Statement of Natalie Ludaway
Chief Deputy Attorney General for the District of Columbia

Before the

Committee of the Whole Subcommittee on Workforce
The Honorable Elissa Silverman, Chairperson

Public Hearing

B21-120, Wage Theft Prevention Clarification and Overtime Fairness Amendment Act of 2015

B21-711, Wage Theft Prevention Revision Amendment Act of 2016

October 26, 2016
10:00 a.m.
Room 412
John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, District of Columbia

Good morning Chairperson Silverman, Councilmembers, staff, and residents. I am Natalie Ludaway, the Chief Deputy Attorney General for the District of Columbia. I am pleased to appear on behalf of Attorney General Karl A. Racine to express his support for the policy goals and objectives of Bill 21-120, the Wage Theft Prevention Clarification and Overtime Fairness Amendment Act of 2015 and Bill 21-711, the Wage Theft Prevention Revision Amendment Act of 2016. Wage theft is a serious problem that desperately needs to be addressed in a comprehensive, efficient, and, most importantly, effective manner. Since the District of Columbia's Wage Theft Prevention Amendment Act of 2014 (the 2014 Act) went into effect in early 2015, there have been numerous attempts to clarify and revise the law. The Office of the Attorney General (OAG) greatly appreciates the work of this Committee of the Whole Subcommittee on Workforce in getting us to this important point. Because of your leadership, District workers are closer to having a law that ensures that they receive full pay for all of the work they have performed.

Wage Theft Prevention Revision Amendment Act of 2016

The Attorney General strongly supports Bill 21-711, the Wage Theft Prevention Revision Amendment Act of 2016. This legislation is the result of collaboration between the OAG and the Department of Employment Services (DOES) spanning over nearly a year. DOES Director Deborah Carroll will explain the intricacies of this legislation and the overarching policy goals. My testimony is focused on one key area that is of particular interest to OAG, the provision of attorney's fees.

The Repeal of the *Salazar* Fee Provision in the 2014 Act

The 2014 Act's provision requiring that attorney's fees awarded to employees' lawyers should be calculated using the matrix established in *Salazar v. District of Columbia*, 123 F. Supp.2d 8 (D.D.C. 2000), should be removed. Bill 21-711 makes this vitally important revision. The Attorney General joins the Mayor in strongly opposing the adoption of *Salazar* fees here, or in any other in legislation. *Salazar* has been relied on by lawyers and some judges as establishing a rate for complex federal litigation. Leaving aside whether the payment scheme established in that case is appropriate even in complex federal litigation, wage and leave cases are not generally considered to be anywhere as difficult as complex federal litigation. Unlike complex litigation, wage and leave cases are generally single issue cases, require few witnesses, and unlike complex cases are generally resolved within a year. By contrast, *Salazar* is a decades-old consent decree case involving provision of Medicaid, particularly to children, dating from an era when the District's Medicaid program was not the highly regarded program it is today. The case has produced many judicial opinions at both the trial and appellate levels. And, even in *Salazar* itself, not all legal services are compensated at *LSI-Salazar* rates. There are three levels of fee compensation, with the *LSI-Salazar* rates at the top for the most complex work defined in the Consent Order. The other two categories of work, which make up most of the legal services in the case, including representing individuals seeking fair hearings before the Office of Administrative Hearings, are compensated at far below the *LSI-Salazar* rates.

The reference in the current Wage Theft Act to *Salazar* rates has been relied on by at least two federal judges in the District to justify the imposition of the much higher *Salazar* fees in other types of cases where such high fees are not warranted. To be clear, the District is facing a serious problem. Because *Salazar* rates are contained in the current wage theft law, attorneys are arguing that the District's payment of attorney's fees at the rates authorized by *Salazar* in non-complex wage theft cases are the "prevailing market rate." They are not. The wage theft attorney's fee rates should be established by looking to comparable cases, including IDEA cases. Attorneys often request payment for hundreds, and sometimes thousands, of hours of billable work in cases brought against the District. If the courts continue to adopt the reasoning that the District has recognized *LSI-Salazar* rates as prevailing market rates, the District will have to pay millions of dollars in attorney's fees that it would not otherwise be required to pay and for legal work to which *Salazar* rates were not intended to apply.

In *Salazar*, the court was looking at complex civil litigation. These wage cases are not complex. In fact, they are more comparable to cases that the District litigates with regard to the Individuals with Educational Disabilities Act (IDEA),—cases which traditionally rely on a maximum of USAO *Laffey* rates or, frequently, much less. And, even in *Salazar*, some legal work is not compensated at the "*Salazar* rate"—much of the legal work done on behalf of individual claimants, which is much more like individual wage claim actions than the original class action, is compensated at $145 per hour, regardless of the experience of the attorney involved.

For more than a decade, it has been clear that the U.S. Attorney's *Laffey* matrix reflects the maximum prevailing hourly rate for legal services in the District of Columbia, and I am advised that this matrix has recently been updated with current data and analysis. It now is referred to simply as the U.S. Attorney's Office Matrix (USAO Matrix), having been significantly revised in 2015 to reflect hourly rates some 30 years after the original *Laffey* decision. This new USAO Matrix represents the upper end of the current prevailing market hourly rates in the District of Columbia. Attached to my testimony are three charts that will demonstrate that *Salazar* rates are approximately 41% higher than the U.S. Attorney Matrix rates. For example, an attorney with twenty years of experience would receive $516 dollars per hour under the USAO Matrix. However, under the *Salazar* formulation, he or she would receive $826 per hour—a difference of $310 an hour. When multiplied by hundreds or thousands of billable hours charged to the District, the difference is significant. The reason that courts rely on the use of a matrix is to identify the prevailing hourly rates collected locally by attorneys with similar experience working on comparable cases.

Although we strongly object to the *LSI-Salazar* rates, the OAG appreciates the underlying rationale for including the *Salazar* language in the current law. Attorney General Racine and I both come to our current positions from private for-profit law firms, and we completely understand why our former colleagues in the plaintiffs' bar would advocate for

Salazar rates. We, too, want to encourage lawyers to handle as many legitimate wage theft cases as possible. Not only does wage theft negatively affect the victim, it also defrauds the District from appropriate employee and payroll tax dollars.

Use of *Salazar* fees, however, is not the answer as is evidenced by the following: (1) According to our discussions with DOES, the current *Salazar* language has not resulted in an uptick in litigation – the very reason for its inclusion; (2) the willingness of private lawyers to take cases in other areas of litigation, such as IDEA cases, where they have been paid according the USAO *Laffey* schedule or less, shows that there is no need for extremely high hourly rates to encourage attorneys to take cases; (3) codifying *Salazar* is having an unintended adverse financial impact on the District government; and (4) it seems that the challenge with encouraging these wage theft cases is not with encouraging the attorneys to take the cases, but with encouraging the victims to pursue the cases. The businesses that often engage in this abhorrent behavior target the most vulnerable employees. I am advised that it is very difficult to maintain litigation in cases were the victim (a) is in desperate need of finances and will accept a "settlement" from an employer that is much less than what they are rightfully owed; and (b) is either actively looking for employment or is working a job that does not allow for the flexibility to pursue these claims. OAG is willing to work with you, our partner agencies, and advocates to come up with better ways to incentive victims to carry forward with litigation. In our opinion, that is the right approach. Attempting to encourage plaintiffs' lawyers through *Salazar* is not helping the victims or the District. I urge this Subcommittee to support this legislative fix.

Wage Theft Prevention Clarification and Overtime Fairness Amendment Act of 2015

I will now focus my testimony on Bill 21-120, the Wage Theft Prevention Clarification and Overtime Fairness Amendment Act of 2015. The OAG strongly supports this legislation with one major revision that I will mention. Moreover, Attorney General Racine greatly appreciates the introducers for including provisions that will much better protect District workers.

OAG Authority

Before the current Wage Theft Act was enacted, OAG was authorized to accept an assignment of wages from an employee, maintain an action to collect those wages, and settle a case without the consent of the affected employee. The 2014 Act deleted this authorization, thus repealing the Attorney General's authority to go to court to collect wages owed to employees. Subsection 2(d) would address this by amending D.C. Official Code § 32-1308 to read as follows:

> The Attorney General, or any employee or person aggrieved by a Violation of [the wage theft law], the Minimum Wage Revision Act, the Sick and Safe Leave Act, or the Living Wage Act [collectively, "wage and leave laws"] . . . may bring a civil action in a court of competent jurisdiction against the employer or other person violating [the wage and leave laws] and, upon prevailing, shall be awarded reasonable attorneys' fees and costs and shall be entitled to such legal or equitable relief as may be appropriate to remedy the violation . . . .

This provision is very helpful. The need for OAG to have authority to investigate and litigate large-scale or pattern and practice wage theft cases directly in court is vital. Not only will this

authority help reduce the burden on DOES, thus allowing them greater focus on the more traditional administrative cases, it will be a clear message to large-scale bad actors that defrauding District workers and not paying their fair share of related taxes will not be tolerated.

Discussion of Other Provisions and the Need to Repeal *Salazar* Fees

Subsection 2(a) of the bill would create an exception to the current requirement that all employees be paid at least twice a month, and would permit employers to pay administrative, executive, and professional employees at least once a month. This change was made in response to concerns raised by the business community.

Subsections 2(b) and 3(f)(2) of the bill would amend the provisions now in effect requiring subcontractors and temporary agencies (the "responsible parties") to indemnify certain other parties who pay wages that should have been paid by a responsible party. This subsection would provide that the parties may limit this indemnification obligation by contract, and was included to address the OAG's concern that the 2014 Act could be construed to impair existing contract rights.

Subsection 2(c) of the bill would reduce the criminal penalties included in the 2014 Act to amounts recommended by OAG. It addresses OAG's concern that if the higher penalties remain in place, a court might conclude that the United States Attorney, and not the Attorney General for the District of Columbia, is responsible for prosecuting offenses of the District's wage theft and living wage laws.

Subsection 2(d) would correct an inconsistency in the 2014 Act to make clear that certain time frames are measured from the date on which a notice is mailed, not delivered. In addition, in response to a concern raised earlier by OAG, this subsection would provide that appeals of administrative orders issued under the District's wage and leave laws shall be made to the D.C.

Court of Appeals. Subsection 2(d) would also address OAG's concern that the organizational standing provision in the 2014 Act was too broad, by limiting organization standing to labor and employee organizations to which the employee belonged.

Subsection 2(e) would give the Mayor rulemaking authority and corrects a gap in the Mayor's authority noted by OAG.

Subsection 3(a) would repeal the current exemption from the District's minimum wage laws for parking lot and parking garage attendants.

Subsections 3(b)(1) and 3(e) would clarify for how long an employer must maintain certain records and addresses a concern raised earlier by OAG that the time period was unclear.

Subsection 3(b)(1) would also exempt employees who are not covered by the minimum wage and overtime laws from the requirement that an employer must keep track of the precise times and dates during which an employee worked. This was done in response to concerns raised by the business community.

Subsection 3(b)(3) would provide that an employee could acknowledge receipt of a required notice by email, and would provide that the statute of limitations for bringing a civil action alleging a violation of the District's wage and leave laws would not begin until the employer had provided all required notices. We recommend that this provision be amended to specify that the employer must provide all notices required under the District's wage and leave laws.

Subsections 3(b)(2), 3(b)(4) and 3(c) would require the Mayor to provide certain notices in any foreign language required for vital documents under the District's language access law and any other language the Mayor deems appropriate.

Subsection 3(d) would be amended to permit the Mayor to provide copies of certain forms to employers by posting them on the District government's website and addresses a concern raised earlier by OAG that the law would otherwise require the government to provide individual notices to employers.

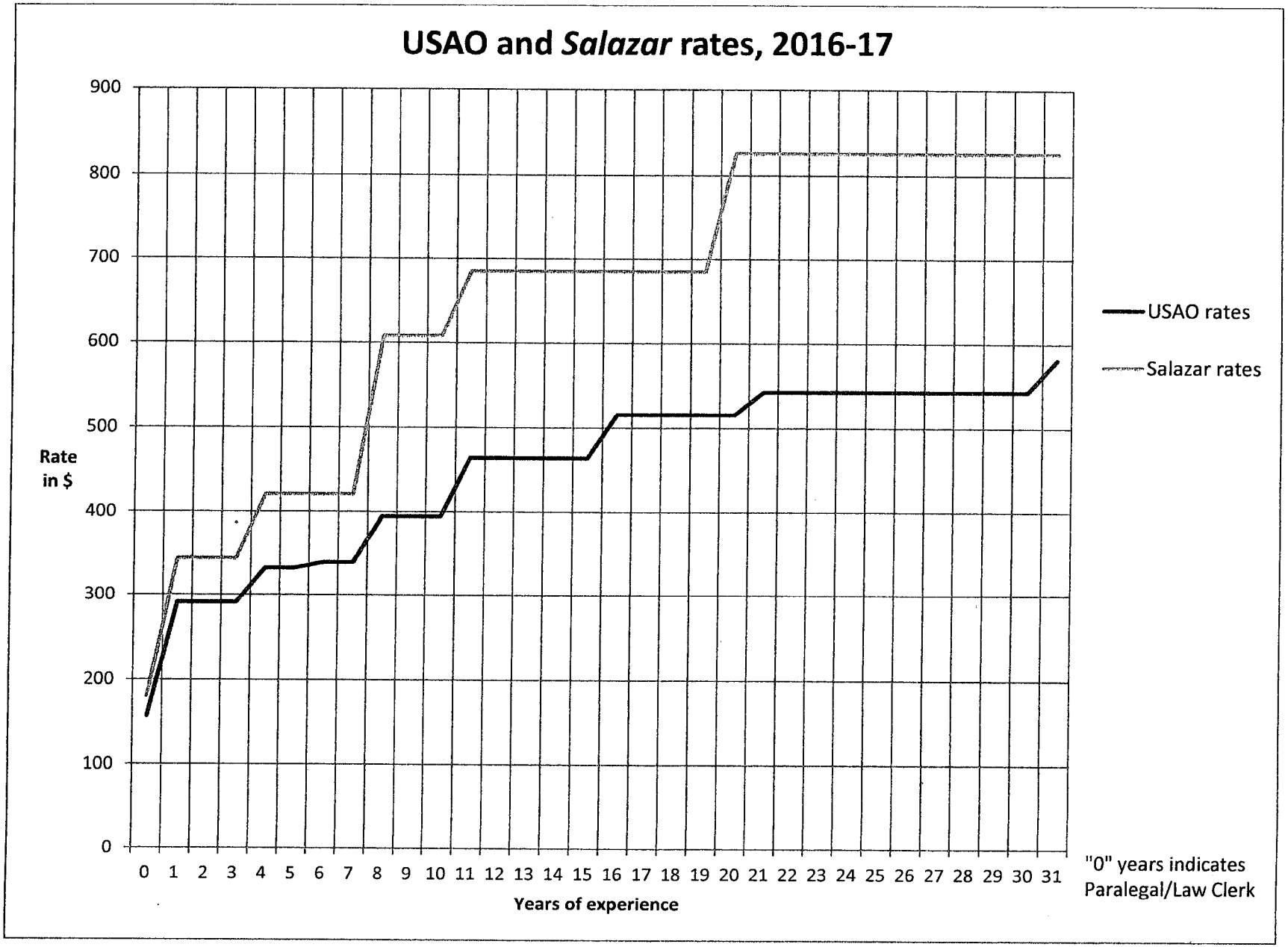
Subsection 3(g) would strike the reference to liquidated damages in the "Remedies" section of the District's minimum wage law, and provide, instead, that an employee could receive "all appropriate relief provided for under section 10a of the Wage Payment Act." Subsections 3(h) and (i) would make clear that the remedies that are available under the wage theft law are also available for violations of the minimum wage law.

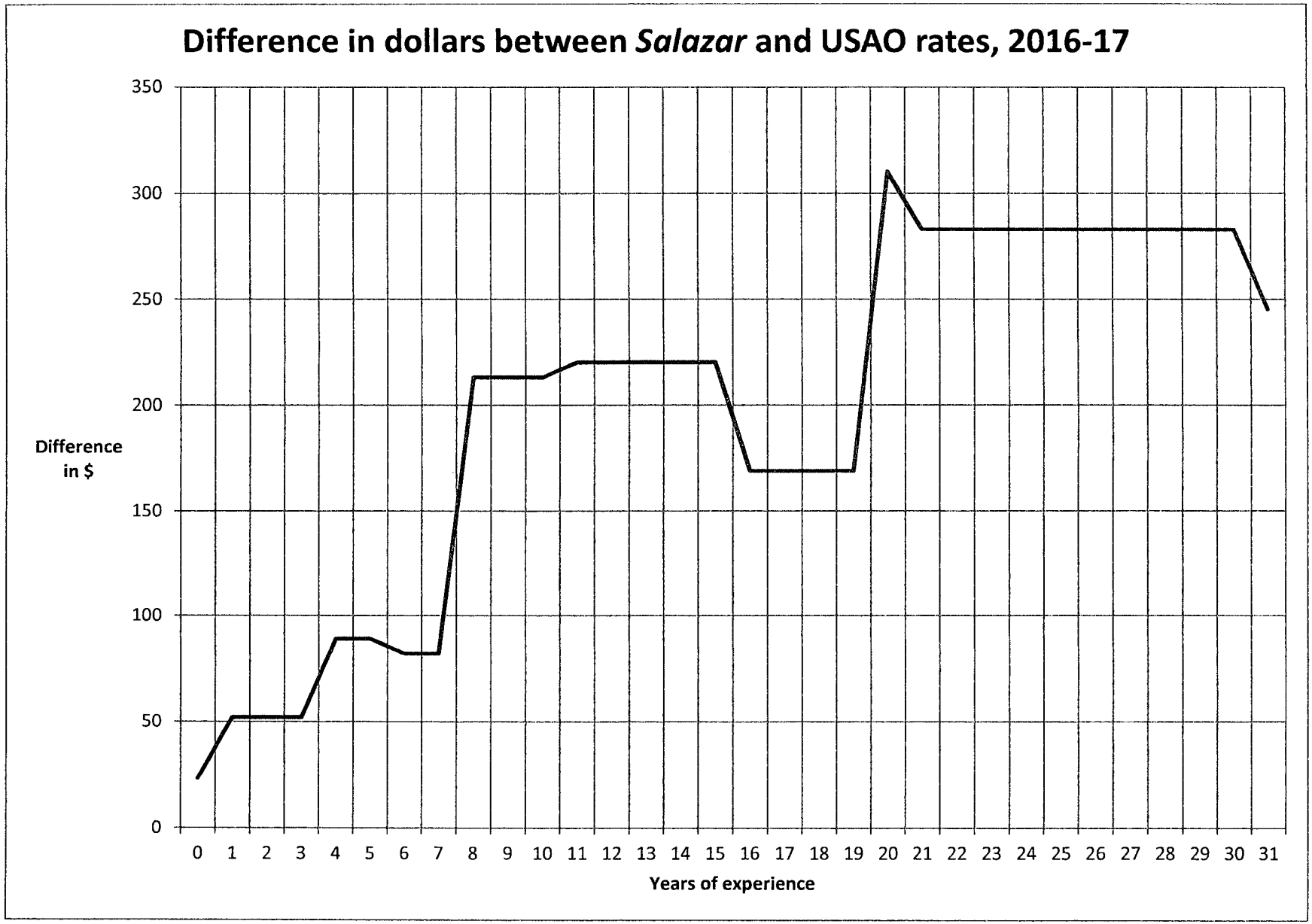
Section 4 would repeal the provision in the 2014 Act making the law retroactive. This change responds to OAG's concern that making the new criminal provisions in the 2014 Act retroactive would violate the Constitution's prohibition against ex post facto laws.

Before closing, I note that our staff has identified several minor drafting recommendations and will contact the Subcommittee with them.

As I stated previously, Attorney General Racine strongly urges a repeal of *Salazar* in the District of Columbia Code. The OAG asks that repeal be reflected in the Bill 21-120.

I greatly appreciate the opportunity to testify on these bills. I am pleased to answer any questions that members may have.


USAO and *Salazar* rates, 2016-17
900
800
700
600
500
400
300
200
100
0
Rate in $
0 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31
Years of experience
USAO rates
Salazar rates
"0" years indicates Paralegal/Law Clerk


Difference in dollars between *Salazar* and USAO rates, 2016-17
Difference in $
350
300
250
200
150
100
50
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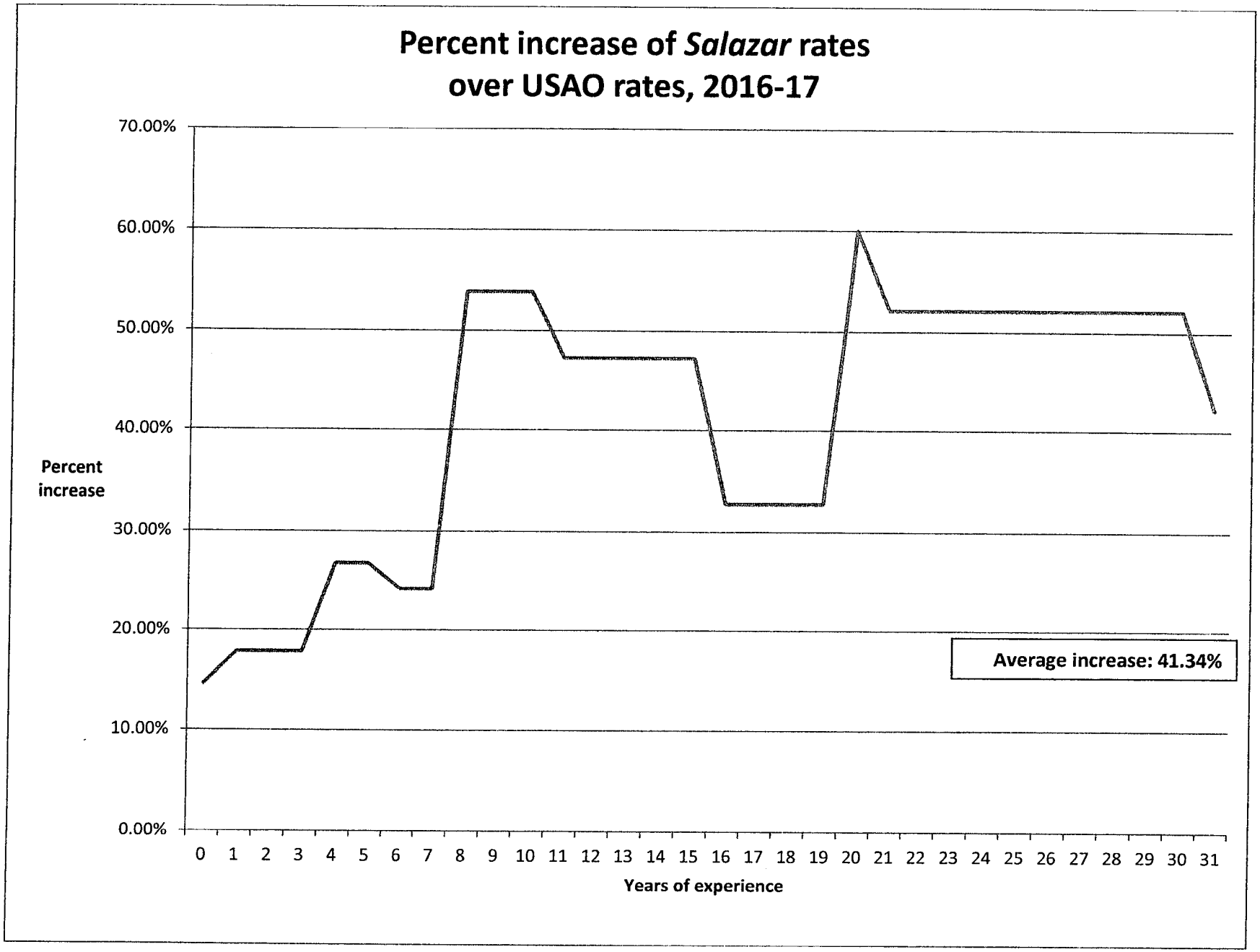
0 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31
Years of experience


Percent increase of *Salazar* rates over USAO rates, 2016-17
70.00%
60.00%
50.00%
40.00%
30.00%
20.00%
10.00%
0.00%
Percent increase
0 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31
Years of experience
Average increase: 41.34%

DEPARTMENT OF EMPLOYMENT SERVICES

Testimony of
Deborah A. Carroll
Director, Department of Employment Services

Muriel E. Bowser
Mayor

Before the

COMMITTEE OF THE WHOLE
Subcommittee on Workforce
Honorable Councilmember Elissa Silverman, Chairperson

Public Hearing

On

Bill 21-711, Wage Theft Prevention Revision Amendment Act of 2016

Bill 21-120, Wage Theft Prevention Clarification and Overtime Fairness Amendment Act of 2015

Bill 21-723, the Wage Enforcement Initiative Amendment Act of 2016

Wednesday, October 26, 2016
10:00 AM

Room 412
John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, DC 20004-3003

Committee of the Whole – Subcommittee on Workforce
Wage Theft Prevention Clarification and Overtime Fairness Amendment Act of 2015, the Wage Theft Prevention Revision Amendment Act of 2016 and the Wage Enforcement Initiative Amendment Act of 2016

Good afternoon, Chairperson Silverman and members of the Committee of the Whole's Subcommittee on Workforce. I am Deborah Carroll, Director of the Department of Employment Services (DOES). Before I begin, I and the DOES staff extend our congratulations to you on your new position as chair of this Subcommittee. We look forward to working with you and your staff for the remainder of Council Period 21.

I am pleased to testify on behalf of Mayor Muriel Bowser and compare the Wage Theft legislation currently under consideration by the District Council. Today, I will be testifying about the three bills under consideration. I will highlight significant differences between the three bills – B21-711, the Wage Theft Prevention Revision Amendment Act of 2016, introduced at the request of the Mayor; B21-120, the Wage Theft Prevention Clarification and Overtime Fairness Amendment Act of 2015, sponsored by Councilmember Elissa Silverman; and B21-723, the Wage Enforcement Initiative Amendment Act of 2016, introduced at the request of the Attorney General.

As you know, Mayor Bowser is committed to making sure that our workers are given a Fair Shot on the Pathway to the Middle Class. However, these goals cannot be achieved if workers are not receiving the wages required by law. We have found that most businesses want and do comply with the law. The Wage Theft Prevention Amendment Act (WTPAA) of 2014 was enacted to enhance remedies, fines, administrative penalties and enforcement of wage payment and collection laws for those businesses who do not comply. The complex law

amends four acts administered by the Office of Wage Hour (OWH) – the Wage Payment Collection Act, The Living Wage Act, the Minimum Wage Revision Act, and the Accrued Sick and Safe Leave Act.

The purpose of the amendment is to make permanent the temporary amendments along with additional changes to further clarify the roles and responsibilities of DOES, the Office of Administrative Hearings (OAH) and the Office of the Attorney General (OAG).

DOES examined and compared the three wage laws currently under consideration and I will share our recommendations, specific to the following areas – *Joint and Several Liability, Penalties, Attorney's Fees, Inconsistent References, Assignment in Trust, Recordkeeping, Employer Notices, and Accrued Sick* and *Safe Leave.*

Joint and Several Liability

The Wage Theft Prevention Amendment of 2014, hereinafter the Wage Theft Act, provides that an employer who allegedly failed to pay wages owed under the employee benefit or minimum wage laws are jointly and severally liable to an employee for payment of wages. B21-711 changed the standard of proof from "allegedly" to "found to have failed to pay an employee any wages earned..." B21-120 expands joint and several liabilities to include intermediate subcontractors. DOES recommends support of the standard "found to have failed to pay an employee" language. However, DOES is neutral on the application of joint and severally liability obligations to intermediate subcontractors.

Penalties

B21-711 adopted the penalty schedule established under the Wage Theft Prevention Correction and Clarification Emergency '

Amendment Act of 2014. Under the penalties section (§32-1307) of B21-120 and B21-711, fines for the first offense of criminal negligence by an employer are capped at $2,500 per affected employee and at $5,000 per affected employee on subsequent offenses. However, willful violations under B21-711 penalties are capped for the first and subsequent offenses at $5,000 and $10,000, respectively, regardless of the number of employees harmed. The willful penalty schedule under B21-120 applies the same penalty amounts on a per employee basis. There is concern that the variance in penalty amounts lack proportionality given the difference in the offenses. DOES will work with the Council to further clarify the penalty schedule.

Attorneys' Fees

The Wage Theft Act included two provisions stating that any prevailing plaintiff would be entitled to attorney's fees "computed pursuant to the matrix approved in *Salazar v. District of Columbia*, 123 F.Supp.2d 8 (D.D.C. 2000)." DOES recommends the "reasonable attorney's fee" standard.

Inconsistent References to Delivering, Mailing, and Filing

The Wage Theft Act lacks clarity about whether a complaint may be mailed, delivered by means of personal service or some other means. Also, it is unclear what is meant by "filing" a complaint (see §32-1308.01(a) and (c)). B21-120 amends the Act to require that a complaint be mailed to achieve consistency in the method of service. B21-711 identifies that a complaint must be "served".

The goal of the bill is to reach consistency across underlying laws and the Wage Theft Act. We believe the language of "served" achieves that consistency.

Assignment in Trust

The Wage Theft Act repealed language in §32-1308(a) that authorized the Mayor to take assignment in trust from an employee who had not been paid wages due, and to settle and adjust those claims. B21-711 restores the Mayor's authority to take an assignment in trust and also expressly provides that the Attorney General may bring legal action to collect wage theft claims. This is particularly important for unrepresented claimants. Therefore, DOES recommends the restoration of the Mayor's authority.

Recordkeeping

B21-711 addresses two issues within the recordkeeping provision. First, the Wage Theft Act of 2014 required employers to keep records for three years, or the "prevailing federal standard, whichever is greater." The 2015 Amendments amended one provision to require the District government to issue regulations to identify the prevailing federal standard. This issue was highlighted by the OAG in the course of the legal sufficiency process. In order to establish consistency among all provisions under the Wage Theft Act, this standard was added to ensure consistency of the recordkeeping standards for all the provisions covered under the Wage Theft Act.

The second issue deals with employer records availability. Before the enactment of the Wage Theft law, the minimum wage law required employers to keep records available for inspection by the Mayor "at any reasonable time."

B21-711 applies a similar standard to the Wage Payment Collection law (see Sec. 2(d)). Recently, the Supreme Court held in the decision of *Patel v. City of Los Angeles* that records inspections (in this case a hotel registry) had to comply with the Fourth Amendment. Therefore, business owners must be given due process to challenge a request for search of records. To comply with the requirements of the Patel holding, we ask your support for the provision that requires records to remain open for inspection by the Mayor upon demand, and provide the necessary due process requirements for employers to challenge that demand before a neutral third party at an administrative hearing.

Employer Notices

The Wage Theft Act requires District employers to provide a notice to an employee in English and the employee's primary language if the Mayor has issued a template in that language. The law also requires DOES to issue sample templates of the notice in English and other language versions. B21-120 proposes to change the DOES sample template requirement to a more prescriptive form. However, given the high number of industries and permutations of information that could not be standardized, DOES set the minimum standard for what must be contained in the notice and provided a sample. However, employers must and should be given the flexibility to provide more than what the minimum standard requires. Therefore, DOES not recommend a specific form.

A related provision to the employer notice requirements, the Wage Theft Act requires employers to retain copies of the written notice furnished to employees that are signed and dated by the employer and the employee. B21-711 amends the minimum wage law (§ 32-1008(d)) that would permit employers

to receive emails from employees acknowledging receipt of the notice and as proof of compliance. DOES recommends support for the electronic acknowledgement as a verification of receipt of notice. This not only modernizes our practice, but it also aligns the law passed by the Council for temporary staffing firms under the Wage Theft Act.

Accrued Sick and Safe Leave Act

Council passed an amendment under the Accrued Sick and Safe Leave Act clarifying that employees in the building and construction industry covered by a collective bargaining agreement shall be exempted from the paid leave requirements only if the agreement expressly waives those requirements.

In conclusion, our communication with businesses, while educating and enforcing their responsibilities under the Wage Theft law, has convinced us that most are eager to comply with the law and have taken the necessary steps to do so. We ask the Council to consider the proposed amendments and ensure that any final decision provides clarity to employers and employees as to their rights, responsibilities, and obligations under the law. This concludes our testimony and I am happy to answer any questions you may have.

TESTIMONY SUBMITTED FOR THE OFFICIAL RECORD

DC Chamber of Commerce
DELIVERING THE CAPITAL

Testimony of the DC Chamber of Commerce

Before the Committee of the Whole Subcommittee on Workforce Public Hearing

on

B21-120, Wage Theft Prevention Clarification and Overtime Fairness Amendment Act of 2015
B21-711, Wage Theft Prevention Revision Amendment Act of 2016

The DC Chamber of Commerce is pleased to submit this written testimony on behalf of the DC Chamber's membership and the hundreds of thousands of workers they employ. The DC Chamber of Commerce advocates for policies that lead to job creation and economic growth and we cannot accomplish these critical efforts without the collaboration from various stakeholders, including the District Government. Our mission, much like yours, is to continue to make the District of Columbia a great place to live, work, play and do business.

Because you and your staff have been generous with your time in meeting with us, you know that the Chamber supports the Council's original intent to defend hourly wage earners from dishonest actors. We further agree with the testimonies we heard on previous hearings regarding this issue, which carried several themes throughout: we need a bill that protects employers from bad actors who put them at a competitive disadvantage by not paying wages, provides a clear and formal hearing process that results in quick resolution of claims, and provides written notice of wages. All of this should support both businesses and employees by creating a quick, efficient process in which employers aren't disadvantages by the actions of bad actors and employees have a process that they feel confident participating in.

The Chamber believes that the series of emergency acts that Council wisely passed addresses these concerns and that the permanent legislation presented by Mayor Bowser which incorporates those emergencies, the *Wage Theft Prevention Revision Amendment Act*, should be passed without delay.

Encouraging Reporting – and Compliance – through a Clear and Speedy Process

Employees will be more willing and able to report instances of wage theft when the process is clear and swift. B21-711 would clarify the jurisdiction for hearings and service requirements, provide consistency in the determination of attorney's fees, and remove ambiguity about how employees who are not hourly should be treated under the law. Provisions in this bill would also clarify the role of the Attorney General and Mayor, and the recordkeeping obligations of employers. As the interim DOES director testified at a previous hearing, the agency needs more clarity to become more consistent, reliable, and timely in its wage theft work. When this legislation is implemented and employees see that there is a clear system that functions well, they will be more willing to come forward.

As current DOES Director Deborah Carroll testified, businesses are eager to comply with the law and have taken the appropriate steps to do so. The clearer procedures are, the easier it is for businesses to comply and to prevent instances of wage theft or perceived wage theft before they happen. The changes already mentioned go a long way toward establishing clarity. Clarification of the standard of proof required for payment of wages a complainant claims are owed and DOES' commitment to eliminate the variance in penalty amounts across wage theft bills will also help create a predictable and feasible compliance regime.

Written Notice

Providing clear, written notice of what wages were agreed to between employee and employer – and retaining those records – is good for both parties so long as the requirements are very clear. We appreciate the specificity regarding the length of records retention in B21-711, and that it reflects the modern reality of electronic communications between employer and employee, as well as electronic recordkeeping.

Alignment with Appropriate Business Practices

Provisions in this bill would allow for electronic notice and recordkeeping, restore the ability for contractors and subcontractors to determine which is best equipped to be responsible for compliance with wage theft laws, and better reflect the diversity of employment arrangements – including salaried employees, temporary employees, and others. These common sense changes better reflect the real world business environment and would make it possible for businesses to comply with wage theft protections without having to contort their current practices to a "one size fits all" fix.

Outstanding Concerns

While B21-711 in its current form would make many improvements, a few key issues remain. B21-711 contains language that would give the Mayor and Attorney General the authority to participate in disputes on behalf of employees – while with the other hand making determinations at DOES about claims. This seems inappropriate, and unnecessary, given the protections already available to employees. Further, the Chamber most certainly does not agree with the testimony of some witnesses who suggested giving advocacy groups party status. The right to pursue claims belongs to individual employees who may choose to exercise that right or not based on their own best interests.

We are also concerned about how the requirement of B21-711 to keep records available for inspection by the Mayor upon demand squares with the Fourth Amendment analysis in *Patel v. City of Los Angeles*. We look forward to a resolution of this very serious problem before any vote on the bill.

The Chamber is happy to work with the Mayor and the Council to develop additional recommendations at your pleasure.

DC Chamber of Commerce
DELIVERING THE CAPITAL

Testimony of the DC Chamber of Commerce

Before the Committee of the Whole Subcommittee on Workforce Public Hearing

on

B21-120, Wage Theft Prevention Clarification and Overtime Fairness Amendment Act of 2015
B21-711, Wage Theft Prevention Revision Amendment Act of 2016

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Because you and your staff have been generous with your time in meeting with us, you know that the Chamber supports the Council's original intent to defend hourly wage earners from dishonest actors. We further agree with the testimonies we heard on previous hearings regarding this issue, which carried several themes throughout: we need a bill that protects employers from bad actors who put them at a competitive disadvantage by not paying wages, provides a clear and formal hearing process that results in quick resolution of claims, and provides written notice of wages. All of this should support both businesses and employees by creating a quick, efficient process in which employers aren't disadvantages by the actions of bad actors and employees have a process that they feel confident participating in.

The Chamber believes that the series of emergency acts that Council wisely passed addresses these concerns and that the permanent legislation presented by Mayor Bowser which incorporates those emergencies, the *Wage Theft Prevention Revision Amendment Act*, should be passed without delay.

Encouraging Reporting – and Compliance – through a Clear and Speedy Process

Employees will be more willing and able to report instances of wage theft when the process is clear and swift. B21-711 would clarify the jurisdiction for hearings and service requirements, provide consistency in the determination of attorney's fees, and remove ambiguity about how employees who are not hourly should be treated under the law. Provisions in this bill would also clarify the role of the Attorney General and Mayor, and the recordkeeping obligations of employers. As the interim DOES director testified at a previous hearing, the agency needs more clarity to become more consistent, reliable, and timely in its wage theft work. When this legislation is implemented and employees see that there is a clear system that functions well, they will be more willing to come forward.

As current DOES Director Deborah Carroll testified, businesses are eager to comply with the law and have taken the appropriate steps to do so. The clearer procedures are, the easier it is for businesses to comply and to prevent instances of wage theft or perceived wage theft before they happen. The changes already mentioned go a long way toward establishing clarity. Clarification of the standard of proof required for payment of wages a complainant claims are owed and DOES' commitment to eliminate the variance in penalty amounts across wage theft bills will also help create a predictable and feasible compliance regime.

Written Notice

Providing clear, written notice of what wages were agreed to between employee and employer – and retaining those records – is good for both parties so long as the requirements are very clear. We appreciate the specificity regarding the length of records retention in B21-711, and that it reflects the modern reality of electronic communications between employer and employee, as well as electronic recordkeeping.

Alignment with Appropriate Business Practices

Provisions in this bill would allow for electronic notice and recordkeeping, restore the ability for contractors and subcontractors to determine which is best equipped to be responsible for compliance with wage theft laws, and better reflect the diversity of employment arrangements – including salaried employees, temporary employees, and others. These common sense changes better reflect the real world business environment and would make it possible for businesses to comply with wage theft protections without having to contort their current practices to a "one size fits all" fix.

Outstanding Concerns

While B21-711 in its current form would make many improvements, a few key issues remain. B21-711 contains language that would give the Mayor and Attorney General the authority to participate in disputes on behalf of employees – while with the other hand making determinations at DOES about claims. This seems inappropriate, and unnecessary, given the protections already available to employees. Further, the Chamber most certainly does not agree with the testimony of some witnesses who suggested giving advocacy groups party status. The right to pursue claims belongs to individual employees who may choose to exercise that right or not based on their own best interests.

We are also concerned about how the requirement of B21-711 to keep records available for inspection by the Mayor upon demand squares with the Fourth Amendment analysis in *Patel v. City of Los Angeles*. We look forward to a resolution of this very serious problem before any vote on the bill.

The Chamber is happy to work with the Mayor and the Council to develop additional recommendations at your pleasure.

D.C. COUNCIL COMMITTEE OF THE WHOLE
SUBCOMMITTEE ON WORKFORCE

The Overtime Fairness and Wage Theft Prevention Clarification Act
Wage Theft Prevention Revision Amendment Act

Supplemental Testimony of Philip Fornaci
Executive Director, D.C. Employment Justice Center
October 28, 2016

Thank you for the opportunity to present additional testimony on proposed revisions to the civil actions section of the District of Columbia Wage Payment and Collection Law, D.C. Code § 32-1308, specifically addressing technical adjustments in the way class action and collective action matters in wage theft cases are handled. It is our intention that these changes, developed in consultation with private bar attorneys specializing in this area of law, will clarify the goals and procedures for multiple plaintiffs to pursue their wage theft claims in a collective action or in a class action lawsuit. This testimony is supplemental to written and oral testimony provided on October 26, 2016 and provided to assist the D.C. Council in addressing these complex issues. The D.C. Employment Justice Center ("EJC") is a non-profit organization providing direct legal representation and brief legal advice to more than 1,300 low-income workers every year, and outreach to hundreds more. The most prominent issue that our worker clients bring to us are complaints of wage theft, and those complaints have only increased over the last two years.

EJC proposes amending D.C. Code § 32-1308(a)(1) to clarify that District workers who have suffered violations of District worker protection laws may elect to sue individually, jointly, as an "opt-in" collective action pursuant to the procedures set forth in the federal Fair Labor Standards Act, as an "opt-out" class action, or initially as a collective action and subsequently as a class action. Specifically, EJC proposes amending D.C. Code § 32-1308(a)(1) to add the following italicized language:

(a)(1) Any employee or person aggrieved by a violation of this chapter, the Minimum Wage Revision Act, the Sick and Safe Leave Act, or the Living Wage Act, or any entity a member of which is aggrieved by a violation of this chapter, the Minimum Wage Revision Act, the Sick and Safe Leave Act, or the Living Wage Act may bring a civil action in a court of competent jurisdiction against the employer or other person violating this chapter, the Minimum Wage Revision Act, the Sick and Safe Leave Act, or the Living Wage Act and, upon prevailing, shall be awarded reasonable attorneys' fees and costs and shall be entitled to such legal or equitable relief as may be appropriate to remedy the violation, including, without limitation, the payment of any back wages unlawfully withheld, reinstatement in employment, and injunctive relief. Actions may be maintained by one or more employees who may designate an agent or representative to maintain such action for and on behalf of themselves or on behalf of all employees similarly situated. *Actions under this subsection may be maintained:*

(A) Individually by an aggrieved person or employee;

(B) Jointly by one or more aggrieved persons or employees;

(C) Consistent with the collective action procedures of the Fair Labor Standards Act, 29 U.S.C. § 216(b);

(D) As a class action; or

(E) Initially as a collective action pursuant to the procedures of the Fair Labor Standards Act, 29 U.S.C. § 216(b), and subsequently as a class action.

This amendment is necessary to clarify the intent of the Wage Theft Prevention Act of 2014, which was to enhance the accountability of employers and strengthen worker protection laws. A recent decision by the United States District Court for the District of Columbia held that the 2014 amendments to D.C. Code § 32-1308 removed District workers' right to bring a collective action for violations of the District of Columbia Minimum Wage Revision Act. *See Vasquez v. Grunley Constr. Co.*, No. 15-CV-2106 (GMH), 2016 WL 4099049 (D.D.C. Aug. 2, 2016); *see also Eley v. Stadium Grp., LLC*, No. 14-cv-1594 (KBJ), 2015 U.S. Dist. LEXIS 126184 (D.D.C. Sept. 22, 2015) ("Thus, it may well be that Plaintiffs here cannot proceed on their DCMWA claims utilizing the procedures applicable to the FLSA, and instead, they may be required to seek class certification under Rule 23."); *Rivera v. Power Design, Inc.*, No. 15-cv-0975, 2016 U.S. Dist. LEXIS 39852 (D.D.C. Mar. 28, 2016).

After this decision, it is likely that courts will require groups of workers who suffer wage and hour violations to satisfy the more onerous standards for certification

as a Rule 23 class action. This result punishes District workers, rewards employers that steal wages, and runs contrary to the intent of the Council in passing the 2014 amendments.

The opt-in collective action procedure of the Fair Labor Standards Act protects District workers by making it easier to obtain court certification of the class of aggrieved workers early in the litigation. Early certification permits court-sanctioned notice to affected workers. Collective actions differ from traditional class actions by requiring aggrieved workers to consent, or "opt-in" to a lawsuit. Only those who opt in to the lawsuit are bound by and benefit from its outcome. On the contrary, the outcome of a class action binds and benefits all those who fall under the class definition, unless they affirmatively opt out. Given that a class action lawsuit may impact the rights of those who did not join it from the outset, it has a more stringent standard for class certification.

EJC's proposal will yield maximum protection for District workers consistent with the goals of the 2014 amendments, without harming law-abiding District employers. The proposal will allow aggrieved District workers to choose whether to proceed as a class or collective action or, alternatively, to seek early certification as a collective action and, later in the litigation, to attempt to obtain a broader class action certification. District workers will receive the attendant benefits of early certification and, if they are

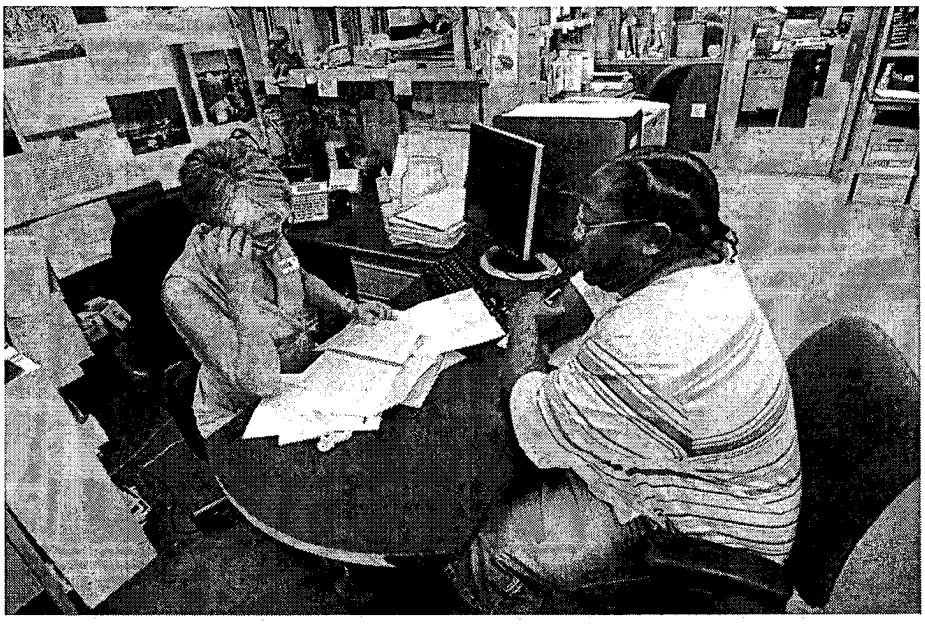
able to make the requisite showing, have the opportunity to expand the class to include those who have not yet opted-in.

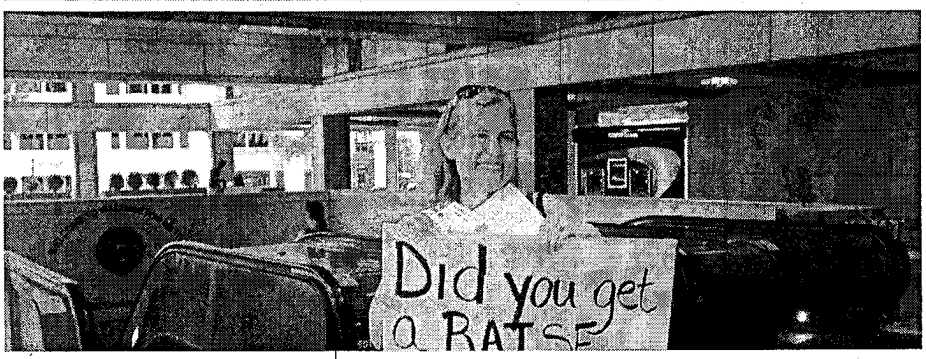
We have developed this specific language in consultation with attorneys Mark Hanna and Michelle Banker from the law firm of Murphy Anderson PLLC, a 17-lawyer public interest law firm in Washington, D.C. that represents a range of clients including workers, unions, and whistleblowers. The firm is experienced in the prosecution and resolution of wage and hour class actions and collective action litigation in federal and state court, and their attorneys are experts in this area.

This proposed amendment will facilitate private enforcement of the District's worker protection laws, including the Wage Payment and Collection Law, the Minimum Wage Revision Act, the Living Wage Act, and the Sick and Safe Leave Act. Improved private enforcement of those laws in turn should reduce the burden on District administrative offices charged with their enforcement. As improved enforcement of these laws will impact only those employers who cheat their employees, this amendment will not harm law-abiding District businesses. The collective action process was previously expressly stated in the D.C. Minimum Wage Act, and so this amendment restores an option to use a commonly accepted practice in wage and hour law, and one with which judges are familiar.

The District's worker protection laws are only as good as they are enforceable. The EJC's proposed amendment to D.C. Code § 32-1308(a)(1) is necessary fix that will

make plain the Council's intent to protect workers and enhance employer accountability. This legislation will facilitate private enforcement of District worker protection laws without harming honest District employers. I therefore respectfully encourage you to adopt this proposed amendment.





WAGE THEFT IS THE NEW LAW DOING WHAT WE NEED IT TO DO?

Mid-2016 Progress Report

The Employment Justice Center takes a snapshot of the effects and progress of to eliminate wage theft in Washington, DC

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August 2016

THE LAW

The Wage Theft Prevention Amendment Act

It is generally accepted that substantive change in a society usually requires some sort of *legislative remedy* to get to the pot at the end of the rainbow. **Wage Theft** is the denial of wages or employee benefits that were earned but illegally unpaid to an employee. Wage theft is carried out in a variety of ways, like: failing to pay overtime, paying below a mandated minimum wage, misclassifying employees as contractors, making illegal paycheck deductions, forcing employees to work off the clock, or not being paid at all. The Wage Theft Prevention Amendment Act of 2014 (the Wage Theft Prevention Act) was enacted to address this daunting problem.

According to numerous studies, wage theft is shockingly common in the United States, particularly among low-wage workers, including among large numbers of undocumented immigrant workers. The Economic Policy Institute reported in 2014 that wage theft costs US workers as much as $50 billion dollars a year. Some rights violated by wage theft have been guaranteed to workers in the United States since the 1938 Fair Labor Standards Act (FLSA), but the D.C. Wage Theft Prevention Act greatly expanded potential remedies for workers in Washington, DC against wage theft.

Most of us are of the mind that every hour of labor deserves fair compensation. The Employment Justice Center (EJC) and our allies in the Just Pay Coalition, and in the broader community, stood up for workers and helped secure passage of the Wage Theft Prevention Act in 2014. It went into effect on February 26, 2015 to the relief of tens of thousands of workers.

The purpose of the Wage Theft Prevention Act was to enhance remedies, fines, administrative penalties, and enforcement of wage payment and collection laws by increasing the accountability of employers and strengthening worker protection laws. The Wage Theft Prevention Act increased penalties for employers who commit wage-hour violations; provides anti-retaliation protections for workers who hold employers accountable for failing to pay wages owed; established a formal hearing process with enforceable judgments; and provided for better access to legal representation for victims of wage payment violations, while making it easier for workers to collect awards from businesses who fail to pay, either in whole or in part, an employee's regular wages.

Good, reasonable and/or fair employers had—and have—nothing to fear from this law. Enforcement of the Wage Theft Prevention Act only makes for better employer-employee relations and a more productive work environment.

EJC's Raw Data

During 2015, the EJC saw more than 1,300 low-income workers at our Workers' Rights Clinics and at our offices. Of these matters, 26 percent were for wage theft claims. Another 19 percent of our intakes were for discrimination claims and another 19 percent were for claims of unfair terminations. About 7 percent of cases involved problems with workers' compensation benefits. In 2015, the EJC was able to recover about $160,000 in unpaid wages and damages for workers, and another $100,000 in workers'

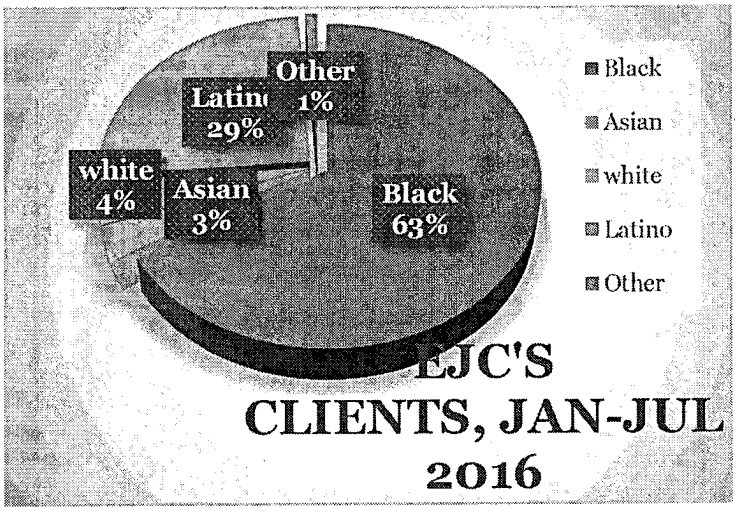
compensation benefits. During the first seven months of 2016, the EJC saw about 720 workers, with similar proportions of claims for wage theft (24 percent), discrimination (19 percent) and unfair termination (20 percent) as in 2015.

It is important to recognize that most claims of unfair termination are not actionable under current law. Employers under the "at will" employment system can terminate employment for the flimsiest of reasons, or for no reason at all. Workers who come to the EJC receive legal counseling in the cases where an unfair job action may have occurred, but where there is no viable legal remedy because the termination was not based on provable and *illegal* discrimination.

Although illegal discrimination in employment based on race, gender, age and other characteristics is prevalent in DC, and in the rest of the country, such claims are very difficult to prove. These claims from low-income workers are less frequently pursued by attorneys because the claims are often raised too late (presenting a statute of limitations problem) or because there are difficulties in proving overt discrimination in a particular workplace. This is particularly frustrating in DC, where we know that African-American and Latino workers are frequently subjected to illegal discrimination but the legal evidence for claims of discrimination is extremely difficult to secure.

Further complicating the situation for African-Americans in D.C. are the hugely disproportionate numbers of African-Americans targeted for arrest and prosecution, the result of racially-biased policing practices. Such practices were documented in detail by the Washington Lawyers' Committee for Civil Rights and the National Capital ACLU in 2013. Although D.C. has one of the broadest "ban the box" laws in the country, enforcement of its provisions by the Office of Human Rights is slow, and limited. Workers denied jobs based on a criminal record should have the opportunity to file their own lawsuits, which is not permitted under current law.

When we consider actionable legal claims – where there is available evidence and a legal remedy - it is apparent that wage theft continues to be an enormous problem in D.C., with consistently large numbers of workers bringing to the EJC valid claims of nonpayment of wages, of failure to pay overtime or minimum wage and the refusal of employers to provide sick and safe leave, despite the legal requirements to do so. Most workers who come to the EJC do not know they are entitled to sick leave benefits, and the failure to provide those benefits usually becomes apparent only after an extended intake discussion.



About 30 percent of EJC's clients are Latino/a, and about 55 to 60 percent are African-Americans. The largest number of wage theft claims come from our Latino clients, whose workplaces are most commonly in the construction, office cleaning and restaurant industries. About three to five percent of low-income workers who come to the EJC are white, and about 3 percent are Asian/Pacific islander. About 80 percent of workers bringing claims of discrimination to the EJC are African-American, and 65 percent of these workers are women.

Typically, and most disturbingly, only about five percent of EJC clients are still employed at the workplaces against whom they are bringing complaints when they come to our Workers' Rights Clinics. Most are unemployed or are no longer working with same employer by the time they can take some sort of legal action.

Who Will We Be Seeing In the Future?

The EJC client base is diverse, with a high concentration of Latino workers. Though the Black population of DC is much larger than the Latino population (48 percent vs. 9 percent), Latino workers more often recover unpaid back wages.

There are an estimated 774,000 workers in the District—more than the actual number of residents (672,000). The total number of public and private sector jobs in DC is up by 10,600, or 1.4 percent from a year ago, while the District's population has grown by about 2 percent in the last year. When private sector job growth occurs, the opportunities to exploit unprotected workers grow as well.

Although more than one in three jobs in the DC area is a government job, either federal or District, with 237,100 total government jobs last year, government employees are still among those who suffer some form of wage theft. The number of federal government jobs in DC in July 2016 was up 1,500 from a year earlier.

Education and health services account for 131,700 jobs in DC, up 0.3 percent from a year ago. Financial activities employment in D.C. was 31,400, up 2.6 percent from a year ago. Professional and business services jobs were up 2.9 percent from a year earlier to 165,600 jobs. These two professions are the sources of some of the most numerous intakes we see at our Workers Rights Clinics.

While the federal government, professional services and healthcare are the DC's biggest employers, DC's economy also thrives on tourism. The leisure and hospitality sector added 1,000 jobs in December 2016, employing nearly 71,000, or 2 percent more than a year earlier. This sector of the economy hosts a vast number of low-wage jobs, and is yet another industry where wage theft flourishes.

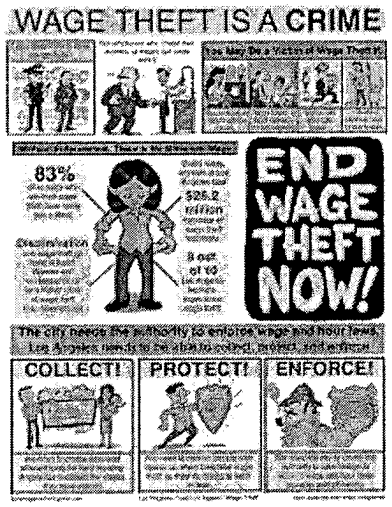
Enforcement

While the EJC can assist hundreds of low-income workers every year, the vast majority of workers experiencing wage theft and other illegal actions by their employers go to the DC Department of Employment Services (DOES) for help. It is crucial that the DOES takes steps to improve its performance in adjudicating complaints quickly and fairly, and to making their procedures more transparent. While DOES has made significant improvements in 2015-2016, including finally beginning to collect liquidated damages (see below) as required by law, we need DOES to do much better.

What's covered?

The Wage Theft Prevention Act and laws providing for paid sick/safe leave include the following provisions:

- **Paid sick leave.** Employers in D.C. must give employees a certain amount of paid time off to recuperate from an illness, to care for a sick family member, or to seek counseling, medical attention, or other assistance to deal with domestic violence. Reference Note*: The amount of leave depends on the size of the employer; for smaller employers (1-25 employees), you are entitled to up to three days of sick/safe leave a year (or one hour of leave for every 87 hours worked. For medium sized employers, you are entitled up to five sick/safe days per year (or one hour for every 43 hours worked.*
  If your employer fails to provide paid sick/safe leave, in addition to the pay you should have received, you can be awarded a penalty of $500 for each day that you had to either work or take unpaid leave. In addition, if you file a lawsuit against your employer, you can also collect compensatory damages (for emotional distress and other harm that you suffered) and punitive damages (intended to punish your employer for breaking the law).



- **Treble damages for minimum wage violations.** If your employer engages in wage theft, you can receive treble damages: three times your unpaid wages. This amount is in addition to your actual wage award.
- **Treble damages for final paycheck.** If you are laid off or fired, you must receive your final paycheck on the next business day. If you quit, you must receive your final paycheck within seven days or on the next regular payday, whichever is sooner. If your employer doesn't pay you on time, you can receive 10 percent of the amount you're owed for each day your check is late, up to three times the total amount you're owed.
- **Liquidated damages for retaliation.** An employer who fires, threatens, or otherwise retaliates against an employee who complains of a minimum wage violation can be required to pay liquidated damages, in an amount between $1,000 and $10,000.

Termination and Retaliation

One significant problem with pursuing wage theft claims in contrast to claims of employment discrimination or other employment issues is that procedures for filing a wage theft claim confidentially are complex. Many workers are reasonably afraid to file a wage theft claim against a current employer under fear that the employer will fire them. In the context of a claim of discrimination filed with the Equal Employment Opportunity Commission, retaliation for filing a discrimination claim is part of the original claim. When a worker files a wage theft claim with DOES, she is told to file a complaint with the Department of Human Rights (DHR) if she suffers retaliation. This would be another, separate process.

The DOES must enable wage theft claimants to file claims confidentially, and assist clients who are punished by their employers for filing those claims. This could take the form of an absolute bar on changing a worker's conditions of employment (including termination) prior to the resolution of the wage theft claim. Although the Act includes language forbidding retaliation, there are no meaningful protections for workers who experience retaliation after filing a claim of wage theft.

Next Steps for DOES

And then, there are the remedial measures the Just Pay Coalition is beating the drum on:

- **Updated rules for sick and safe leave.** We have requested that DOES post the rules for implementing the Accrued Sick and Safe Leave Act (ASSLA) by the end of 2016.

- **Posting claim forms online.** The ASSLA complaint form is not yet available online. This is long overdue and we are pressing the DOES to make this immediately available.
- **Additional outreach activities.** The DOES must organize additional employer roundtables, webinars and information sessions to inform workers and employers of their rights and responsibilities under the Wage Theft Enforcement Act and ASSLA.
- **Informing DC workers and employers via bus/Metro ads.** The DOES must aggressively publicize workers' rights under the new laws. Advertising on the Metro system is a simple way to reach thousands of low-wage workers and their employers.
- **Multi-Language Information.** Outreach materials must be available in Amharic, Vietnamese, and other languages, in addition to English, French, Korean, Mandarin, and Spanish.

Who is the "We" We're Talking About?

The Just Pay Coalition has successfully co-led campaigns to raise DC's minimum wage, expand paid sick days for all DC workers, and strengthen enforcement of DC's workplace protection laws to prevent wage theft. Members have also participated in other coalitions that successfully advocated for legislation to reduce employment discrimination against job applicants with arrest or conviction records (Ban the Box), establish a living wage for DC government contractors, and expand unemployment benefits.

The EJC strives to improve workplace justice in the DC metropolitan area through advocating for policy changes based on the employment problems we learn about through our Workers' Rights Clinics, through our outreach work and through the work of our community organizing allies. While providing legal advice and representation helps address problems one individual at a time, the EJC also identifies issues for systemic reform. The EJC leads and supports workers' rights campaigns for systemic reform through organizing impacted workers and leveraging our policy expertise.

The legalese of advocating for workers is an integral element in winning workplace justice, but it alone does not a successful campaign make! There are on-the-ground activists and organizers whose strategy, expertise and organizing make this goal winnable.

The Bottom Line

When the dust clears, empirical data demonstrates that the problem of wage theft is not solved, despite the existence of legal remedies. In a city of over 630,000, EJC's interactions with workers make up only a sliver of the whole, but our clients' experiences serve as both a snapshot of injustice and confirms that the new laws are still being skirted. It is also widely known that many workers are unable to stand up for their rights or do not know about their legal rights. EJC's Workers' Rights Clinics are free and open to all low-income workers across the metro area.

The EJC is still logging a steady stream of complaints about wage theft. The fact that there are still people in line waiting for help indicates that wage theft is still occurring despite the law. Enforcement must be our immediate goal. We cannot for a moment expect that government agencies will act responsibly on their own when needed. We must make them do it!.

Committee of the Whole

Subcommittee on Workforce Public Hearing

B21-120, Wage Theft Prevention Clarification
and Overtime Fairness Amendment Act of 2015

DISTRICT OF COLUMBIA NURSES ASSOCIATION

TESTIMONY, October 31, 2016

Thank you for convening this Hearing.

The District of Columbia Nurses Association (DCNA) is a full-service professional organization and labor union solely dedicated to representing health care professionals in the District of Columbia. With over 2,000 members, DCNA advances the health care profession by fostering high standards of practice, promoting the economic and general welfare of employees in the workplace and lobbying District officials regarding health care issues. DCNA requests that this testimony be inserted into the record.

DCNA is in full support of Bill 21-120 and has reviewed the legislation, along with the transmittal letter from Attorney General, Karl Racine, dated April 28, 2016 and agrees with the rationale for the introduction of such legislation.

Employers continue to steal money from their own employees, by misclassifying them as contractors, failing to pay overtime as required by law, failing to pay employees who work during paid breaks, failing to pay agreed upon salary rates and paying employees less that the minimum wage. The National Law Employment Project found that:

> Employers in an increasing number of industries misclassify their employees as independent contractors, denying them the protection of workplace laws, robbing unemployment insurance and workers' compensation funds of billions of much-needed dollars, and reducing federal, state and local tax withholding and revenues, while saving as much as 30% of payroll and related taxes otherwise paid for "employees." Misclassification also hurts law-abiding employers who play by the rules but are under-bid and out-competed.

National Employment Law Center, Fact Sheet/July 2015, http://www.nelp.org/content/uploads/Independent-Contractor-Costs.pdf.

A study by The National States Attorneys General Program at Columbia Law School finds that despite minimum wage and overtime laws in the vast majority of states, employers continue "pervasive violation" of federal and states laws. J. Meyer, Esq. & R. Greenleaf, Esq., Enforcement of State Wage and Hour Laws: A Survey of State Regulators (2011) (http://web.law.columbia.edu/attorneys-general/policy-areas/labor-project/inconsistent-enforcement-state-wage-and-hour-laws-could-lead-regulatory-race-bottom-new-study-finds). The authors opine that

> Without meaningful enforcement by state regulators, some employers will simply disregard their legal obligations, putting the majority who abide by the law at a significant competitive disadvantage. This creates a regulatory race to the bottom by states as they compete to attract businesses. Insufficient enforcement therefore has a considerable negative impact on employees and their families, law abiding businesses, and the communities in which they reside.

Id.

The District of Columbia, through its Department of Employment Services, investigates and prosecutes wage theft matters. DCNA believes, however, that DOES is not equipped to handle the challenges of complex or pattern cases. The legislation proposed by the Attorney General will result in the payment of millions of dollars in stolen wages and potentially serve as a deterrent for those businesses who currently believe the low risk of enforcement is worth the effort. "Adequate enforcement not only increases compliance with labor law, it improves worker well being, and levels the playing field so some employers do not have an illegal, unfair advantage over others. When wage law is not enforced, workers may not be paid for all of their hours, tax revenue is not collected on the unpaid wages, families are deprived of earnings, and communities can suffer." Z. Schiller & S. DeCarlo, *Investigating Wage Theft: A Survey of the States*, Policy Matters Ohio (Nov. 2010), fairwarning.org.

DCNA believes that the Office of the Attorney General has made a commitment to fight employer wage theft and with proper funding for investigatory positions, such commitment will yield results. Thus DCNA supports providing the Office of Attorney General with full enforcement powers, including the ability to issue and enforce subpoenas, adopt rules and regulations and to monitor and penalize employers with patterns of violations.

Respectfully submitted,

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October 31, 2016

VIA FEDERAL EXPRESS AND ELECTRONIC MAIL TO esilverman@dccouncil.us

Elissa Silverman, Councilmember
Council of the District of Columbia
Subcommittee on Workforce
1350 Pennsylvania Avenue NW
Suite 408
Washington DC, 20004

Re: LEGISLATIVE ACTION NEEDED TO PRESERVE THE SALAZAR RATE PROVISION OF THE WAGE THEFT PREVENTION AMENDMENT ACT OF 2014

Dear Councilmember Silverman:

As an attorney practicing Plaintiff's side employment law, a member of the Metropolitan Employment Lawyers' Association and the Board President of the Employment Justice Center, a non-profit organization representing and advocating for the rights of low income workers, I write regarding the Mayor's proposal contained in Bill 21-711, which seeks to remove the *Salazar* rate provision from the D.C. Wage Theft Prevention Act of 2014.

At the outset, I want to thank you for your tireless dedication and unwavering commitment to advocating for better working conditions on behalf of all employees in the District of Columbia. Your vision and leadership have been instrumental in shaping the D.C. Wage Theft Prevention Act into a formidable tool for those of us who represent the victims of wage theft. However, as you are aware, Bill 21-711 seeks to strip the Act of one of its key provisions which allows Plaintiff's attorneys in wage theft cases to recover compensation at *Salazar* rates.

This provision is a critical component of the Act because: (1) it provides a much needed and effective incentive to attorneys to represent low-wage, wage theft victims; (2) the *Salazar* rates most accurately reflect the market for legal services in the District and the LSI *Laffey* Matrix is best suited to measure the change in prices for legal services over time; and (3) the availability of *Salazar* rates helps facilitate effective legal representation of wage theft victims by private attorneys who may not otherwise have the economic means to surmount the barriers that come with representing low-wage, wage theft victims.

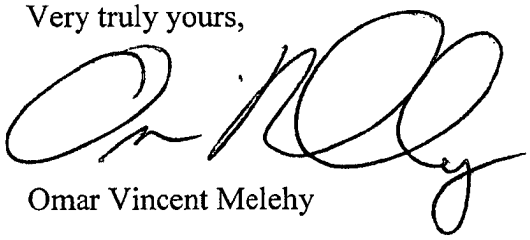
The *Salazar* rates provide a much needed incentive for private attorneys in the District to take on wage theft cases. Those employers who violate the wage payment laws often do so because they know their victims lack the financial resources to be able to hire an attorney to pursue their claim. At the same time, wage theft cases are often time consuming and difficult to prove, usually requiring the attorney to expend a considerable amount of time and resources just to investigate whether a violation has occurred. The availability of *Salazar* rates for attorneys who take on wage theft cases helps to correct this imbalance by allowing them to get compensated for the time spent on these cases at rates on par with other legal professionals in the District. Without the *Salazar* rate provision in the Act, the economic reality is that more and more employment law attorneys would forego handling wage theft cases, choosing instead to practice in other areas of the law where adequate compensation is available to them. This is especially true in the case of solo practitioners and smaller boutique law firms. With fewer attorneys available to handle the growing need for representation among wage theft victims, unscrupulous employers would feel more emboldened to commit wage payment violations.

The *Salazar* rates most accurately reflect the market for legal services in the District and the LSI *Laffey* Matrix, in contrast to other matrices, is best suited to measuring the changes in those rates overtime. Rates calculated using other available matrices are often far lower than the prevailing rates for similar services in the District. The *Salazar* rates in contrast, are derived from the LSI *Laffey* matrix and are calculated using factors specific to the market for legal services, for this reason they are more likely to be consistent with the actual billing rates charged in this area and more likely to respond to changes that occur in those rates overtime. Therefore, there is a strong empirical basis for awarding attorneys' fees in wage theft cases in the District at the *Salazar* rates.

Effective legal representation of wage theft victims often requires the attorney undertaking the representation to overcome substantial barriers unique to wage theft cases which, in the absence of the availability of *Salazar* rates, can quickly make such representation cost prohibitive for smaller law firms and solo practitioners. Such barriers include paying for interpreters to communicate with clients who do not speak English, dealing with unscrupulous employers who often destroy employment records, making the task of recreating an employee's work history nearly impossible, and trying to collect on behalf of the client once a judgment is entered. While there exist federally subsidized agencies in the District who specialize in wage theft cases and are well equipped to deal with such obstacles, there are an insufficient number of them to meet the needs of the ever growing number of wage theft victims who require representation. The *Salazar* rate provision of the Act makes representative of wage theft victims economically feasible for smaller law firms and enables them to provide uncompromised legal representation to an otherwise underserved client base.

In conclusion, I urge you to continue to oppose Bill 21-711 to the extent that it seeks to remove the *Salazar* rate provision from the D.C. Wage Theft Prevention Act. This is a foundational provision, the absence of which will dilute the Act's overall effectiveness as a means of marshalling the District's legal sources on behalf of victims of wage theft and holding employers accountable for violations of the District's wage laws.

Very truly yours,



Omar Vincent Melehy