criticized for taking too long to resolve complaints. If investigations go too long, the agency can lose the ability to collect some back wages – although every new day that passes often is another day for which back wages are owed.

Nonetheless, I tried to address this issue when serving as Administrator by setting standards for investigators and tracking the days taken to complete investigations.

Investigation should be resolved more quickly but tolling the statute of limitations will only remove all incentives for WHD to do so. If long delays in investigating complaints have no consequences, we will see the days required to resolve complaints grow longer and longer. I respectfully submit that my approach would have a greater impact: set metrics that investigators must meet or risk impacting their compensation. This Committee also could demand more transparency, and conduct effective oversight on this issue, by directing WHD to publish with its enforcement data the average number of days to resolve investigations each year.

Finally, the Labor Department has an existing effective means of protecting the wage claims of employees from expiring limitations periods in requesting employers to sign tolling agreements. The standard tolling agreement was developed by the Solicitor's office and has been in use with few changes from the Bush Administration. Most employers asked to sign such agreements do so. Although I would respectfully suggest that tolling agreements are only appropriate when investigation delays due to employer conduct or settlement discussion, not when caused by the inattention of WHD.

The Grant Program

Finally, the bill would establish a grant program within the Wage & Hour Division to provide funding for "community partners" to disseminate information, conduct outreach and training, provide assistance to employees in filing wage claims, assist enforcement agencies in conducting investigations, monitor compliance, and perform joint visitations to work sites with WHD staff.

I have several concerns with this program. First, the Wage & Hour Division already disseminates information, conducts outreach and provides training to employees, employee representatives and employers. I question whether grants to "community partners" without the training and experience of the career professionals at WHD would better protect vulnerable, low-wage workers. WHD already has a significant community outreach program. During the Obama Administration, the WHD created the new position of Community Outreach Research and Planning (CORP) as a pilot program. The Trump Administration made the position permanent and expanded it to every one of the 54 district offices around the country. The CORP are former investigators whose sole duties are community outreach and strategic initiatives. With over four dozen WHD employees dedicated to community outreach, the tools are already in place to accomplish what the grant program envisions – but with expert WHD staff.

WHD could do more to assist employees in filing wage claims. While serving as Administrator, I suggested to my staff that the agency adopt more formal procedures for employees to file complaints, receive updates about the status of investigations and even receive right to sue letters, as the EEOC has done for decades. I was surprised by the level of resistance to the suggestions. But 20 years later, the technology is available to allow employees, with or without help from community partners, to file complaints; to screen out complaints that the agency itself does not handle; to send automatically generated status letters to employees; and to route the complaint to the appropriate office (inside or outside WHD) for investigation. I could design an application to do so in just a few months. Leveraging available expert system technology would be faster, more cost-effective, and lead to better results than the proposed grant program.

Second, the Wage and Hour Division is not a grant awarding agency. It is an enforcement agency. Responsibility to administer a grant program would distract from its primary enforcement mission. Without experience in awarding grants, I fear this program is set up to fail.

Third, and perhaps most importantly, deputizing unions and employee advocates to "assist[] … in conducting investigations" and "perform[] joint visitations to worksites" would eradicate the long tradition of employers voluntary cooperating with WHD investigations. In the vast majority of investigations, employers voluntarily produce documents, welcome investigators into their worksites, and facilitate employee interviews. It is rare for an employer *not* to cooperate with investigators voluntarily.

We sometimes forget that the Fourth Amendment applies to WHD investigations. I have never advised an employer to assert its Fourth Amendment rights. But, if WHD attempts to partner with union representatives or other employee advocates to conduct investigations, employers most likely will stop cooperating and insist that WHD seek a search warrant to enter a worksite and go to federal court to enforce document subpoenas. The result: Investigations could take years rather than months. Delay of investigations and recovery of back wages will harm low-wage workers disproportionately – both because they will not have the money when they need it, and because the longer it takes to get the money, the harder it is to find the workers.

Alternative FLSA Reform Suggestions

Before I close, I would like to leave you with some alternative FLSA reform suggestions that could achieve our common goals of increasing compliance and workforce protections, especially for our most vulnerable workers. These suggestions are designed to simplify the rules, provide incentives to employers to comply, ensure back wage are paid quickly, and re-

focus FLSA protections to where it needs to be – vulnerable, low-wage workers (not highly compensated workers):

1. Amend the definition of a covered enterprise from a business with $500,000 in annual gross volume of business to $5,000,000 in business.
2. Create an affirmative defense to liquidated damages, civil penalties, and criminal penalties for employers who adopt and communicate complaint procedures to address employee wage claims, investigate such claims, and take appropriate action.
3. Create a new program, such as the former PAID program, allowing employers to ask the Labor Department to supervise the payment of back wages, as proposed by Rep. Stefanik in H.R. 5743.
4. Allow employees and their representatives to enter private settlements of FLSA claims with protections similar to the Older Workers Benefits Protection Act so employers can correct mistakes they find in payroll calculations without fear of litigation.
5. Adopt a definition of "willful" and "repeat" violations.
6. Amend the definition of regular rate in Section 207(e) to expand the types of extra pay and benefits that are excluded from the overtime calculation. In particular, new exclusions from the regular rate for childcare, student loan repayment and similar benefits would provide incentives for employers to provide employees with such benefits and remove the fear of violating the FLSA.
7. Adopt a new exemption for highly compensated employees.
8. Amend the Section 7(i) exemption for commissioned employees.
9. Update the computer employee exemption.
10. Revive the companion exemption to its original scope to prevent home care workers from going into the underground economy to provide care for families that cannot afford to hire caretakers through regulated and safer agency oversight.

Chairwoman ADAMS. Thank you very much. We'll now from Daniel Swenson-Klatt. You are recognized for five minutes.

STATEMENT OF DANIEL SWENSON-KLATT, OWNER & OPERATOR, BUTTER BAKERY CAFÉ

Mr. SWENSON-KLATT. Thank you, Representative Omar, for your kind introduction and your strong support of small businesses like mine in Minnesota's Fifth congressional District. We certainly appreciate you taking the time to meet with small business owners from Main Street Alliance last week during our May Small Business Month of Action.

Chairwoman Adams, Ranking Member Keller, and Members of the Subcommittee thank you for the opportunity to address you today.

My name is Daniel Swenson-Klatt. I've owned and operated Butter Bakery Café for the past 16 years in Minneapolis, Minnesota. I'm also here on behalf of Main Street Alliance, a national network of small businesses working to build people-centered, community-focused local economies.

In my ideal world, fair wage laws wouldn't be necessary. What if instead we valued everyone fairly for their labor, providing each person with what they need in order to help them thrive. Sadly, that is not the history of our country and those unfair labor practices don't actually ring true to the ideals of our country.

As a result, there's been a long and continual process of undoing those harms and righting the wrongs. The Fair Labor laws developed over many years are one way of moving closer to those goals. This philosophy has been at the core of my business. I learned about Fair Wage laws by doing. My first job out of college was as the sole employee of a small, nonprofit community center in Baltimore.

And while I had held jobs before as an employee, I quickly needed to understand what it also meant to be an employer. I learned about payroll recording and taxes and how to decipher IRS letters through a great mentor who walked me through it and taught me the basics of accounting. Those lessons stayed with me over the years as I worked in public and charter schools, in nonprofits, in self-employment, and finally, now as a for-profit business owner.

Technology available to me now that didn't exist in the mid-eighties makes preparing payroll on your own accessible, even if you don't use a payroll service. I recognize that the complexity of payroll can at times be baffling and frustrating. I still make mistakes. I am still learning, but the process of hiring staff, setting up payroll, and retaining staff through fair labor practice is fundamental for business owners.

The benefits of providing clear rules and policies far out way the effort to create them. The technical assistance available in many forms and with willing mentors it's a business owner's choice to not play fair. As someone who chooses to play by the rules, I lose out business owners who bend those rules and use their power and privilege to avoid paying a fair wage.

When I price my products fairly to represent a true cost of labor, I get questioned by lower prices elsewhere. Because I have worked in the restaurant industry and knew its issues with wage theft, I was willing to work with my staff to deal with a systemic inequities, create a fair wage model, and treat all my staff as professionals. My staff appreciate the ability to know what they'll make when they come to work.

When our city added an Earn Sick and Safe Time Ordnance for staff in 2016, we were at the lead teaching other businesses how to adopt it and build it into their payroll recording.

During 2018 and 1919, I had the opportunity of serving on Minneapolis' Workforce Advisory Committee which worked to craft a Wage Theft Ordinance. A key component was an employee notice which would spell out the terms and conditions of employment for

every staff member. We modified a State template for our city and it's an easy form. I complete it each time I go through the hiring process.

During our research on wage theft, one of the stories that bothered me the most was that large, national chains that were willing to encourage wage theft practices knowing that in nearly all states restitution was limited to Federal minimum wage and that wage was lower in many states and so they would come out ahead, even if they were caught and lost.

My staff gain a sense of agency in their role as an employee with a clear employee notice. My workers appreciate the openness and transparency, they appreciate a clearly spelled out policy for wages and payroll reporting. The tasks of hiring and setting up payroll should include this information. Your efforts to define what that notice include are helpful, not harmful. I can meet those compliance requirements.

Thank you for continuing the effort to undo fair labor practices of the past and work with small businesses to build a sustainable economy, vibrate neighborhoods and strong communities across this country. I am happy to answer any questions you may have.

[The Statement of Mr. Swenson-Klatt follows:]

PREPARED STATEMENT OF DANIEL SWENSON-KLATT

the MAIN STREET alliance

U.S. House Committee on Education and Labor
Workforce Protections Subcommittee

"Standing Up for Workers:
Preventing Wage Theft and Recovering Stolen Wages"

May 11, 2022
10:15 A.M.

Testimony of Daniel Swenson-Klatt
Owner
Butter Bakery Cafe
Minneapolis, MN

Chairwoman Adams, Ranking Member Keller, and members of the Subcommittee:

Thank you for allowing me the opportunity to address you today. My name is Daniel Swenson-Klatt, I have owned and operated Butter Bakery Cafe for the past 16 years in Minneapolis, MN. I am also here on behalf of Main Street Alliance, a national network of small businesses working to build people-centered, community-focused local economies.

In my ideal world, fair wage laws wouldn't be necessary. What If instead we valued everyone fairly for their labor, providing each person with what they need in order to help them thrive. Sadly, that is not the history of our country and doesn't actually ring true to the ideals of our country's founding. As a result, there has been a long and continual process of undoing those harms and righting the wrongs. The Fair Labor laws developed over many years are one way of moving closer to those goals.

I applaud the current efforts to address wage theft so that we can better achieve our ideals by compensating all workers fairly. This philosophy has been at the core of my business since we opened and continues to provide the transparent base needed for our successful employee-employer relationships.

I learned by doing. In my first job out of college, I was the sole employee of a small non-profit community center in Baltimore. While I had held jobs before as an employee, I quickly needed to understand what it meant to also be an employer. I learned about payroll reporting and payroll taxes. I learned to decipher IRS letters (mostly) and built patience waiting to speak with representatives. Fortunately, I was given a great mentor who walked me through much of this and taught me the basics of accounting. Those lessons stayed with me over the years as I worked in public and charter schools, churches, non-profits, in self-employment, and finally now as a for-profit business owner. I wish that back in the mid-1980s, the technology available to me now had existed then, making preparing payroll on your own accessible even if you don't use a payroll service.

I am still learning and I recognize that the complexity of payroll can at times be baffling and frustrating. I still make mistakes. I still wish I knew more. However, the underlying vision of fair compensation for labor continues to be my overall goal and so I persist.

The process of hiring staff, setting up payroll, and retaining staff through fair labor practices is not just fundamental for business owners like me, it's the reason we continue to exist. The benefits of providing clear rules and policies far outweigh the effort to create them. With technical assistance available in so many forms and willing mentors in all industries, it is a business owner's choice to not play fair. As someone who chooses to play by the rules, I lose out to the business owners who bend rules, and use their power and privilege to carry on the harms of the past. When I price my products fairly to represent the true cost of labor, these get questioned by lower prices elsewhere. Mostly this reflects an undervaluing of labor by others rather than my own personal profit motive.

For the record, my business model was never designed to create a high profit venture. We've used a social benefit model for many years and really only ever intend our budgeting

to be break-even after community benefits are distributed. As a small restaurant, we chose to move away from a tipped model of compensation to pay a fair, stable wage for all of our staff. Within the restaurant industry, traffic patterns, menu prices, scheduling games, and hierarchies all play into an employee's actual overall compensation. Add the layers of gender, age and race-based biases and it's standard practice that two employees working the same job position can have vastly different compensation rates even if their overall work experience levels are the same.

As a staff, we decided to deal with this systemic inequity by moving to pay staff a fair wage for a set of scheduled hours based on their experience level and training. We choose to treat each other as professionals. My staff appreciate the ability to know what they'll make if they come to work, and not worry about the weather, the number of others they'd share tips with, or the whims of a customer. It has been easy for me to find and keep staff these past five years, with our current staff averaging nearly three years of employment with us. Seven of our 20 staff have over four years of experience.

One of the missing pieces of my employment efforts was an Employee Notice, which I had covered through a working agreement that the employee and I signed. Then during 2018-19 I had the opportunity of serving on Minneapolis' Workforce Advisory Committee which worked to craft a minimum wage ordinance and a wage theft ordinance. A key component of the wage theft ordinance was the Employee Notice which would spell out the terms and condition of employment for every staff member. We worked to modify a state template for our city and it became an easy form to complete each time I went through the hiring process.

During our research on wage theft, one of the stories that bothered me the most was that large corporate chains were willing to encourage wage theft practices knowing that in nearly all states, the restitution was limited to the federal minimum wage. Because that wage is lower than most state levels they would come out ahead even when they were caught and lost the battle. On a large scale, that's a profitable practice that hurts small businesses like mine by creating an unfair playing field in a competitive market.

It is a great process of education for my staff members to be provided with the Notice, as it gives them a sense of agency in their role as an employee. My workers appreciate the openness and transparency of an Employee Notice for hire. They appreciate a clearly spelled out policy for wages and payroll processes. They appreciate equally clear policies for benefits, supports, and limits to what is available. To promise more without the intention of providing it only breeds resentment.

It saddens me to hear the stories of staff who wish that a previous employer had provided more information about their employment and the payroll process. I build payroll education into my onboarding process to help these new employees feel more comfortable with reading their paystub, or understanding payroll taxes, or how earned time off accumulates and can be put to use.

I recognize there is great benefit in tightening labor laws regarding wage theft, so that small businesses can fairly compete with larger corporations. Doing so will help protect those of

us seeking to do the right thing from being hurt by the bad actors in our industries. The tasks of hiring and setting up payroll should include a straightforward, clearly defined set of parameters to describe one's employment. This isn't a burden, it's simply a necessary task. Your efforts to help define what that notice should include is helpful for both employee and employer, not harmful.

Thank you for continuing the effort to undo the harms of the past and work with the small business community to build a sustainable economy that builds vibrant neighborhoods and communities across this country. I am happy to answer any questions you may have.

Chairwoman ADAMS. Thank you very much. Under Committee Rule 9(a), we'll now question witnesses under the five-minute rule. I'll be recognizing Subcommittee Members in seniority order. Again, to ensure that Members' five-minute rule is adhered to, staff will be keeping track of time. Please be attentive to the time, wrap up when your time is over, and re-mute your microphone.

As Chair, I'll now recognize myself for five minutes. Ms. Cacace, under current law the FLSA provides that workers who are victims of wage theft can only be compensated for unpaid hours of work at the Federal minimum wage rate of $7.25 an hour. That would mean that a worker earning $10 per hour who was a victim of wage theft would only receive back wages at the rate of $7.25 per

hour. So, how does this current limitation on damages under the FLSA harm low-wage workers?

Ms. CACACE. Thank you, Chair Adams. Your question points out a significant problem. If you have an agreement with your employer to get paid above the Federal minimum wage, which is only 7.25 an hour, even if they don't pay you the $10 an hour, they said they would, if you are suing under the Fair Labor Standards Act, you cannot currently sue for that $10 an hour. You are only able to sue for the 7.25 an hour, there's no way for them under the Fair Labor Standards Act to obtain the money that the employer agreed to pay them and that they earned. And this significantly diminished their damages.

If you work at $7.25 an hour for 40 hours a week for 50 hours a year, it comes out to only $14,500 per year. So, you have somebody who's full time working making just $14,500 and only able to collect that much money, even if they were promised a wage of $10 an hour.

Chairwoman ADAMS. OK. Thank you for that. Raising the Federal minimum wage is an issue of great importance to me and many of the Members of this Subcommittee. I appreciate your testifying and speaking to the importance of the issue, but Ms. Cacace, as you know, wage theft disproportionately impacts workers of color, including Black women.

In your experience as a Labor Bureau Chief and as a Legal Aid attorney, can you share some of the ways in which wage theft impacts our most vulnerable communities?

Ms. CACACE. Yes, of course. The low-wage workers work paycheck to paycheck, so they do not have savings in the bank if their employer does not pay them the wages they're owed for the last week. So, what happens is, as you mentioned in your opening statement, they're unable to pay their rent. They're unable to buy groceries, to pay their utility bills.

And when I was at Legal Aid, we would screen every worker that came in for an employment law issue for any other issues and often they would already be in eviction proceedings. There would already be a scarcity of food in the house. There were so many fundamental issues that developed from not getting paid your minimum wages every single week and the stress that that puts on a person is enormous and people are really suffering. And so, any amendments to the Fair Labor Standards Act that will increase the ability to enforce the law will be an enormous benefit to these workers.

Chairwoman ADAMS. Thank you very much. I've got a few minutes left. Mr. Swenson-Klatt, as a small business owner, what would you say in response to the argument that providing paystubs and pay records to employees is too burdensome?

Mr. SWENSON-KLATT. I am currently providing paystubs and all of the information required. I don't feel like it's a burden at all to me. It's a one-step click of a box and in this case I'm not afraid of it.

Chairwoman ADAMS. OK. So, it doesn't appear to be a burden to you?

Mr. SWENSON-KLATT. Not at all.

Chairwoman ADAMS. You've been doing it for how long?

Mr. SWENSON-KLATT. For 16 years.

Chairwoman ADAMS. OK. Alright, well, you know it sounds like you have the model. Thank you very much. I have a little time left. I'm going to yield my time back, but I also want to now recognize Ranking Member for the purposes of questioning the witnesses. Rank Member Keller, you're recognized, sir.

Mr. KELLER. Thank you. Ms. McCutchen, thank you for being here today. Democrats have long been hostile to the independent contractor model, which has offered flexibility and well-paying opportunities to millions of Americans. Are you concerned that the burdensome requirements and excess penalties in Congresswoman DeLauro's bill would have a chilling effect on the ability of independent contractors to find work?

Ms. MCCUTCHEN. Oh, absolutely, Representative Keller and thank you for asking. Now, you know there are over 10 million open jobs right now in this country and at the same time in 2021 over 12 million workers joined the independent workforce. That's according to a study by NBO Partners. By the way 55 percent of those are women and 67 percent are Gen Z and Millennials. The vast majority are choosing to do that voluntarily and are happier and healthier, according to this report.

Now, employers need to tap into this workforce, 12 million versus 10 million open jobs, but uncertainty caused by DOL's illegal withdrawal of the Trump administration's IC regulations and then coupled with this massive increase in penalties means that no rational employer would actually want to engage the independent workforce which they really need to be able to do.

Mr. KELLER. Thank you. Also, Ms. McCutchen, the Fair Labor Standards Act covers roughly 143 million workers in the diverse businesses of all sizes that employ them. Are you concerned that the burdensome requirements contained in Congresswoman DeLauro's bill would unduly impact small businesses?

Ms. MCCUTCHEN. Yes. You might as well call this bill the Bankrupt Small Business Act. Small businesses do not have in house attorneys. They can't afford outside employment law specialists. They don't have a professional HR. They primarily rely on the advice of their accountants, who I'm sorry to say, just do not know the FLSA sufficiently.

Guidance for the small businesses is really hard to find on the Wage and Hour Division website. Sometimes I can't find it. Many small businesses, even when current law, need a payment plan to repay the back wages they owe and let alone the excessive penalties proposed here.

I have seen small businesses bankrupted. There are perhaps—I don't know. Perhaps that's the goal. Under current leadership at DOL, targeting ICs, franchisees, guess what, bankrupt small businesses can't employ any workers at all.

Mr. KELLER. And this might be for, as you mentioned, the regulations are not clear and the guidance isn't always there, so a small business if they would make a mistake or something that would be detrimental to them because is that a lot what we find that businesses might have made a mistake, an error in trying to sift through the regulation?

Ms. MCCUTCHEN. Yes. And that's the problem with the word 'wage theft? in talking about this as if they're criminal activities.

Good employers make mistakes because compliance is hard, and this bill does not distinguish between the good faith employer who makes an error versus the really bad actors that are out there.

Mr. KELLER. And we all want to hold people that are intentionally doing things wrong accountable. I think that's the minority of people. I mean I noticed in Mr. Swenson-Klatt's testimony he recognized that there's a complexity of payroll at times and can be baffling and frustrating and he still makes mistakes, according to his own testimony and I don't think they're going after the right thing.

Mr. Klatt, I don't think you're doing those things on purpose, are you?

Mr. SWENSON-KLATT. Indeed not, and that's——

Mr. KELLER. That just proves the point that this legislation is going to be detrimental to people and the vast, vast majority of the employers in the United States want to do the right thing for their employees because their employees—I mentioned in my opening statement how I recognized that going across central and northeastern Pennsylvania, but when I was in high school, I worked in a restaurant. I worked in a nursing home washing pots and pans, and I worked in a factory right out of high school. And I tell you what, the people that owned those businesses back in the early and mid-eighties, guess what, the cared about the people that came to work every day. They wanted to do the right thing. So, I just think we, as policymakers, need to quit demonizing the people we represent that create jobs every day. Thank you and I yield back.

Chairwoman ADAMS. Thank you very much, Ranking Member. I'll now recognize Mr. Takano. You're recognized for five minutes.

Mr. TAKANO. Thank you kindly, Madam Chair. Ms. Cacace, what do you have to say about the allegation that this law, this proposed bill doesn't make a distinction between mistakes and willful wage theft?

Ms. CACACE. Well, the liquidated damages they are more significant if it is somebody who has engaged in willful behavior, so it definitely does make a mistake. But I think the important thing to recognize is that this bill, the only additional substance that it's requiring of employers is to give a paystub. A paystub is the most basic thing that an employee should receive from their employer. They should know exactly how much they are getting paid. They should know for exactly how many hours their employer is paying them. That is not too much of a burden. It is not too complicated. And under the Fair Labor Standards Act, it's necessary because many states do not have that requirement, so this is an essential protection that is not going to burden anyone. And any small business who complies with that will have no—there's no penalties. Pay your workers the right amount and nobody is bankrupting your business.

Mr. TAKANO. Thank you. Ms. McCutchen indicates that both Federal and State laws under the paystub disclosure requirements would, in her words, 'lead only to more complexity and confusion when employers try to figure out which law is more effective, but this doesn't make any sense to me. I think employers like Mr. Swenson-Klatt are smart enough to figure it out. Do you agree with Ms. McCutchen that a Federal paystub requirement, such as the

one that you described, would lead to more complexity and confusion?

Ms. CACACE. No. As I said, I think the paystub requirement is a very basic requirement. It is absolutely the bare minimum that you should give your employees. I do not think it will be more complicated for businesses and they should be able to figure it out.

Mr. TAKANO. I'm astounded, quite frankly, Ms. Cacace, that there isn't a national requirement for paystub. I receive a paystub. I know the Ranking Member and every Member of this Committee, Republican or Democrat, receives a paystub. Every one of my employees receives a paystub. It's common sense that you need a paystub to figure out whether or not we're receiving the full amount that's due. We can actually go back and look at whether or not we're being paid minimum wage or whether we are being paid the overtime that we deserve and we can dispute with your supervisor.

I think all this bill is doing is saying every American worker should get a paystub detailing their deductions. I think most Americans would say that this is common sense.

Mr. SWENSON-KLATT. Ms. McCutchen says that the Wage Theft Act propose increases to the penalties for violators of Fair Labor Standard Act are, 'very significant and even ridiculous.? I don't believe it's ridiculous to hold businesses accountable for stealing workers' wages. What do you think?

Mr. SWENSON-KLATT. I would find it a little more ridiculous to not charge someone for stealing. If I were to take my employees? wages after they took them out of the bank, I'm sure I would be in trouble, but if I do it before they get to put it in the bank, I should also be in trouble. So, I don't think it's ridiculous at all to take on the bad actors to let them know this is not the way to play business.

Mr. TAKANO. Mr. Swenson-Klatt, you mentioned or alluded to the big national chains and some of their practices. How you have to compete against some of their bad acting. Can you tell us a little bit more about what you've experienced and what you've seen?

Mr. SWENSON-KLATT. Within our own city, it's pretty clear that the wage levels here are much higher than across the country. And so, when a company can use that difference to get the Federal minimum wage as the base, they're cutting wages for those staff who work in our city. I have to pay my staff in this city the full wage and that's a pretty discrepancy. They can certainly out compete me in a lot of ways by not having to do that.

Mr. TAKANO. Madam Chair, I yield back, but I'm astounded that workers cannot recover the minimum wage that is set in Minneapolis that's higher than the Federal Government. They can only recover what the Federal Government has set at seven dollars and change. I find that astounding. I yield back.

Chairwoman ADAMS. Thank you, sir. Thank you very much. I want to now yield to the gentlelady from North Carolina, Ranking Member of the Education Committee, Representative Foxx you're recognized.

Ms. FOXX. Thank you, Madam Chairman. Ms. McCutchen, thank you very much for being here and for your very positive opening statement. The DeLauro bill creates a new requirement for DOL's

Wage and Hour Division to enforce all employment contracts and collective bargaining agreements.

Ms. McCutchen, based on your time leading the Division, are you concerned about the Division's ability to enforce this mandate and what implementation issues would the Division face?

Ms. MCCUTCHEN. Yes, I'm very concerned. That type of contract claim is totally outside of the Wage and Hours experience and indeed the attorneys and solicitors' office too. They do not know contract law and certainly I would suggest that unions are the experts at enforcing collective bargaining agreements. So, you would have to develop, the agency would, new training and train every investigator and it's not an easy, new type of law. And all that time training new investigators, developing the training, every minute of that would be spent away from helping low-wage workers.

And I'd also like to suggest employees who have contracts and union members under collective bargaining agreements are not the low-wage workers that we should be focusing on here, so it's just a bad idea all around. And believe me, they have remedies. It's called State contract laws and enforcing collective bargaining agreements.

Ms. FOXX. Thank you. Ms. McCutchen, the legislation we're discussing today would force a business to comply with stringent disclosure requirements that would include unnecessary paperwork and costly analysis. How would these costly requirements subvert the legislation stated goal of benefiting workers?

Ms. MCCUTCHEN. Well, first of all, let me correct the record. Every employee gets a paystub because every State does have a paystub requirement. Some of them require more and some less, but paystubs do exist, everybody gets them, but adding additional disclosures would mean additional time. It means working with our payroll provider to make sure that your paystubs actually comply with the law, that's more perspective. California versus Federal, for example.

Under California law, you have to list total hours, not just regular and overtime. This law would just do regular and overtime, so it is confusing because this would add 51 laws that you have to comply with rather than just your local, State, or numbers of states. So, I would rather employers spend the time instead of trying to comply with unnecessary paperwork, which we frankly don't know whether it helps low-wage workers, whether they even would read this additional paperwork. I'd rather spend the time and money and resources on enforcement of the bad actors for low-wage workers.

Ms. FOXX. Thank you again. Ms. McCutchen, 5 years ago, a witness testifying before the Committee representing the Society of Human Resource Management discussed the challenges of complying with FLSA requirements in the modern workplace and how the FLSA has not kept pace with the 21st Century economy. Do you agree that employer compliance with the FLSA wage and hour requirement has become more complicated in light of technological developments? How has the COVID–19 pandemic accelerated this trend?

Ms. MCCUTCHEN. Absolutely, I agree. The core requirements for FLSA, as you will recall, were enacted in 1938 and the workplace

today is nothing like the workplace 80 years ago. Then we were primarily a blue-collar manufacturing economy and now today we are a service economy with more independent workers and COVID just accelerated all the changes, where we work, how we work, the types of jobs, the types of pay. It's more complicated to track hours. It's more complicated to calculate overtime. It's more complicated to figure out who is exempt from overtime and who is not.

And yes, we need to help low-wage workers, but we need to focus on reforms that will do that, simple, clear rules and quick enforcement is what we need.

Ms. FOXX. Thank you. Madame Chair, I yield back.

Chairwoman ADAMS. Alright, thank you to the Ranking Member. So, I want to recognize Ms. Jayapal, Representative Jayapal, you are recognized.

Ms. JAYAPAL. Thank you so much, Madam Chair. Wage theft is indefensible, especially, as corporations rake in record profits. Funding for the Wage and Hour Division to combat wage theft has essentially remained flat for the past decades thanks to corporate lobbying. In addition to beefing up Federal enforcement, we have to take an 'All of the Above? approach to protect workers' paychecks.

One of the most effective recourses for workers is litigation. Between 2017 and 2020, class action lawsuits recovered more lost wages than Labor Department action and yet many employment contracts contain provisions that waive a worker's right to a day in court by subjecting them to mandatory arbitration and preventing them from bringing class action lawsuits.

That's why I'm a proud co-sponsor of the Wage Theft Prevention and Wage Recovery Act, which bans these coercive practices against workers fighting to win their hard-earned wages.

Mr. Esparza, thank you for sharing your story. I think it's too often that immigrant workers get overlooked and erased, even as they face very unique challenges. If you had been required to sign an employment agreement that mandated you to bring your wage claim in arbitration as an individual and pay out-of-pocket arbitration costs, do you believe that your wage claim would've been successful?

Mr. ESPARZA. It would not be successful at all because, I mean, I don't have the resources to do it by myself. That's why the union supported me and thanks to them I was able to do this class action lawsuit. Without them, I wouldn't be able to.

Ms. JAYAPAL. You wouldn't have been able to do it. It's just too expensive and you wouldn't have had the resources. On average, a worker experiencing minimum wage violations lose about $3,300 in 1 year, more than a month of rent in a city like Seattle, but a small sum compared to the cost of litigation.

Ms. Cacace, would an individual, low-wage worker be able to easily find legal representation for such a claim?

Ms. CACACE. No, definitely not. I mean before even being at Legal Aid I was in private practice, and it was very difficult for us to take claims of low-wage workers because the recover most significant to the workers was not great enough to warrant the resources put into the litigation and so the ability to bring collective

and class actions is really essential so workers can have their rights vindicated and can receive the money that they're owed.

And going to arbitration is not the answer. Arbitration is not as efficient as it is claimed to be. We had a recent case here in New York where the arbitration took over 3 years for a group of home health aides, so it's important that workers have the right to litigate in court as a group. Thank you.

Ms. JAYAPAL. Let me followup on that because you were just starting to get at my next question, which is why do employers prefer settling wage theft disputes in arbitration rather than in the courts? Because if you look at the data, more than half of private sector non-union employees are subjected to this forced arbitration. So, what's in it for the employers?

Ms. CACACE. So, many arbitration agreements say that a worker has to arbitrate individually, so, for instance, there is currently a collective and class action against Uber and Lyft in New York State brought by the Taxi Workers Alliance and that is claimed for thousands of workers.

The companies have claimed that all of those workers are subject to individual arbitration, so thousands of individual arbitrations. It would be impossible to find representation to do that and would take decades to individually arbitrate each one of those claims, so it's more efficient to have class and group actions that can go into court.

Ms. JAYAPAL. So, in a way, it's an effective way to quash many of these complaints from workers to be able to get what's fairly owed to them. Let me stick with you and say that the Wage Theft Prevention and Wage Recovery Act includes a provision that would automatically include qualifying workers in a class action lawsuit instead of requiring them to opt in. How will that impact the strength of class action cases and the Fair Labor Standards Act enforcement?

Ms. CACACE. I think that makes sense because when workers often receive an opt in notice, they're afraid. They would be making themselves known. They could be currently still working for this employer and it's a difficult decision whether to opt in because of the fear of retaliation. So, if they don't have to take that affirmative step until after the case is over and there is going to be recovery, I think a lot more workers will get the compensation that they earned.

Ms. JAYAPAL. Thank you so much. And Madam Chair, I'm proud that the House has passed the ending of Forced Arbitration of Sexual Assault and Sexual Harassment Act, my bill with Cheri Bustos, and that the Senate passed it and it got signed into law. I hope we can eliminate forced arbitration and provide limitations on class action and eliminate the limitations on class action with this bill. Thank you very much. I yield back.

Chairwoman ADAMS. And thank you. I want to recognize now, Mrs. Miller-Meeks of Iowa. You have five minutes, ma'am.

Mrs. MILLER-MEEKS. Thank you, Madame Chair and Ranking Member Keller and thank you to all of our witnesses for their important testimony.

Ms. McCutchen, you had done an excellent job and thank you for appearing here in person, describing the onerous implementation

and regulations around the FLSA and how difficult it is for a business that wants to comply and is paying a fair wage to comply with those regulations.

The FLSA does not define the term 'joint employer.? congressional Democrats and the Biden administration support creating the broadest definition possible of joint employment and do have concerns about how broad joint employment definition would work with the DeLauro bill and would it significantly increase liability for employers and threaten the franchise business model.

Ms. MCCUTCHEN. I think it would kill the franchise business model and also ruin many small businesses because they cannot afford the tripling and quadrupling of penalties that this bill would propose, especially, in a franchisee business. What company would have franchisees when they're going to be held responsible with these extreme penalties for every minor violation by every single franchisee who is a small business? Better just to have company stores where you can control the pay and the pay practices of the employees in the storefronts with our brand on it.

So, the broader the joint—anti-joint employment is anti-franchise and anti-small business.

Mrs. MILLER-MEEKS. And I know that our small businesses in Iowa who are extremely concerned about this and they're paying, in many cases, well over $15 an hour. Your testimony discusses the complexity of the Fair Labor Standards Act and the value of streamlining requirements. During the Trump administration, DOL issued a final rule on workers classification as employees and independent contractors under FLSA. This rule emphasized the degree of workers control over their work and their great entrepreneurial opportunity for profit or loss. Does this rule provide greater certainty for workers and businesses?

Ms. MCCUTCHEN. Absolutely. Before that there were no regulations. There were no clear standards at all. It was only informal guidance, which you had to be an expert to find on the Wage and Hour Division website. So, these were regulations. They were focusing on who controlled the work, which is the commonality in all the—sorry to say this—100 different Federal and State regulations and statutes on independent work.

Now, of course, the Biden administration withdrew that rule. A Texas Court said that that was illegal, and it is back in force, but here's more confusion. It's not on the Wage and Hours Division's website. The Trump regulations that are in force today what we see on the website is a notice about the law, but not a link to the actual regulations and they have, instead, their Factsheet 13, which is a seven-factor test that was in place before the regulations. So, to help small businesses and franchisees, they need to put the Trump regulations back on their website and take off Factsheet 13.

Mrs. MILLER-MEEKS. So, it sounds like that clarifying language needs to present and we need to stop practices where we know it's illegal, but we're going to continue to do it.

In March of this year, a Federal court held that efforts by the Biden Labor Department to withdraw the Trump administration's final rule on independent contractors were invalid, to your point, and that the Trump rule, which became effective in March 2021 re-

mains in effect today and I think you alluded to this. Do you know whether the Department is following the Trump administration work classification rule, and will they put it back on their website or is that an indication they're not following it?

Ms. MCCUTCHEN. I don't know. I don't think anybody knows whether they're actually following the law, as they're required to do under the Texas District Court. I also don't know whether they're going to appeal that case, so we're in total disarray right now. My advice to employers is the rule is the Trump rule and that's the rule that you should insist DOL and in litigation be applied.

Mrs. MILLER-MEEKS. Thank you so much for your testimony. Ms. Chair, I yield back my time.

Chairwoman ADAMS. Thank you very much. Representative Omar, you are now recognized for five minutes, ma'am.

Ms. OMAR. Thank you, Madame Chairwoman. Thank you, Mr. Swenson-Klatt for joining us today. Can you please detail how illegal payroll practices from certain companies end up hurting businesses like yours and your employees?

Mr. SWENSON-KLATT. Thank you. It's been my experience that when I've made a mistake with any of my payroll issues, I get opportunity to learn. I've had great experience with the IRS in working through any issues. I haven't had any fines that I've needed to be afraid of. And when I hear about businesses that break rules willingly, make efforts to skirt the law in order to gain some competitive advantage, I feel like all the work I'm doing is kind of at a loss.

It also just makes me feel like my consumers, my workers, my community feels devalued for their labor when they know businesses, on a large scale, can avoid paying a fair wage.

Ms. OMAR. Thank you. Democratic AG offices across the Nation have been working hard to protect workers' labor rights and make sure the economy is safe and sustainable for historically disenfranchised communities. And so, I first want to thank Ms. Cacace for fighting for working families in New York. You mentioned in your testimony that your office and State legislature enacted vital reforms to require universal payroll transparency and enforce tougher legal and mandatory repercussions for wage violations.

In 2019, the Minnesota legislature passed similar worker protection which also authorized criminal penalties and increased civil fines for wage theft. That same year my good friend and predecessor, Attorney General Keith Ellison, established wage theft unit that is dedicated to advancing and protecting the rights of exploited workers.

Over the past couple of years, our AG's office has won hundreds of thousands of dollars in payback unpaid overtime and other damages for workers in my District and across the State. Unfortunately, some of the most pervasive cases of wage theft in my State still occur in construction industries where almost one in five construction workers suffer some type of payroll fraud and misclassification.

A very recent example of this happened last week where workers claimed wage theft for more than $100,000 by subcontractors at the

Viking Lakes Development in Egan, Minnesota. It is clear that more DOL funding and additional Federal reforms are needed to assist our localities in protecting the most vulnerable workers. How do you think the Wage Theft Act aids in your legal work?

Ms. CACACE. Thank you for your questions. So, as we're talking about the paystub requirements, I think it's important, not only so workers know each and every week what they are getting paid for and so they can address any discrepancy immediately, but if they need to litigate those records are really invaluable. So, we have seen cases in our office where, even though the minimum wage is $15 an hour, the workers are being paid $13 an hour and that's what it says right there on the paystub, so that just makes the case easier to litigate.

And if there were even more penalties, I think rather than lead to more litigation, I think that leads that to less litigation, right? So, if you know that your paystub shows you did not pay correctly, you're going to be subjected to double or triple penalties. If you have a good lawyer on the employer's side, they're going to tell you to settle that case. Let's resolve this, let's start paying correctly, and then we won't face this again.

One of the other things that's in the bill is also to codify the standard that if an employer doesn't keep records that then the employee's testimony is presumptively true about their hours and their wages. And it's really important to get that in the statute because I think that then employers will be on notice that, oh, it's good for me to give the paystub because then I'm doing something right. We deal with things immediately, if they happen. And they realize that if they don't what my worker comes in and testifies it's going to be very difficult for me to rebut that. So, I think a lot of the provisions will make it easier for employers to comply with the law and will make it more likely that there will be early settlements rather than long litigation.

Chairwoman ADAMS. The Gentlelady's time has expired.

Ms. OMAR. Thank you.

Chairwoman ADAMS. Alright, thank you very much. Mr. Good, you are now recognized, sir, five minutes.

Mr. GOOD. Thank you, Madame Chairman. Thank you to Ranking Member for holding this hearing. I want to thank our witness who is here, Ms. McCutchen, for being with us in person. I suspect this will be a requirement of this and every other committee in a few months and I appreciate your courageous example of being here with us in person.

As you know, though—as we all know, we're experiencing record inflation in the country thanks to the reckless and relentless spending sprees by this Administration. This is further exacerbated by the Democrat COVID lockdowns that have decimated small businesses, many of which will never recover. In fact, NFIB has reported that 25 percent of small businesses in my home State of Virginia have closed permanently, never to reopen again as a result of these Democrat lockdowns.

This is even more tragic when you consider the fact that some 90 percent of Americans work for small businesses, so we know who ultimately this is impacted by. They're not going to make any wage without a job. But we should be working, I know you agree,

to get the heavy, oppressive hand of government off the necks of working families and small businesses.

As a matter of fact, tomorrow I plan to introduce my bill, the Small Business Before Bureaucrats Act, which would update the 60-year-old NLRB regulatory standards to reduce the number of businesses that are under the oppressive control of the NLRB. It would increase by tenfold the standard for when a business would have to qualify to be under that control.

But back to the 40-year high inflation rate which we're all suffering under, which I believe is the No. 1 issue for most Americans today. In the State of the Union Address, this President made it clear that he blames business owners or seems to make that clear that he blames them. I don't know if he was dishonestly trying to deflect from his terrible record, his failed policies, or he simply after 50 years in government does not understand what it takes to run a business, to operate at a profit, when he said to businesses lower your costs, not recognizing that businesses every day try to do two things, increase revenue, reduce their costs so they can survive, meet their payroll, keep their doors open, and employ their employees.

Congress should be looking, I think you agree, to empower job creators to survive this economic crisis. So, I ask you, what's the most important action or some of the most important actions that you believe that Congress could take to empower job creators and hopefully therefore bolster the wages or the opportunities for working Americans.

Ms. MCCUTCHEN. Well, I think one of the most urgent things, just like your bill is going to be in NLRB, is exclude more small businesses from the FLSA coverage. It's 500,000 in annual business sales. It's been that way for decades and decades and decades. So, taking that out by ten times would be a help to get the Federal Government out of small businesses, but this bill would do the opposite effect, right?

I mean, yes, this bill, even minor, unintentional violations the penalty is going to be $22,000 per violation per employee. Now, think about that. You have five employees, and you make a minor mistake on your paystubs. That's $100,000 in fines a week. That is going to bankrupt small businesses and it just can't happen in this economy.

I will also say I was at a conference last week where hospitality employers the whole discussion was staffing, staffing, staffing. We cannot get employees. You've seen the 'Help Wanted? signs on every store, on every restaurant. We need to simplify, simplify, simplify these rules so that employers can comply with them easily, pay the employees what they are owed now, not after 3 years of litigation.

Mr. GOOD. Well said. I tell folks back home in the District this Democrat majority looks with contempt and distain at job creators, employers, business owners and believe that they seek to exploit their employees and they must have done that to become successful and to be an employer to begin with and continues to layer more and more consequence, punitive damages upon employers who are just trying to survive, just trying to pay their employees. Could you speak with the limited time that we have—you referenced the need

for clear and simple Labor rules. What should Congress do to more simplify and eliminate some of those to help small business owners?

Ms. MCCUTCHEN. Well, my written testimony actually has 10 ideas for FLSA reform that would help do that. That includes, for example, a refocus on low-wage workers, that includes excluding high compensated workers from the coverage of the FLSA, make them exempt. It includes allowing businesses and employees to enter private waivers of claims so they can resolve issues quickly and privately without the danger of being sued again.

I could just go on and on, but we just need the regular rates. I'm sorry for the time, but today to get staffing businesses have to give special benefits and special pay, like Dollywood, where I'm from in Eastern Tennessee, is giving full, free college educations to every full-time and part-time employee from Day One.

Chairwoman ADAMS. That's time.

Ms. MCCUTCHEN. Now, before the Trump administration's regulations on the regular rate that would've caused overtime liability.

Chairwoman ADAMS. Ma'am. Ma'am.

Ms. MCCUTCHEN. You can't give that without violating the FLSA.

Chairwoman ADAMS. Ma'am, excuse me.

Mr. GOOD. Thank you very much.

Chairwoman ADAMS. We have to move on. You're out of time.

Mr. GOOD. Thank you, Madame Chairman. I yield back.

Chairwoman ADAMS. Thank you. The gentleman from New Jersey, Representative Norcross, you are recognized, sir, for five minutes.

Mr. NORCROSS. Thank you, Madame Chairwoman, and for holding this incredibly important hearing. I know what it's like to be cheated out of wages. Unfortunately, when I was young man, I was a victim. And there is a difference between somebody making a mistake and what we're talking about today. And I will talk about this with one our witnesses to get his feedback.

I have never heard in my entire career of somebody going into bankruptcy, being prosecuted criminally because of an accidental mistake. The ones that we are talking about today are intentional, are large, and hurt real people. I understand contractors are the partners of workers. We're in this together, but there's a distinction between a good contractor who does the right thing and might a mistake and what we're going to hear here in a few minutes.

Mr. Esparza let's talk about the bad actors and in your case, the wage thefts. You joined with 200 plus other workers in a class action suit for $618,000. That's not an accidental mistake. Let's be clear. You were working for the employer. Talk to me about what kind of paystubs, earning statements that you received. How was it that you were either able to document or difficult to document the wage theft?

Mr. ESPARZA. Well, the form of payment from this person that I was working for, she was just giving me a personal check with a certain amount of money for the hours that I worked. There was no overtime paid after 40 hours. I used to work from Monday to Sunday and still get paid the same amount. And for Saturday/Sunday, I mean, I was keeping a record of everything that I was doing

because, like I said on my testimony, the union was educating me, and they told me to start saving those as proof.

Mr. NORCROSS. So, when you got a personal check, it was just made out to you, the amount, and the signature by the employer?

Mr. ESPARZA. Yes, that was it. There was no paystub or anything, so it was just an amount.

Mr. NORCROSS. That happened week after week or was that a one-time occurrence?

Mr. ESPARZA. It was week after week.

Mr. NORCROSS. So, this isn't an accident by any stretch of the imagination and that's what I'm trying to suggest here to my colleagues. There's a huge difference trying to put little guys out of business. No, we're not. They're the ones who drive our country. The ones we worked with. That's not an accident, folks. Oh, gee, I forgot my paystub today. OK, that was once. How many weeks did that happen on your job?

Mr. ESPARZA. I want to say around probably 10 weeks straight.

Mr. NORCROSS. Yes, that's a pretty big accident. So, when we look at what's going on, if you had a standard, what most people around the country have, is how many hours you worked, the amount of pay, that would've been very helpful in terms of making sure you got the right pay. Now, was it just you on the job that got that or were there other workers?

Mr. ESPARZA. No, there were multiple workers there.

Mr. NORCROSS. Yes. And unfortunately, in the construction industry, these are some of the things that I ran into as a young apprentice trying to make my way through the industry like you, Mr. Francisco. It is tough. And all we're doing is checks and balances. Nobody wants to get beat up here. We all want to have a shot at life, but we want a fair playing field. And the fact of the matter is when they hold the hammer over some of the employees' heads like we're hearing here today, that's not a fair, that's not a level playing field.

We all should be focused on getting rid of the bad actors and making sure that everybody plays by the same rules. Contractors don't go out of business for making a little mistake. They do not get criminally charged accidentally. It's bad actors. And I want to thank you for sharing your story and I yield back the balance of my time.

Chairwoman ADAMS. Thank you. Thank you very much, Mr. Norcross. I want to recognize Ms. Steel. You're recognized for five minutes.

Ms. STEEL. Madame Chairwoman, thank you very much. Independent contractors and entrepreneurs and small businesses in my home State of California already understand the devastating effects California burdensome laws have had on their ability to provide for their families. There are more than two million independent contractors and entrepreneurs working across California. And now, more than ever, we should be supporting our workforce and providing clear guidelines to give workers more flexibility and independence to find the right job for them.

Those who chose to become an independent contractor want and enjoy the independence and flexibility and control that is provided to them. Recently, the Court blocked the Biden administration's at-

tempt to limit clarity and guidance on the classification of contractors under the Fair Labor Standard Act.

Having said that, Ms. McCutchen—if I pronounce it wrong, sorry—with your background and knowledge of your Labor Department and recent Court rulings, how is current Department actually observing the independent contractor worker classification rule and do you agree there should be more certainty for workers and employers?

Ms. MCCUTCHEN. Thank you for that question. Right now, there's actually no published regulations on independent contractor status and that's a particularly tough situation because under Federal and State law there are actually over 100 different regulations and statutes which have independent contractor standards in them. So, the Trump administration did the right thing in establishing a clear, simple rule that employers could follow.

Right now, what we have at DOL is no rules at all, so it's litigation. It's setting the standards through litigation rather than legislation and that is pretty tough, especially, for small businesses to figure out what is the law that they're supposed to be complying with.

Ms. STEEL. Thank you for the answer. I'm very supportive of local small business models and empowering minority entrepreneurs to start their own business. And let me ask you one more question. With bad definitions of independent contractor classifications and joint employer, would this hurt those who want to open their small business under the franchise model at this point?

Ms. MCCUTCHEN. Well, it makes it very difficult, right? Most businesses, in my experience, want to comply. They want to do the right thing, but they're not compliance machines. When you're opening a small business, especially, today you have enough problems just trying to open a small business, let alone having to try to figure out all these laws. And with this bill, and the 22,000 per employee per violation for unintentional violations that's ruinous for small businesses. And so, I just don't know how, even if I was a small business owner, I would be scared today in trying to open a new business because I don't know how you survive this type of bill.

Ms. STEEL. Especially, in California, it's much worse than any other states in the Nation.

So, thank you very much, Madame Chair, and I yield back.

Chairwoman ADAMS. Thank you very much. I want to recognize Representative Stevens.

Ms. STEVENS. Yes, great.

Chairwoman ADAMS. You've got five minutes, ma'am.

Ms. STEVENS. Yes. Sounds good. I'm ready to rock. I'm surprised that all of five minutes of questioning wouldn't be used by any Member of Congress the egregious topic at hand known as wage theft, preventing wage theft and requiring stolen wages, particularly, in a time of rising costs. Particularly, in a time of inflation, I think we should be helping the American worker achieve and recuperate and gain all of the wages that they are owed. I really want to salute Mr. Esparza for being here and for your testimony and for your effort.

Certainly, as a labor-aligned Member of Congress hailing from the great State of Michigan. I represent Oakland County in the Congress, working alongside many building trade unions. I do want to express that we have our own challenge in Michigan as it pertains to prevailing wage, right, and making sure that prevailing wage continues to be the utilization and the method of how contracts go, going forward. And yet, it was rolled back in Michigan, and I know our Governor, Governor Whitmer, has been working to combat that.

I know that here in the Congress I am very dedicated to this effort and I'm proud to be an original co-sponsor the Wage Theft Prevention and Wage Recovery Act, a responsible solution to deter wage theft and help workers seek justice. I'm going to be clear. If you're not on board with this, you're part of the problem. OK, I'm a daughter of small business owners. I've seen my dad go through it with his landscape company and he pays his workers for good day work. So, Ms. McCutchen says that increased penalties for violating the Fair Labor Standards Act could harm small businesses. Please remind us how many people do you employ?

Mr. SWENSON-KLATT. I employ 20. I have 20 on staff.

Ms. STEVENS. So, you consider yourself a small business?

Mr. SWENSON-KLATT. I am a small business.

Ms. STEVENS. And do you think businesses of any size that play by the rules would have anything to worry about with the increased penalties in the Wage Theft Act?

Mr. SWENSON-KLATT. I feel that I am in compliance with what is here. I am doing my best to match all of the requirements and I have no fears of what's going forward.

Mr. STEVENS. Right. And we know as a result of an ongoing pandemic, an unbelievable and catastrophic war started by Russia in Ukraine prices are rising, people are going to the grocery store, they're paying through the roof for the brisket, the roast, the this and that. So, could you please highlight, Mr. Swenson-Klatt, some of the technical assistance and resources available to small businesses that they can use to be sure that they're compliant with wage and hour laws?

Mr. SWENSON-KLATT. Now, within Minneapolis, we feel we're pretty fortunate. I have business associations. I have the city. I have the small business team. We have been able to work with our state-support community development corporations. All of them provide technical assistance and mentors. I, myself, have served as a mentor for new and emerging entrepreneurs in my own neighborhood. It's available. We put it to use online and in person.

Ms. STEVENS. And it's exciting. That's great. So, Ms. Cacace, thank you so much for being here and for your role at the New York State Office of the Attorney General.

Considering that there are no penalties for recordkeeping violations and no requirements to provide employees with paystubs, employers currently have little legal incentive to maintain accurate records. How important are paystubs and payroll records for pursuing wage theft cases?

Ms. CACACE. Thank you for the question. And yes, I think, as I said earlier, it's essential, right? It's essential for workers to know what they're getting paid to be able to deal with it immediately if

there is a problem and then it's essential for the lawyers if there needs to be a wage theft claim. So, if you are litigating a claim, that is your first piece of evidence. Is there a paystub, what does it say, and is it accurate? And if an employer is correctly paying their employees, it is their best defense. So, it essential for everyone and will make things much easier.

Ms. STEVENS. Yes. Excellent. Well, with those 10 seconds remaining, the near full utilization of my five minutes. Thank you, Madame Chair and I yield back.

Chairwoman ADAMS. And thank you very much. I want to yield now to Representative Stefanik. You are recognized, ma'am, five minutes. Is Representative Stefanik on? Is Representative Stefanik on? She is not. OK, Representative Scott are you on the platform?

Mr. SCOTT. I'm not on the platform. I'm in the Hearing Room.

Chairwoman ADAMS. OK, Representative Scott, you are recognized. I want to recognize the gentleman of the Full Committee in Labor. You are recognized, sir. You have five minutes.

Mr. SCOTT. Thank you. Thank you. Thank all the witnesses for being with us. And I want to start with Ms. Cacace.

We've heard a lot about technical errors. How do we know that wage theft is actually taking place, not as just technical errors, but intentional acts?

Ms. CACACE. Yes. Thank you for the question. I think it's by the volume and I think that somebody recently just asked about this. If it is I forgot to give a paystub 1 day, that's very different from I didn't pay wages to thousands of employees for years on end. So, in the New York State Attorney General's Office, we recently had a case that we resolved with two large agencies that provide home health aides and there are two components to the settlement. One is over $5 million, and the other is over $6 million. So, this is for thousands of workers who were routinely not paid for all of the hours that they worked.

Mr. SCOTT. We've heard a lot about errors that are made by people who don't understand the rules and that kind of thing. How often do you see these errors benefiting the employees?

Ms. CACACE. I don't think in the 20 years I have been in this field have ever seen one of those, but people come to me when they have a problem.

Mr. SCOTT. Now, you mentioned recovery and mentioned the minimum wage under FLSA. If you were promised $20 an hour and actually got paid $10 an hour, would you have recovery available to you under the FLSA because you've been paid more than the Federal minimum wage?

Ms. CACACE. No, currently, you would not.

Mr. SCOTT. You would not have a claim at all under the FLSA.

Ms. CACACE. That's correct.

Mr. SCOTT. You would have a claim under contract, I'd imagine.

Ms. CACACE. You could have a breach of contract under State law, but as I said earlier, that does not come with attorneys' fees and it does not come with any liquidated damages, so it may be very difficult for you to find a lawyer to take that case.

Mr. SCOTT. And if it goes to arbitration, who pays the arbitration fees?

Ms. CACACE. It is usually split between the employee and the employer.

Mr. SCOTT. So, the employee would have to pay part of the arbitration fees.

Ms. CACACE. Yes.

Mr. SCOTT. And if the claim is not a huge claim, you just ripped of a couple hundred dollars.

Ms. CACACE. It's generally not worth it.

Mr. SCOTT. It's just not worth it. Now, are you familiar with the pending legislation?

Ms. CACACE. Yes.

Mr. SCOTT. We've heard comments that the penalties are 20 some thousand dollars up and then $100,000. Is that not to exceed those numbers?

Ms. CACACE. Yes, of course. And the Department of Labor would have discretion if it was a small mistake not to award those high-level penalties.

Mr. SCOTT. And could they take into consideration the size of the business?

Ms. CACACE. Yes.

Mr. SCOTT. And how egregious the situation was?

Ms. CACACE. Yes.

Mr. SCOTT. Thank you. Ms. McCutchen, you indicated that all states have paystub requirements; is that right?

Ms. MCCUTCHEN. (Inaudible.)

Mr. SCOTT. Well, we can agree at least most states.

Ms. MCCUTCHEN. Yes.

Mr. SCOTT. And if you're operating in a lot of different states, you'd have a lot of different compliance. Would it make sense to have one Federal law on paystubs to preempt all of those different laws?

Ms. MCCUTCHEN. I think there's different viewpoints of that. I, myself, have sort of dreamed about writing a uniform code of employment law, but I think to do that would take a lot of study, right, because you shouldn't automatically adopt what California and New York are doing, which are very burdensome and haven't had a great affect in those states. So, you would want to study every single law and figure out what's the middle ground.

Mr. SCOTT. Well, you would only have to learn one system. You wouldn't have to learn each and every one if you have in a number of different states.

Ms. MCCUTCHEN. Right. Correct.

Mr. SCOTT. You also talked about tolling the statute of limitations during the investigation.

Ms. MCCUTCHEN. Yes.

Mr. SCOTT. And you think that the statute of limitations should not be tolled.

Ms. MCCUTCHEN. That is because I am afraid that if you toll the statute of limitations there would be no incentive for the Wage and Hour Division to complete their investigations more quickly and it is speed that low-wage workers need. They need to get their pay.

Mr. SCOTT. Of course, on the other side, the statute of limitations may expire while the investigation is going on and the person waiting for action just lost his case.

Ms. MCCUTCHEN. Every day, right, is a new back wages, so it very rarely happens that you lose all claims. You still will have two or 3 years of back wages to collect. And I think this Committee, in particular, can conduct great oversight of the Wage and Hour Division to make sure they don't do that. They shouldn't do that.

Mr. SCOTT. Thank you, Madame Chair. I yield back.

Chairwoman ADAMS. Thank you. Thank you, Chairman Scott, and appreciate you being here. And I want to just thank all of the witnesses. I don't think there are any other Members present, at least that's the information I have. So, let me thank all of the witnesses for their participation today.

Members of the Subcommittee may have some additional questions for you, and we ask the witnesses to please respond to those questions in writing. The hearing record will be held open for 14 days in order to receive those responses. I do want to remind my colleagues that pursuant to Committee practice, witness questions for the hearing record must be submitted to the Majority Committee staff or Committee Clerk within 7 days. The questions submitted must address the subject matter of the hearing.

I want to recognize the distinguished Ranking Member now for a closing statement.

Mr. KELLER. Thank you. As we've heard throughout today's hearing, Republicans and Democrats share a common goal in ensuring that workers are paid in full for their work as required under the Fair Labor Standards Act.

Unfortunately, Democrats are advancing a partisan proposal which will fail to meet that goal. Instead, the DeLauro bill will add to the challenges job creators and American workers are already facing in our struggling economy. The bill's gotcha still treatment of unintentional or technical violations of the FLSA, combined with its disproportionate penalties will have a chilling impact on employers.

In addition, the DeLauro bill drastically expands the authority of the Department of Labor's Wage and Hour Division, requiring the agency to enforce all pay-related contracts and collective bargaining agreements, interfering with its core mission of enforcing Federal wage and hour requirements.

Workers and employers both benefit from clear and concise rules, but this bill is a step in the wrong direction. A supply chain crisis, raising inflation are already wreaking havoc on our economy. This legislation, if signed into law, could be the nail in the coffin for many struggling job creators.

The DeLauro bill is counterproductive and will harm America's job creators and workers. These economic engines deserve better, and I urge my colleagues across the aisle to promote bipartisan solutions that ensure collaboration among the Department of Labor, employers, and workers.

I'd like to thank our witnesses again for participating in today's hearing and I yield back.

Chairwoman ADAMS. Thank you, Ranking Member Keller. I want to thank our witnesses for being here today. Today our witnesses underscored the pervasive and the severe consequences that wage theft has on our workforce. Everyday workers across the Nation keep our communities running and the economy growing. Unfortu-

nately, unscrupulous employers stiff their workers out of the wages they have earned.

Again, if we want to raise people out of poverty, if we want to ensure that Americans have the opportunity to enter the middle class, and if we believe that workers deserve a decent wage for an honest day's work, then we must enact a meaningful deterrent to wage theft and help workers seek justice. To do so, Congress must pass the Wage Theft Prevention and Wage Recovery Act, and finally ensure that wage theft is no longer profitable for dishonest employers.

So, thank you again to our witnesses for your time and your testimony. If there's no further business, without objection, the Subcommittee stand adjourned.

[Additional submissions by Ranking Member Keller follow:]

NFIB

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May 17, 2022

The Honorable Bobby Scott
Committee on Education and Labor
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Virginia Foxx
Committee on Education and Labor
U.S. House of Representatives
2101 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Scott and Ranking Member Foxx:

I write in opposition to H.R. 7701, the *Wage Theft Prevention and Recovery Act*. This legislation significantly increases penalties on small businesses who have isolated errors when trying to comply with complicated federal employment law, increases paperwork and compliance burdens for small businesses, and deputizes private organizations – including those that may not be impartial – to help enforce the law.

H.R. 7701 would exponentially increase fines for overtime and minimum wage violations. Under current law, employers found guilty of these violations are required to pay back wages to employees to make them whole and fined up to $2,203 in civil penalties per violation for repeat or willful violations, as well as up to $10,000 in criminal penalties. H.R. 7701 would subject employers to *two times* back wage payments, a first-time violation civil penalty of up to $22,030 per employee, up to $110,150 in civil penalties per employee for repeat or willful violations, and $10,000 in criminal penalties *per employee*.

These massive fines are the same regardless of the size of the business. Minimum wage and overtime violations currently operate under a strict liability standard, meaning the law does not account for employers who have an honest misinterpretation of the law or make an isolated mistake. For example, consider a small business that employs four people who work 42 hours a week at a wage rate of $20 an hour. That employer, who does the payroll by hand, forgets to pay overtime one week. Under current law, the employer must pay back wages, which would total $80, and up to $10,000 in criminal penalties for a maximum liability of $10,080. If H.R. 7701 were enacted, the employer would owe $160 in back wages, a $22,030 fine per employee, and $10,000 criminal penalty per employee totaling $128,280. These penalty amounts will undoubtedly put some small employers out of business.

H.R. 7701 would also require all employers to issue pay stubs to employees. While employers in most states are required to do so, there are still nine states that do not require pay stubs (Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, Ohio, South Dakota, and Tennessee). About half of small employers process their payroll in-house and half of the owners handling payroll personally (rather than delegating to another employee),[1] asking them to process detailed pay stubs may be costly and time-consuming to owners that don't already provide pay stubs to employees.

Further, H.R. 7701 would establish a "Wage Theft Prevention and Wage Recovery Grant Program" to partner with private organizations for, among other actions:

> *"Assisting enforcement agencies in conducting investigations, including in the collection of evidence and recovering back pay; monitoring compliance with wage and hour laws; performing joint visitations to worksites that violate wage and hour laws with officials from the Wage and Hour Division of the Department of Labor… evaluating the effectiveness of programs designed to prevent wage and hour violations and enforce wage and hour laws; and recruiting and hiring of staff and volunteers."*[2]

The deputizing of private organizations to perform functions traditionally performed by the Department of Labor establishes a problematic precedent. These types of enforcement activities should only be performed by agencies that have a requirement of impartiality in enforcing the law, not by groups that may have a motive or interest in a particular outcome.

H.R. 7701, the *Wage Theft Prevention and Recovery Act* may be well-intentioned but can have real and lasting negative effects on the small business community. NFIB opposes H.R. 7701 and urges the committee to reject its consideration.

Sincerely,

Kevin Kuhlman

Kevin Kuhlman
Vice President, Federal Government Relations
NFIB

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[1] NFIB Research Center, *NFIB National Small Business Poll: Tax Complexity and the IRS*, Volume 13, Issue 5, 2017, http://www.411sbfacts.com/sbpoll.php?POLLID=0086.
[2] Sec. 302(c)(1)(E)-(G), (I)-(J), Title III—WAGE THEFT PREVENTION AND WAGE RECOVERY GRANT PROGRAM, https://docs.house.gov/meetings/ED/ED00/20220518/114805/BILLS-1177701ih.pdf.

U.S. Chamber of Commerce

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May 18, 2022

The Honorable Bobby Scott
Chairman
Committee on Education and Labor
U.S. House of Representatives
Washington, DC 20515

The Honorable Virginia Foxx
Ranking Member
Committee on Education and Labor
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Scott and Ranking Member Foxx:

The U.S. Chamber of Commerce opposes H.R. 7701, the "Wage Theft Prevention and Wage Recovery Act," which would hinder employees from receiving their due compensation and inhibit the use of arbitration procedures that have been shown to be highly efficient and cost effective.

While sounding benign and well meaning, the provisions on requiring pay disclosures and paystubs are redundant with rights covered under state law. Adding federal requirements would add complexity and confusion without actually improving worker protections.

Similarly, increasing the financial consequences for violations makes a great headline, but the actual impact on low-wage workers will not be to their advantage. Employers faced with such massive damages and penalties will most likely choose to challenge the citations and allegations and pursue a litigation approach. Payment of back wages would be delayed by years. The plaintiff's bar will collect more fees, but low-wage workers may see scant returns or nothing at all. The proposed increases also are inflexible with no room for discretion based on the size of business or the type of violation.

The ultimate goal of this bill is to promote expensive class action litigation that does little to help businesses and employees by precluding the enforcement of predispute arbitration clauses. Such litigation serves principally to benefit the attorneys who file class action lawsuits. Arbitration is a fair, effective, and less expensive means of resolving disputes compared to going to court. Empirical studies demonstrate that employees in arbitration do just as well, or in many circumstances, considerably better, than in court. For example, recent studies have found that employees in arbitration prevail three times more often, win more money, and resolve their claims must faster than in litigation.[1] Studies have also shown that class action settlements frequently provide only a pittance – or many

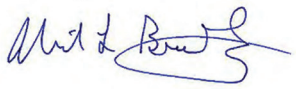
[1] *See* Fairer, Faster, Better III: An Empirical Assessment of Consumer and Employment Arbitration (March 2022) available at https://instituteforlegalreform.com/research/update-an-empirical-assessment-of-consumer-employment-cases-in-arbitration-litigation/.

times, nothing at all – to class members while millions of dollars are paid to their attorneys.[2]

Finally, the bill's Grant Program would deputize advocates to help conduct investigations. This would eradicate the long tradition of employers voluntarily cooperating with agency investigations, producing documents, and welcoming investigators into their worksites. If the Department of Labor brings along unions and advocates, employers would likely stop cooperating and insist on search warrants and document subpoenas, in accordance with the Fourth Amendment. Again, more complexity, longer investigations, and more litigation will harm low-wage workers by delaying payment of wages.

The Chamber urges the Committee not to approve the Wage Theft Prevention and Wage Recovery Act.

Sincerely,



Neil L. Bradley
Executive Vice President, Chief Policy Officer,
and Head of Strategic Advocacy
U.S. Chamber of Commerce

cc: Members of the House Committee on Education and Labor

[2] *See* Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions (Dec. 11, 2013) available at https://www.mayerbrown.com/files/uploads/documents/pdfs/2013/december/doclassactionsbenefitclassmembers.pdf.

Associated Builders and Contractors

May 18, 2022

The Honorable Robert Scott
Chairman
House Committee on Education and Labor
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Virginia Foxx
Ranking Member
House Committee on Education and Labor
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Scott and Ranking Member Foxx:

On behalf of Associated Builders and Contractors, a national construction industry trade association with 69 chapters representing more than 21,000 members, I write to express opposition to H.R. 7701, the Wage Theft Prevention and Wage Recovery Act.

ABC knows the importance of employer compliance with the Fair Labor Standards Act and the critical protections the FLSA provides America's workers. Unfortunately, H.R. 7701 seeks to enforce this compliance by imposing potentially devastating penalties that would result in lengthy, costly litigation and could bankrupt many smaller businesses for potentially inadvertent overtime and minimum wage violations.

We are already seeing the federal government propose and impose a crippling regulatory agenda on our nation's small businesses and calls for tax increases that would devastate many smaller and family-owned businesses throughout the country. Bills like H.R. 7701 would further target employers and feed into the pervasive uncertainty that has affected many ABC members and their businesses at a time when we are experiencing inflation at a 40-year high, increasing material prices, and persistent workforce shortages.

Congress and the federal government should facilitate more cooperative rather than punitive measures to ensure further compliance with the FLSA and provide workers with the pay they have earned and deserve. Regrettably, last year, the Biden administration abruptly terminated the U.S. Department of Labor's Wage and Hour Division Payroll Audit Independent Determination Program, a nationwide program that allowed employers to voluntary correct inadvertent errors that may have resulted in FLSA violations to ensure full compliance with the law and provide backpay to employees. This program sought to resolve these violations expeditiously and without extensive litigation and the delays it can often cause.

ABC appreciates the opportunity to comment on H.R. 7701 and hopes that Congress will take this opportunity to pursue a more bipartisan effort that will best serve all of America's workers.

Sincerely,

Kristen Swearingen
Vice President of Legislative & Political Affairs

440 First St., N.W., Suite 200 | Washington, DC 20001 | (202) 595-1505 | abc.org


11TH ANNUAL STATE OF INDEPENDENCE
The Great Realization
MBO partners | Research Report | December 2021

Report Contents

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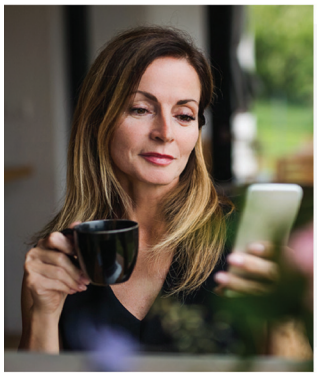
SETTING THE SCENE

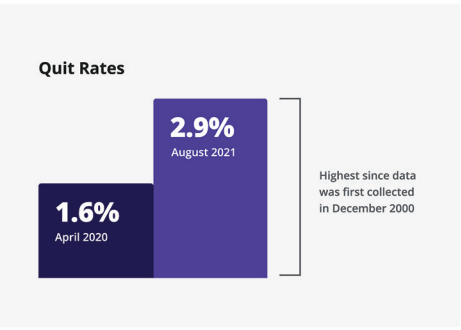
01

Millions of people are re-examining their career paths and goals, their relationship to work, and their priorities.

The Great Realization

The COVID-19 health crisis, and the attendant shocks it inspired, spurred immense churn in the American workforce. In 2020 and 2021, many baby boomers retired ahead of schedule; sadly, several hundred thousand people of working age died. Large numbers of workers who were furloughed, or sent home, or forced to work remotely during the pandemic began to rethink what work means to them, how it should define (or not define) their lives, and where it should be done. Across the board, people are seeking better work-life balance, shorter commutes, greater flexibility, and the ability to pursue their passions. This has translated into what analysts have dubbed The Great Resignation.





According to the Bureau of Labor Statistics, the Quits Rate, the percentage of people who leave their jobs voluntarily each month, rose from 1.6 in April 2020 to 6.4 in August 2021. That's the highest reading in the 21-year history of this metric. People aren't simply quitting to cross the street for a new payroll job at a different company. The number of open jobs has, in fact, trended sharply upward throughout 2021, to a record 10.9 million at the end of July. Many of those quitting are clearly turning to independent work, whether they are spending a few hours a day consulting, creating videos on YouTube full-time, or building a business with the skills they acquired at their jobs—but this time on their own terms.

What Does it Mean?

Millions of people are re-examining their career paths and goals, their relationships to work and their priorities.

In this period of change and renewal, we've shifted from The Great Resignation to The Great Realization. People are realizing the possibilities of change and they're seizing control of their destiny while embracing a newfound ability to set the terms of their employment.

This is the occasionally confounding, often inspiring backdrop of MBO's 2021 State of Independence Report. In this, our 11th year, we note continuing changes from powerful existing structural and cyclical forces playing out against the backdrop of the largest and fastest scope of global evolution known. We see the intersect of technology, international trade, rising independence, skyrocketing demand for skills and the relentless search for efficiencies. And, we layer it with an analysis of new trends.

Demographic changes have shifted the makeup of the independent workforce and the rise of the Creator Economy has spurred a new class of independent workers. And, of course, there are the continuing public health concerns from the pandemic. These shocks to the U.S. economy in the past 18 months have had a profound impact on how we live, work and the way in which we view work. They've proven to be a significant boon to America's independent workforce, which is growing in size, complexity and confidence.

A NEW WAVE

02

More women and professionals near the start of their careers are joining the ranks of independent workers.

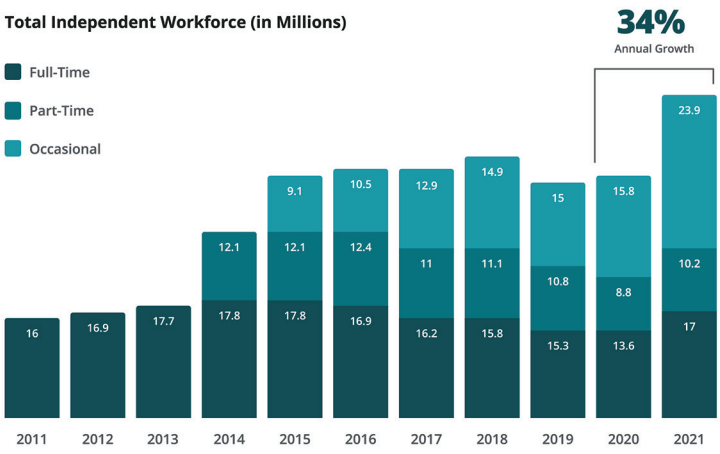
Independent Surge

After falling by 7% in 2020, largely due to the pandemic, the overall number of independent workers grew sharply in 2021: up 34%, to 51.1 million from 38.2 million in 2020.

Growth was evident across the board. Full-time independents, those who work more than 15 hours per week, rose 3.4 million, or 25%, from 13.6 million to 17 million. That figure is the highest number of Full-Time Independents reported in our survey since 2015, when a tightening job market began to pull people back to payroll jobs.

The larger group of part-time independents, who regularly work fewer than 15 hours per week, rose 39%, or 9.1 million, from 24.6 million to 34.1 million. The fastest growing segment of Part-Time Independent are Occasional Independents—people who work regularly, but part-time and without set hours. Their numbers rose sharply, from 15.8 million in 2020 to 23.9 million in 2021, up 51%.

Total Independent Workforce (in Millions)



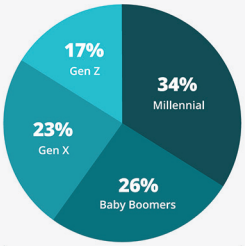
A Demographic Reshuffle

Each year, more baby boomers age out of the workforce. Millennials, those born between 1981 and 1996, are growing in strength and numbers while more from Generation Z, born between 1997 and 2012, find their way into the working world. For the first time, millennials (34%) and Gen Z (17%) outnumber the combined ranks of baby boomers (26%) and Generation X (23%) in the independent workforce.

Some 68% of new arrivals to independent work are millennials or Gen Z. The recession of 2020 hit younger workers particularly hard, pushing many to join the independent workforce either for supplemental income or as their primary income source. Many younger workers have also decided they don't want their lives defined by work. Instead, they seek autonomy, freedom and control. And, they look for work that fits their values and passions.

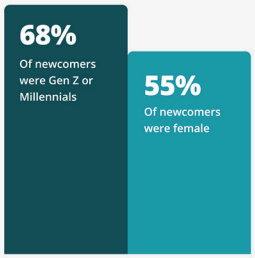
On average, newly independent workers in 2021 were also more likely to be female. Some 55% identified as female, up from 46% in 2020. In what analysts dubbed the "She-cession," women were more likely to leave the workforce than men during the shutdowns. As childcare and education went remote, women bore the brunt of caregiving and needed more flexibility than traditional jobs could provide. This led women to seek independent work to earn income in a way that better fit their demanding schedules. As a result, the share of women independents returned to pre-pandemic levels of 48% in 2021 after falling to 42% in 2020.

Demographic at a Glance



Millenials and Gen Z outnumber Baby Boomers and Gen X

New Faces



The New Creator Economy

This year, we began to track and measure the rising group of independent workers who can monetize their knowledge, skills, and creative abilities in the Creator Economy. While TikTok star Charli D'Amelio, YouTube celebrity Mr. Beast, and others whose social media followings rank in the millions get publicity, the reality is that the vast entertainment, marketing, and advertising complex is evolving to tap into this new class of independent influencers and creators. Of the 7.1 million independents who say they earn money in the Creator Economy, 37% say they are full-time independent creators and 63% say they are part-time creators.

As in many creative endeavours—music, writing, acting, art—a few do remarkably well while the vast majority engage in the activity because it is fun, or a hobby, or a passion. The top five sites for those earning money in the Creator Economy are: YouTube, Facebook, Instagram, TikTok, and Twitch.

Part-time vs Full-time Creators

63%
Part-time

37%
Full-time

HOW THEY FEEL

03

Independent workers are more confident and happier in their choice of career path.

Independent By Choice

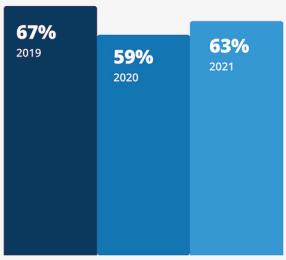
At a time when traditional payroll jobs are plentiful, independent workers are, in effect, constantly weighing whether to stay on the path they have chosen.

The growth in numbers, especially among full-time independents, shows a higher level of confidence. There's growing evidence that the core of the independent workforce is doing so by choice, is increasingly confident, and is committed to pursuing their work.

In 2021, 63% of independent workers said that working independently was their choice completely, up from 59% in 2020, and close to the 67% who reported in the affirmative in 2019. Satisfaction remained strong.

Overall, 77% said they were very satisfied with independent work, up marginally from 76% in 2020, and the highest reading in the 11 years of the survey.

Percentage Choosing Independent Work



The Happier Path

Full-time independent workers are, in general, happier and healthier in their career paths than they were in more traditional roles.

Nearly nine out of ten (87%) of full-time independents said they're happier working on their own. And, 78% said working on their own is better for their health, up from 71% in 2020. Sixty-eight percent also said they feel more secure working independently than at traditional jobs, and 58% said they earn more money. Finally, 76% of full-time independents said they're optimistic about the future of their career, up from the pre-pandemic reading of 65% in 2019.

That's not to say independence doesn't come with challenges. Most cited was not enough predictable income (44%, up from 39% in 2020). But over the years, the proportion of independents expressing concerns about benefits and a lack of job security have fallen sharply. There's also been a drop in the number of those saying they're worried about the next job or their project pipeline, with only 31% saying so in 2021, down from 41% in 2020.

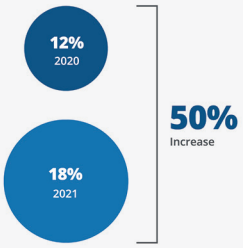
In 2021, 56% of independents said they wanted to remain solopreneurs while 18% said they plan to build a larger business, indicating a full 74% who intend to remain independent. Only 11% said they'd seek a permanent full-time job, down from 15% in 2020.

Sentiment at a Glance

87%
Are happier working on their own

78%
Are healthier working on their own

Percentage Planning to Build a Larger Business



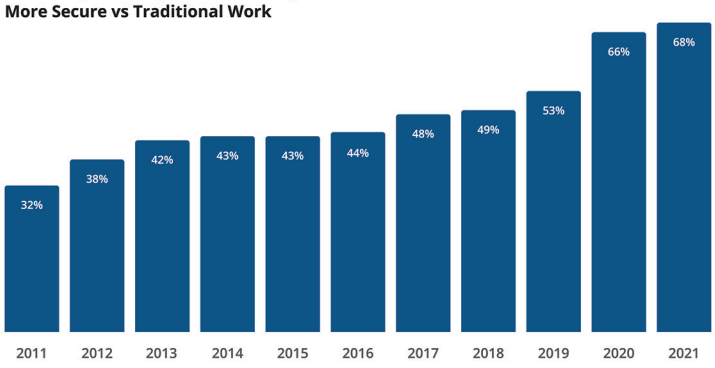
A Rising Confidence

The pandemic has reinforced the growing view that traditional jobs are riskier and less secure than they once were. The elimination of 20 million payroll jobs in the space of a few weeks in March 2020 made many people realize the precariousness of what they had previously thought to be secure positions. At the same time, as more people work as independents for longer periods of time, they—and their friends and colleagues—start to view it as less risky. In 2021, about two-thirds (68%) of full-time independent workers say that working independently is more secure than having a traditional job.

In one of the most notable trends in our study, this measure has risen for 10 straight years, from only 32% in 2011. Since 2018, we have also asked traditional workers whether they feel that working independently is more secure than working a payroll job. In 2021, 29% of traditional workers agreed with this statement, up from 18% in 2020.

As independents continue their path and become more visible, the choice is being seen as less alternative and more mainstream. Over the years, the proportion of full-time independents who say more of my friends are working independently has risen steadily and stood above 40% in 2021. The number of full-time traditional workers reporting the same has risen as well, with 38% saying so in 2021.

Percentage of Independents Feeling More Secure vs Traditional Work



NEW WAYS OF WORK

04

Workers are finding more money, opportunities and flexibility going independent.

Unprecedented Opportunity

One of the reasons people see greater possibilities in independent work is that businesses are becoming more comfortable working with independents. For the last several years, we have been tracking the ranks of what we call independent service professionals. These are full-time and part-time Independents who provide services to businesses (as opposed to consumers). Their number rose 9.4% in 2021, to 8.1 million.

Many of these professionals were at the right place at the right time. In an era of sharply rising demand (as the economy emerged from shutdown) and sharply lower payrolls, skilled employees in the right fields, like health care and technology, found themselves in great demand. Others discovered that, in some instances, they could quit their jobs and earn higher incomes working independently.

The number of independents reporting annual earnings of $100,000 or more soared in 2021, from 3 million to 3.8 million, an increase of nearly 30%. That's the highest number of high-earning independents in the 11 years of the survey, and nearly twice the number in 2011.

Percentage of Independents Earning Over $100K

3M
2020

3.8M
2021

30%
Increase

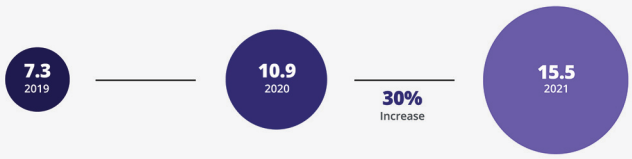
Work From Anywhere

Part of the reframing is where work happens. Even before the pandemic, a lot of attention was paid to digital nomads, people who can theoretically work from everywhere, equipped with their laptops and internet connections.

In 2020 and 2021, in the U.S., many people left large cities to seek safety in rural areas, or moved to be closer to family, or decided to combine travel and work and become digital nomads.

The number of American digital nomads rose 42% in 2021, from 10.9 million in 2020 to 15.5 million. While most of them were traditional workers, there were 5.3 million independent nomad workers in 2021, up 15% from 4.6 million in 2020.

Number of Digital Nomads (in millions)

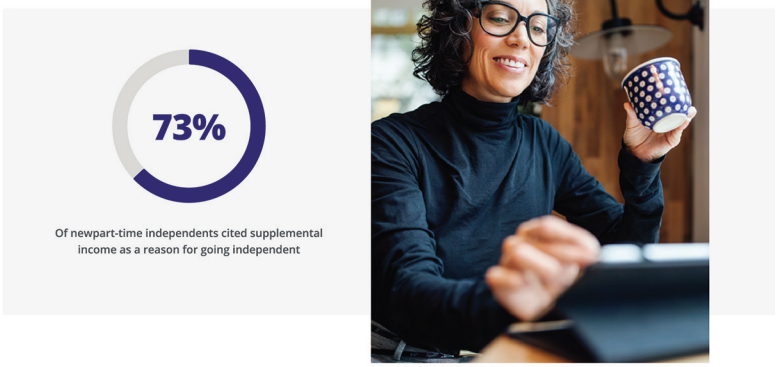


Increasingly, the customers of independents can be found all over. In a global economy, online platforms, technology, and growing sophistication have led more independents to find new markets and connections outside the U.S. borders. In 2021, a record 29% said they provided goods and services to customers outside the U.S., up marginally from 28% in 2020, but more than double the 13% in 2016.

Independent Side Hustle

The U.S. has long been seen as a two-tier economy, with those at the very top thriving while many at the bottom struggle. This effect is replicated in the independent workforce. As noted, those with in-demand credentials and skills are finding they can charge a premium for their work. But the loss of payroll jobs, combined with the rising cost of living, is pushing more people to supplement their income via independent work. This is particularly evident among the part-time and occasional independents, the fastest growing portions of the independent workforce.

Of those who started working as part-time independents in the past year, 73%, cited supplementing their income as a reason for going independent.



Of newpart-time independents cited supplemental income as a reason for going independent

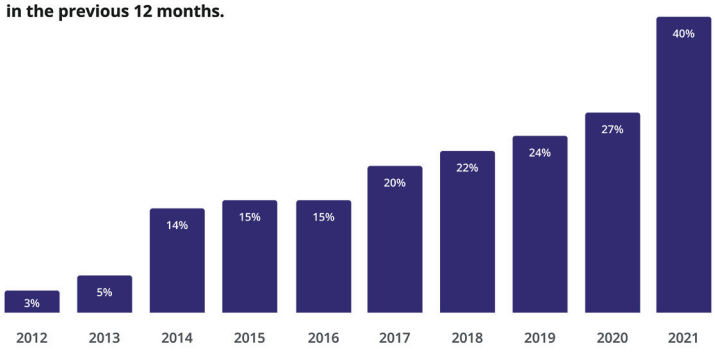
Referring Work

Online platforms and marketplaces have acted as powerful facilitators, making it easier, cheaper and more convenient for independent workers to start businesses and find customers.

And as time goes on, more companies and individuals are comfortable using them to acquire talent and get work done. These platforms can also provide sturdy on-ramps for newly independent workers to get started and find customers. These are among the growing and expanding ecosystem of products, services and programs that cater to independents. The services provided by MBO Partners is one such example, with other examples including low-cost, internet-based tools and services for everything from billing and project management to sales and marketing.

The trajectory of these platforms has been one of the most powerful growth stories in this survey. In 2011, only 3% of independents reported using an online talent platform in the previous 12 months. As recently as 2017, only 20% did. But in 2021, an impressive 40% said they had done so in the past year. And an even higher number—43%—said they planned to do so in the coming 12 months.

Percentage that used an online talent platform in the previous 12 months.



Referring Work

Online talent marketplaces are increasingly becoming just another sales channel for many independent workers—and perhaps one of the more common ones. Based on interviews and other research we have conducted, the main uses of online marketplaces are to fill in gaps in schedules, to find new clients (especially for those who are new or starting up), to learn new skills, and to explore new markets.

Online marketplaces aren't the only digital platforms providing a spur to independents. This year, among the newly independent, 72% said social media is an important tool for building a professional reputation, and 36% listed social media as one of the top three methods through which they acquire work.

Among all independents, word of mouth continues to be the top method for finding assignments and customers, with 51% listing as their top method. It's followed by social media (34%) and other independents (25%).

Importance of Social Media

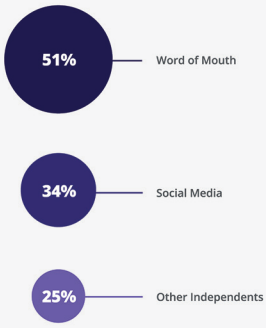
72%

Said social media is an important tool for building a professional reputation

36%

Said social media is one of the top three methods in which they acquire work

Top Methods for Finding Assignments



Teaming Up

As independent work grows in popularity and complexity, independents are interacting with colleagues and clients in new ways—by forming teams. In the past 12 months, 25% of full-time independents said they had teamed up with independent workers or microbusinesses in their work, up from 19% in 2020. Among full-time traditional workers, 20% said they had, up sharply from 12% in 2020. Over the next 12 months, higher proportions of full-time independents (30%) and traditional workers (26%) said they plan to team up with independent workers of microbusinesses.

Percentage that Teamed Up with Independent Workers or Microbusinesses

19%
2020

25%
2021

Percentage Expecting Teaming up to Increase a Lot

21%
2020

43%
2021

The Way Forward

Over the past 18 months, the independent workforce has shown remarkable resiliency—bouncing back from trauma, carving out new ways to work, expanding their customer base, and finding strength and confidence in numbers. All the data points to a strengthening in the web of connections, relationships, and infrastructure that combine to provide solid support for independents.

If we have learned anything from 2020 and 2021, it is that it is very challenging and difficult to make projections about the future—especially about events that are beyond one's control. But increasingly, independent workers are finding that they are in control of their destiny. And whatever disruptions we may face in the future, the structural trends supporting independent work remain intact. To be sure, there is likely to be some ebb and flow, as reluctant independents return to traditional jobs and companies seek to fill the large number of empty positions. But all signs point to continued growth in the strong core of independents. Most independents say they plan to continue their path, and this year 17% of traditional workers said they will definitely or probably become independent over the next two to three years. As we look ahead to 2022, independent work is an increasingly prevalent reality—and an aspiration.

17%

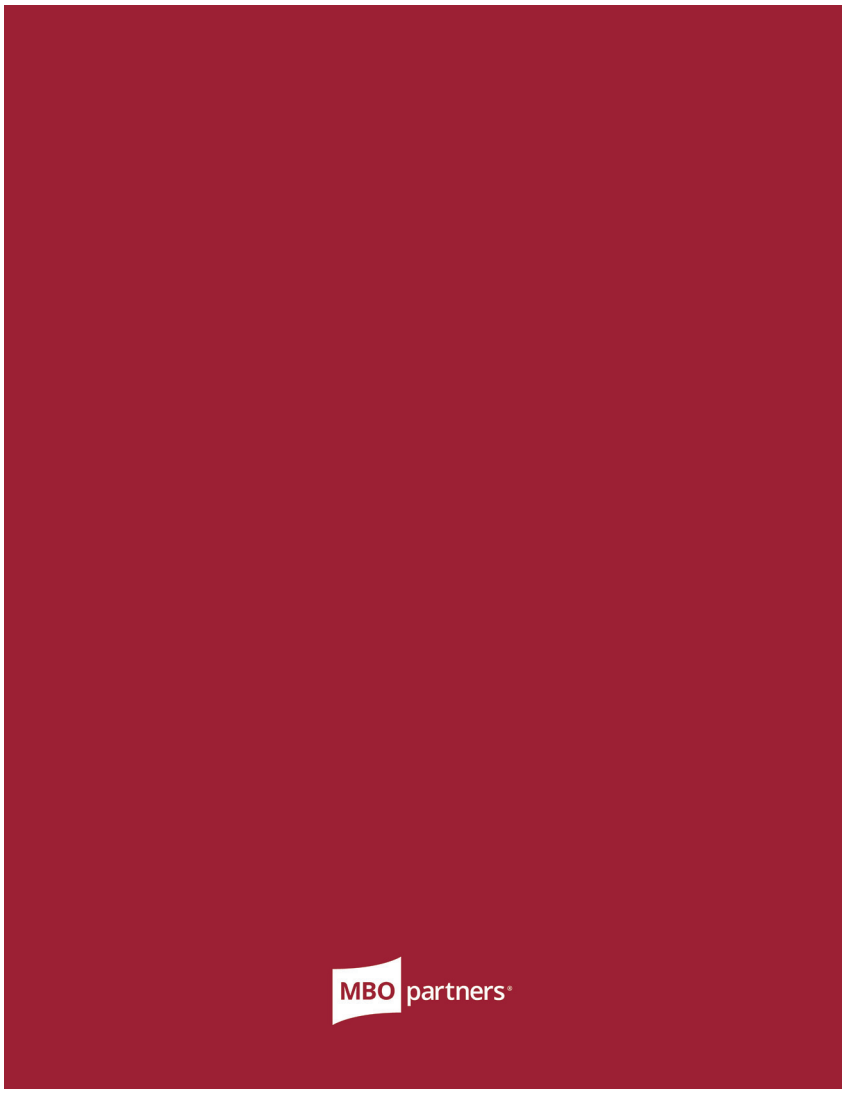
Percent of traditional workers say they will definitley or probably go independent in the next two to three years

Methodology

The findings in this research brief come from the 2021 MBO Partners State of Independence in America study survey, which was fielded in July of 2021. This is the 11th consecutive year this study has been conducted. For the 2021 study, Emergent Research and Rockbridge surveyed 6,240 residents of the U.S. (aged 18 and older), including 928 independent workers. The results were used to size the independent workforce and profile work motivations and attitudes among independent and traditional workers. The survey results were weighted to reflect the demographics of the U.S.

About MBO Partners®

MBO Partners is a deep job platform that connects and enables independent professionals and microbusiness owners to do business safely and effectively with enterprise organizations. Its unmatched experience and industry leadership enable it to operate on the forefront of the independent economy and consistently advance the next way of working. For more information, visit mbopartners.com.


MBO partners

National Retail Federation

May 16, 2022

The Honorable Robert Scott
Chairman
House Education & Labor Committee
U.S. House of Representatives
Washington, DC 20515

The Honorable Virginia Foxx
Ranking Member
House Education & Labor Committee
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Scott and Ranking Member Foxx:

I write to express the National Retail Federation's (NRF) views concerning the recently introduced "Wage Theft Prevention and Wage Recovery Act," which was among the topics raised at a recent Committee hearing, "Standing Up for Workers: Preventing Wage Theft and Recovering Stolen Wages." NRF respectfully requests that this letter be included in the official record of the hearing.

NRF is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants and internet retailers from the United States and more than 45 countries. Retail is the nation's largest private-sector employer, supporting one in four U.S. jobs — 52 million working Americans. Contributing $3.9 trillion to annual GDP, retail is a daily barometer for the nation's economy.

NRF opposes the Wage Theft Prevention and Wage Recovery Act. This legislation would, among other things, bar the use of arbitration agreements and class action waivers for claims under the Fair Labor Standards Act (FLSA), subject employers to burdensome and costly new disclosure requirements, establish a grant program whereby "community partners" and other "eligible entities" would assist the Department in educating workers on their rights under the FLSA, and increase civil and monetary penalties upon employers.

NRF has long supported the right of employers to enter into pre-dispute arbitration agreements with their employees. Such clauses in contracts are legal, common, cost-effective and mutually beneficial for both parties. The use of arbitration to resolve claims has been repeatedly upheld by the Supreme Court and allows for swift resolution of employment disputes. Congress should not bar the practice to satisfy the greed of plaintiffs' attorneys.

The legislation also adopts the most problematic aspects of state laws currently in effect in California, including the imposition of massive penalties upon employers for minor or technical violations of paystub disclosure requirements, even if employees received all due wages and compensation.

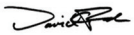
The Labor Department already has significant resources to disseminate wage and hour compliance information and training to employees and employers alike. Existing regulations and programs are sufficient to address the need for workers to understand their rights under the FLSA and related laws.

NATIONAL RETAIL FEDERATION
1101 New York Avenue, NW, Suite 1200
Washington, DC 20005
www.nrf.com

Wage and hour regulations, at both the federal and state level, are already needlessly complicated and burdensome for even the best-intentioned employers. The legislation does nothing to ease compliance with these regulations and merely would subject American employers to increased claims from plaintiffs' attorneys.

NRF stands ready and willing to work with the Committee on ways to enhance compliance with wage and hour laws but urges Members to reject this legislation.

Sincerely,



David French
Senior Vice President
Government Relations

RETAIL INDUSTRY LEADERS ASSOCIATION

99 M Street, SE
Suite 700
Washington, DC 20003

www.rila.org

May 24, 2022

The Honorable Bobby Scott
Chairman
U.S. House Education & Labor Committee
Washington, D.C. 20515

Dear Chairman Scott:

The Retail Industry Leaders Association (RILA) and our members believe employees should be compensated equitably and fairly. Year after year, leading retailers often top the ranks of best employers in the country because RILA and its members are committed to compensation packages that invest in the 21st Century Retail Workforce that is diverse, innovative, and skilled.

We write today in opposition to the H.R. 7701, the Wage Theft Prevention and Wage Recovery Act. This legislation will ultimately divert resources away from employee benefits and wages because it ensures unnecessary compliance complexities and creates more litigation, regulation, and penalties against businesses. This is regrettable given the historically high wage growth for retail workers over the last few years[1] where leading retailers are raising hourly wages at a rapid pace and setting the standard for the services industries.[2] This is in response to an incredibly tight labor market where demand for talent is at an all-time high and leading retailers are working proactively and creatively to attract and retain workers.[3] Unfortunately, proposals like H.R. 7701 will hinder these positive developments.

Leading retailers agree that workers should receive their pay, but H.R. 7701 is a heavy handed and potentially damaging way to address this issue. The following are some particularly concerning provisions of the legislation:

- Increasing civil penalties up to $110,150 in fines per violation per employee if the Department of Labor (DOL) determines a person has "repeatedly or willfully" violated wage policy. These punitive fines will chill business investment, causing businesses to hire fewer workers as well as reduce overtime and flexible work policies that are demanded by workers.
- Providing federal grants, and powers, to chosen entities to investigate businesses and industries on behalf of DOL. These grants privatize government oversight to certain favored entities like organized labor unions that may be more concerned with increasing rolls and dues than ensuring fair and collaborative workplaces.

[1] https://www.rila.org/blog/2022/01/untold-story-of-growing-retail-wages-rewards
[2] https://footwearnews.com/feature/highest-paid-retail-jobs-1203092587/
[3] https://workforce-resources.manpowergroup.com/white-papers/attract-and-hire-people-for-who-they-are

- The bill includes new disclosure and recordkeeping requirements for businesses regarding pay, status, rates, and other documentation which may conflict with existing state requirements.
- Banning the use of voluntary arbitration in all instances under FLSA, is a violation of contract freedom.

The challenges over the last few years ranging from COVID-19, supply chain disruptions and rapidly changing consumer have created uncertainty in the market. However, leading retailers and their workforces have been at the front lines developing leading safety protocols and evolving operational practices to meet the demands of the moment. Investing in our workforce is the only way to remain successful and that is why wages and benefits continue to grow in the retail industry. Ensuring fair and equitable pay practices supports this mission and improves outcomes for workers and employers. For these reasons, we urge the U.S. House of Representatives to oppose H.R. 7701 and prioritize policies that support the retail industry in its mission to building a 21st Century Retail workforce that is diverse, innovative, and skilled.

Sincerely,

Evan Armstrong
Vice President, Workforce Policy
Retail Industry Leaders Association (RILA)

May 17, 2022

The Honorable Bobby Scott
Chairman
House Committee on Education and Labor
2176 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Virginia Foxx
Ranking Member
House Committee on Education and Labor
2101 Rayburn House Office Building
Washington, D.C. 20515

Re: Wage Theft Prevention and Wage Recovery Act (H.R. 7701)

Dear Chairman Scott and Ranking Member Foxx:

We submit this letter for the record to express our concerns with H.R. 7701, the Wage Theft Prevention and Wage Recovery Act, legislation that would impose new requirements and potential fines on private sector businesses regarding payment of wages.

In overseeing enforcement of the Fair Labor Standards Act (FLSA) by the U.S. Department of Labor (DOL), we understand that Members of the Committee and Congress have interest in ensuring that businesses and individuals comply with federal wage requirements. At times, businesses fail to compensate workers properly due to confusion, negligence or sometimes dishonesty, which warrants legal recourse to ensure workers are made whole.

Unfortunately, even if H.R. 7701 is well intended, this legislation applies heavy-handed stipulations, stifling costs, is an unwarranted expansion of DOL powers, and grants government policing powers to special interest groups like unions. It would do more to undermine American workers and businesses than it could ever do to address legitimate instances of improper wages and payments.

Some troubling provisions of H.R. 7701 include:

- Massively increasing civil penalties from $1,100 for a violation to $12,340 for tipped employees, with other penalties as high as $22,030. Additionally, up to $110,150 in fines could be inflicted by DOL for each employee if DOL determines a person has "repeatedly or willfully" violated wage policy. These punitive fines not only encourage a "policing for profit" motive within DOL that could bankrupt businesses and cripple industries, but they will also have a major stifling effect, causing businesses to hire fewer workers as well as reduce overtime and flexible work policies that benefit workers. Additionally, the risk of harsh penalties for misclassification could stifle independent work and jeopardize the livelihood of countless entrepreneurs and small businesses.
- Imposing massive payment requirements on employers of not only newly-determined "prevailing rates" but two to three times that rate when DOL determines a worker has lost wages due to employer error or intent. Such pay could bankrupt some businesses and is unwarranted excess for the process of recovering lost wages for workers.
- Providing federal grants, and powers, to chosen entities in order to police businesses and industries on behalf of DOL. Entities will be empowered to disseminate information to employees, conduct trainings independently and with the DOL, assist employees in filing claims, assist agencies in conducting investigations, monitor compliance of laws, and more– including currently undisclosed powers granted by DOL in the future. Not only is this grant program set up to

favor labor unions and other certain entities based on selection criteria, but it expands government policing powers to private entities and helps unions advance workplace organizing activities with taxpayer funds – a major concern.

- Extensive new disclosure and recordkeeping requirements – along with fines – for businesses regarding pay, status, rates, and other documentation that would be particularly onerous for smaller businesses. This would be problematic for all businesses as they already must comply with state paystub and disclosure laws that could contradict new federal requirements.
- Increasing the statute of limitations to as far as five years out, a length of time that makes recordkeeping more burdensome and extends liability to periods past when employers and workers can give reliable answers to questions posed by DOL.
- Banning the use of voluntary arbitration in all instances under FLSA, a violation of contract freedom.

If H.R. 7701 is enacted, the myriad of new requirements and costs would be destructive enough, but the expanded DOL powers and public funds going to entities such as unions in order to police businesses could drive significant levels of fear and mistrust toward DOL. Furthermore, businesses would have to monitor workers under increasingly watchful eyes, making jobs stressful and rigid for workers as a matter of survival for businesses who could be one honest mistake away from having to shutter their doors.

Additionally, pay issues may not stem from employer error. Sometimes employees mistakenly fail to document hours properly despite efforts by businesses to train employees.

To improve business compliance with FLSA, we instead see merit in reforms such as H.R. 5743, the Ensuring Workers Get PAID Act,[1] which would establish a permanent version of the Payroll Audit Independent Determination (PAID) pilot program that began in March 2018 but was ended in January 2021. This program, which opens lines of communication for businesses to get assistance from DOL in fixing compensation issues, focuses on the most important outcomes - getting workers the compensation they are entitled to in a timely manner and helping to ensure businesses operate compliantly in the future, thereby avoid the need for DOL investigations in the first place.

By allowing businesses to self-audit, report, and correct violations around overtime and regular wages, the Ensuring Workers Get PAID Act transforms DOL into a helpful resource for businesses trying to do the right thing. Contrast that with H.R. 7701 where DOL could be viewed as an adversary by many employers who fear the potential of being targeted or fined extensively for seeking assistance and trying to correct mistakes.

Assistance and cooperation are no small matters for businesses who face not only the challenge of complying with FLSA and other federal labor laws, but a host of state and local ones as well. The cost of complying with DOL regulations alone was estimated to be $127 billion for Americans in 2021, for instance,[2] with recent DOL changes to minimum wage, overtime rules, tip regulations, and independent contractor status– just a few examples of shifting environment that honest businesses and workers face while complying with DOL regulations.[3]

Independent contracting, which comprises the largest contingent of over 59 million freelancers,[4] should also be noted as a particular source of concern if H.R. 7701 were enacted. Not only are self-employed workers and clients required to comply with different employment tests used by IRS, DOL, and other federal agencies, as well as differing state and local employment determinations, but the manner in which factors are used to determine the status of workers also changes. For instance, an FLSA independent contractor (IC) rule that was published on January 7, 2021 was delayed on March 4, 2021, withdrawn on May 6, 2021, and then reinstated by a federal district court on March 14, 2022, which made the rule retroactively enforced back to March 8, 2021.[5]

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[1] https://i4aw.org/resources/ensuring-workers-get-paid-act/
[2] See page 46 of CEI's 10,000 Commandments. https://cei.org/wp-content/uploads/2021/06/Ten_Thousand_Commandments_2021.pdf
[3] See page 79. https://cei.org/wp-content/uploads/2021/06/Ten_Thousand_Commandments_2021.pdf
[4] https://investors.upwork.com/news-releases/news-release-details/upwork-study-finds-59-million-americans-freelancing-amid
[5] https://www.dol.gov/agencies/whd/flsa/misclassification

With the changing landscape in mind, a business could face misclassification charges from DOL for contracting with an IC that it fully believed to be a compliant relationship based on its honest interpretation of laws and regulations. Unfortunately, DOL could destroy the livelihoods of millions of contractors and clients they work with through both extreme fines as well as the fear of breaking compliance – a sad reality for IC relationships which produce more job satisfaction and optimism than traditional employment.[6]

H.R. 7701 would expand DOL's enforcement of FLSA in an alarming and destructive manner. In enforcing DOL's noble objective of ensuring businesses fairly compensate workers for their time on the job, we ask that you focus on greater cooperation and fair enforcement of labor laws, not punitive measures that stifle employment and worker flexibility.

Sincerely,

Institute for the American Worker

Americans for Prosperity

Americans for Tax Reform

Open Competition Center

Mackinac Center for Public Policy

Workers for Opportunity

New Jobs America

[6] https://investors.upwork.com/news-releases/news-release-details/upwork-study-finds-59-million-americans-freelancing-amid

[Whereupon, at 12:02 p.m., the Subcommittee meeting was adjourned.]

○