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COMBATING WAGE THEFT IN DENVER:

How the City of Denver Can Protect
the Safety & Dignity of Workers

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Executive Summary

While Denver's economy is booming, and our unemployment rate is hovering around 2%, too many of our working families are struggling to make ends meet. For many, the core impediment to economic mobility is not that they cannot find a job; it is that their employers do not pay them what they are owed. This harms workers, law-abiding employers, and the City itself, which loses out on critical tax revenue. Wage theft is one of the most under-policed crimes in Colorado, and it is time that the City of Denver join the ranks of progressive cities around the country in addressing the problem.

This Issue Brief provides an overview of wage theft in Denver, including a snapshot of the experience of construction day laborers in Denver who provide the backbone for our residential real estate boom. It then offers a set of recommendations for the City to implement to police the problem to protect workers, small businesses, and the local economy.

The proposals here include the following:

- 1. Clarifying and Strengthening the City's Wage Theft Prohibitions:** The City should clarify and strengthen its wage theft prohibitions to enable enforcement, protect workers from retaliation, and increase penalties for violators.
- 2. Expanding Enforcement:** The City should expand enforcement by creating a wage theft enforcement division to engage in strategic, proactive enforcement, partnering with community groups to identify violators, and expanding enforcement of the Occupational Privilege Tax, which many employers evade by misclassifying their workers.
- 3. Using Contracting, Licensing, and Permitting Laws to Deter Violations and Facilitate Recovery:** The City should not contract with or issue businesses licenses to employers that owe workers unpaid wages or that chronically violate employment protections, and it should deny building permits to developers and contractors that consistently use subcontractors that misclassify their workers to skirt employment protections and avoid payroll taxes. The City could also incentivize good behavior and reward responsible employers by expediting permits for contractors that use subcontractors that comply with the law. Further, the City should leverage its licensing power to require employers in certain industries to post wage bonds that would allow workers who go unpaid to collect even if the employer disappears or claims insolvency.
- 4. Empowering Workers:** The City should actively engage workers in its commitment to policing wage theft by creating a Wage Theft Advisory Board to advise the City and its wage theft enforcement efforts. Additionally, Denver should follow New York City's lead



in making it easier for workers to support advocates and workers' centers that seek to level the playing field.

The Problem

The term “wage theft” describes the myriad ways workers are denied earned wages and benefits—including underpayment of wages and illegal deductions, misclassification, improper withholding of tips, and denial of overtime pay.

Wage theft is pervasive. In 2014, the Colorado Fiscal Institute estimated that \$750 million in earned wages was stolen from Colorado workers each year,¹ and there is reason to think that number is even higher now, particularly as immigrant communities confront increased fear of immigration consequences for reporting unlawful conduct by employers.² In a 2009 survey of low-wage workers in New York, Los Angeles, and Chicago, one quarter of workers were paid less than the required minimum wage, two of every three workers experienced meal or break violations, and three of every four workers were underpaid or not paid at all for overtime work. In all, almost **70%** of the surveyed workers had experienced at least one pay violation in their previous week of work.³ The Economic Policy Institute estimates that wage theft could be costing low-wage workers \$50 billion a year nationwide. This is criminal misconduct of a staggering scale; to put this number in perspective, reported robberies, burglaries, and auto theft in 2012 amounted to around \$12 billion in losses.⁴

The impacts of wage theft go far beyond that dollar amount. Many of these impacts are fairly obvious: people who work long hours without overtime pay are deprived of the opportunity to either get another job or to spend more time with their families and friends; wage theft can deprive people of the money needed to save for a home or to send kids to college; for the lowest paid workers, wage theft is the difference between paying the utilities or losing service, between paying rent or getting evicted, between providing food or going hungry. But wage theft can have broader, systemic consequences in a community too—causing the children of wage theft victims to lose educational opportunities, exacerbating mental health problems among victims and their families, and making it more difficult for everyone to participate in the economy.

On top of all of that, wage theft and the underground economy deprive the government of billions of dollars in unpaid payroll withholding taxes that we need to expand our infrastructure

¹ See <http://www.coloradofiscal.org/cfi-analysis-wage-nonpayment-costs-colorado-workers-750m-per-year/>

² Eric Cortelessa, *How Trump Made Wage Theft Routine*, June 5, 2017, available at <http://prospect.org/article/how-trump-made-wage-theft-routine>.

³ Bernhardt, Annette, et al., *Broken laws, unprotected workers: Violations of Employment and Labor Laws in America's Cities*, Nat'l of Employment L. Project (2009).

⁴ <http://www.epi.org/publication/epidemic-wage-theft-costing-workers-hundreds/>.

and support our schools. The Colorado Fiscal Institute estimates that wage theft costs the state \$25-\$47 million in lost tax revenue.⁵

A Portrait of Wage Theft: Interviews with Denver Construction Workers

The construction industry in Colorado is booming as developers seek to create residential and commercial space to keep pace with our population boom. Yet the profits spurred by our real estate boom are not shared equally. In 2013, more violations of federal wage-and-hour violations were recorded in the construction industry than any other industry in Colorado. Day laborers in residential construction and affiliated occupations such as landscaping, masonry, roofing, and painting are among the most vulnerable to such abuses.

To evaluate the problem and gain a better sense of how it occurs, in 2015-2016, a research team from the University of Denver interviewed 170 low-wage immigrant workers who rely on informal hiring sites and the worker center, El Centro Humanitario, for support in finding jobs. In a follow-up study, they surveyed 411 day laborers. Of those surveyed, 68% reported having experienced wage theft—22% in the six months prior to being surveyed.

The results of those interviews also help to illustrate *how* wage theft occurs and why it can be so difficult to police. Low-wage workers explain that wage theft often follows the following patterns:

- Employers write bad checks.
- Employers promise to pay the worker at a later date, only to disappear. Day laborers call this the mistake of “dreaming for Friday.”
- Employers say they have not received payments from supervisors or contractors and cannot dispense wages. Workers often do not know the employer higher up the chain to contest this assertion or are too scared to come forward.
- Employers string workers along on subsequent projects with promises to pay accumulated wages on the next project, a practice known as “kiting.”

When workers know that they are owed unpaid wages they are several resources available to them, but because of the following factors, many workers never come forward to vindicate their rights:

- Many employees do not know that their rights have been violated. Many do not realize, for example, that they may have a right to overtime pay even if their employer pays them a “salary.” Other workers

⁵ Stiffler, Chris. 2014. Wage Non-Payment in Colorado: Workers Lose \$750 Million Per Year: An Analysis of Nonpayment of Legally Owed Wages in Colorado. Colorado Fiscal Institute.



may not realize that even though they're treated as an independent contractor by their employer, they may be an employee under the law. Other workers may not realize they're entitled to overtime pay even if they do not have legal documentation to work in the United States.

- Many workers have difficulty finding or knowing the requisite information about their employer. In employment relations with multiple layers of subcontracting (common in construction work), many day laborers only know who hired them and not contractors further up the employment chain.
- Many employers are “judgment proof,” meaning they are insolvent, have companies that are delinquent, or flee the state. In one case, a worker had a judgment for nearly \$70,000 for a workplace accident, unpaid wages, and penalties from the employer’s failure to carry worker’s compensation insurance. However, the worker never received his money because the employer proved impossible to locate.
- Many workers fear of reporting incidents or lack of trust in or access to the legal system.
- Many workers fear harassment or retaliation by employers. Many employees are afraid, for example, that the employer may also retaliate against friends or family that continue to work for the employer. Workers also fear that reporting an incident will lead the employer to “blacklist” the worker in future hiring relationships in the market.
- Many workers lack the time, money, cultural resources and English language skills to navigate the legal and court systems. Only 30% of day laborers surveyed spoke fluent English.
- Due to the above challenges and need to earn a day’s wage, most workers do little to recoup their wages. They rationalize that they must look for more work and “work hard”—often leading workers to internalize, rather than seek redress for their exploitation.
- Finally, many low-wage workers, including day laborers, are housing insecure, making it difficult for them to take the time and effort to contest exploitation. Lack of stable contact information complicates the efforts of legal agencies to maintain contact with workers to proceed with the claims process. Of 411 day laborers surveyed, 22% were homeless at the time of the survey, with an additional 16.5% experiencing homelessness within the past year. Nearly 60% had at one-time experienced homelessness and 19% lacked cell phones of any kind. Without contact information, investigators face challenges reaching workers to update cases or seek additional required information. Moreover, 41% of day laborers surveyed did not track the days and hours they worked, which can make reclaiming wages through small claims court or the CDLE’s Division of Labor Standards & Statistics wage claim process challenging, often requiring the assistance of trained and experienced advocates and investigators.

These factors combine to mean employers can often get away with cheating workers. Less than half of workers surveyed who had ever experienced wage theft reported doing anything to recover their wages. Only 35.6% requested assistance to recoup unpaid wages.

What the City Should Do

Colorado law provides that “[n]o unit of local government . . . shall enact any jurisdiction-wide law or ordinance with respect to minimum wages.” Colo. Rev. Stat. § 8-3-102(g)(II). That language prevents Denver from following other cities around the country in enacting a higher minimum wage than that required by federal or state law. The provision does not, however, prevent Denver from protecting its residents from the scourge of wage theft. In taking aggressive steps to remedy the problem, Denver could ensure that workers are paid the wages they are owed, that responsible employers do not face unfair competition from those who skirt the law, and that the City recovers tax revenue from businesses that engage in payroll fraud.

The following proposals serve those ends by (1) clarifying and strengthening the City’s wage theft prohibition; (2) expanding City-level enforcement, (3) using licensing, contracting, and permitting rules to deter misconduct and facilitate recovery of unpaid wages, and (4) empowering workers.

Clarify and Strengthen Wage Theft Prohibitions

Clarifying the City’s Ordinance Governing Wage Theft

An employer commits theft under Denver municipal law when it “knowingly obtains or exercises control over anything of value of another without authorization, or by threat or deception.” The ordinance expressly defines “thing of value” as “property, tangible or intangible, including, but not limited to, personal property, services, and wages for labor,” and makes the statute applicable only “only where the value of the thing involved is less than one thousand dollars (\$1,000.00).” Denver Mun. Code 38-51.8.

When the petty theft ordinance was broadened to cover wages in 2004, advocates considered it an important accomplishment in the fight for economic justice and a thriving and equitable marketplace. In practice, however, this protection has failed to live up to its promise. Many low-wage workers report that they are willing to call the police or other local law enforcement to report wage theft. (When day laborers interviewed by DU researchers were asked who they would call or what they would do if they experienced wage theft in the future, 107 workers—26% of the 411 surveyed—mentioned they would call the police.) But whether it be because they are under-resourced or not adequately trained about wage theft, the Denver Police Department, City Attorney, and District Attorney rarely intervene in these cases. Police officers and other law enforcement officials in Denver often tell workers that wage theft is a “civil matter,” and that it is not their job to enforce wage theft protections. Others have informed advocates and workers that the ordinance requires a showing of criminal intent that is difficult to establish in the typical



wage theft case. This is especially true considering the common employer avoidance strategy of claiming that they will soon pay a worker’s wages.⁶

To better empower law enforcement to protect workers from wage theft, the City should simplify and clarify its ordinance. As currently written, the ordinance does not explain that denying someone her pay is, for the purposes of the ordinance, the same as taking money out of her hands. For a model of clearer language Denver should look to Boulder’s ordinance, which is designed specifically to prohibit wage theft and provides that “[n]o employer or agent of an employer who is under a duty to pay wages or compensation shall fail to pay those wages or that compensation or falsely deny the amount of the claim for the payment of wages or compensation.” Boulder Mun. Code 5-3-13(a). This provision states, simply, that it is against the law to deny a worker his or her pay, without suggesting that law enforcement must establish that the employer specifically intended to permanently withhold wages.

Prohibiting Retaliation

One of the most direct impediments to protecting workers against wage theft—and one of the reasons that wage theft violations are so pervasive—is workers’ fear of coming forward to report it. Workers, and low-wage, immigrant workers in particular, face threats of retaliation in a variety of forms, including losing their jobs or facing other mistreatment by their employer, punishment directed toward a family member or friend of the complaining worker, or being reported to immigration enforcement, whether or not the worker has documents to work legally in the United States.

Federal and state law already prohibit employers from retaliating against employees that exercise their rights under the wage-and-hour laws—it violates both federal and state law, for example, to report a worker to ICE or cut her pay because she has filed a wage-theft complaint.⁷ But it can

⁶ For a discussion of this problem in other jurisdictions, see Markeshia Ricks, *DeLauro Targets Wage Theft*, New Haven Independent, Apr. 6, 2016, *available at* http://www.newhavenindependent.org/index.php/archives/entry/delauro_wage_theft/ (“Lugo said ULA has tried to get the New Haven Police Department to detain wage theft law violators and even encouraged employees to file complaints with the police, but they are often told that wage theft is a civil court issue.”).

⁷ See 29 U.S.C. § 215(a)(3) (“...it shall be unlawful for any person to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act generally”); Colo. Rev. Stat. § 8-6-115 (“Any employer who discharges or threatens to discharge, or in any other way discriminates against an employee because such employee serves upon a wage board, or is active in its formation, or has testified or is about to testify, or because the employer believes that the

often be difficult to establish that retaliation has occurred. These protections only apply to retaliatory actions taken by the employer accused of wage theft by the employee doing the accusing, and in many contexts only when the employee has made a formal complaint of wage theft to authorities.⁸ The protections, thus, do not cover more indirect forms of retaliation.

Denver should enact its own ordinance that prohibits

- (1) *any* employer—not just the employer reported for violating the wage theft prohibition;
- (2) from retaliating against *any* person, including any employee, prospective employee, or family member or friend of an employee;
- (3) for making *any* complaint regarding workplace violations, including but not limited to wage theft, even if that complaint was only made internally to another employee or the employer or to others.

For a model, the City should consider California’s or New York’s retaliation protections. California’s statute provides, among other things, that “any employer, or any person acting on behalf of an employer” shall not retaliate against “an employee” for reporting a violation of “local, state, or federal law” to the government, any law enforcement agency, or to the employer.⁹ New York’s statute similarly applies to retaliation based on any complaint an employee has made to “any person” that the employer has engaged in conduct that the employee, reasonably and in good faith, believes violates any provision of New York workplace protections.¹⁰

Additionally, the ordinance should make it easier to establish that retaliation has occurred when the circumstances suggest that it likely has. For example, like Seattle, the City could establish a rebuttable presumption of retaliation, at least for the purpose of civil enforcement, when the employer has taken an adverse action against the employee within 90 days of the employee making a complaint about illegal conduct.¹¹

employee may testify in any investigation or proceeding relative to enforcement of this article is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than two hundred dollars nor more than one thousand dollars for each violation.”).

⁸ See, e.g., *Cranford Rehab. Servs., Inc. v. Weissman*, 938 P.2d 540, 552 (Colo. 1997) (holding that Colo. Rev. Stat. § 8-6-115 is inapplicable where the state does not initiate an investigation of the employee’s complaint).

⁹ Cal. Lab. Code § 1102.5(a).

¹⁰ N.Y. Lab. L. § 215.

¹¹ Seattle Ord. 14.20.060.

Retaliation should be prohibited under the Denver Municipal Code Article II, proscribing obstruction of justice, and should be subject to potential criminal or civil sanctions, including fines and jail time.

Adding Penalties

Recent findings suggest that one of the most effective mechanisms for deterring wage theft is increasing the penalties for violations.¹² If the only consequence to employers intent on breaking the law is that they are required to pay back the small set of workers who assert their rights, it will almost always be economically rational to deny employees their lawful wages.

By increasing the penalties for wage theft, the City could upend this incentive structure. The ordinance should apply penalties for every week that an employer denies an employee her lawful wages. Where the wage theft is “willful,” the penalty should be triple the amount of unpaid wages up to \$999.00.

Allowing Workers or Third Parties to Sue to Enforce Their Rights under the Ordinance

Particularly if the City expands prohibitions against retaliation beyond protections afforded by state law and adds penalties per violation, it should also expressly provide workers with a private right of action for enforcing wage theft and retaliation laws.¹³ This private right of action should require that courts award prevailing workers both their attorney’s fees and the cost of pursuing their wage theft claim in court.

The City should also allow workers to assert their rights without fear of retaliation by designating third parties like workers’ centers to assert rights on their behalf and litigate a case, with recovery going to the worker and the worker’s identity only being revealed when necessary. Certain state

¹² See Daniel J. Galvin, *Deterring Wage Theft: Alt-Labor, State Politics, and the Policy Determinants of Minimum Wage Compliance*, American Political Science Association, *Perspectives on Politics*, 2016 (finding that, of all anti-wage theft policies passed at the state level in recent years, only increased penalties effectively deter employers from paying workers less than the minimum wage to a statistically significant degree)

¹³ Paul A. Diller, *The City and the Private Right of Action*, 64 *Stan. L. Rev.* 1109, 1172 (2012) (citing *Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913, 923 (Colo. 1997), and noting that the Colorado Supreme Court has assumed that state law allows home rule cities to create private rights of action).

laws, including New Mexico law, provide that organizations may sue on behalf of designees,¹⁴ and the Colorado Department of Labor and Employment (CDLE) already provides a mechanism for employees to authorize third parties to represent their interests in some aspects of the CDLE’s administrative investigation and adjudication process.¹⁵ Proxy enforcement of this kind is critical to protecting workers who may be afraid of coming forward to assert their rights.

Expand & Improve City-Level Enforcement

Creating a Labor Standards Enforcement Bureau within the City Attorney’s Office to Perform Proactive, Strategic Investigation and Enforcement

Along with the City Attorney’s and District Attorney’s authority to investigate and enforce violations of the City’s ordinance, state law also provides authority to both agencies to enforce violations of Colorado wage-and-hour law, independent of the administrative scheme governed by the CDLE.¹⁶

To ensure that the City Attorney focuses its enforcement efforts on systemic violators that have avoided being held accountable by federal, state, or private enforcement, the City should create a specialized bureau within the City Attorney’s office to focus on wage theft. That bureau could process and investigate complaints, spearhead enforcement efforts, work with other agencies to implement City licensing, contracting, and permitting rules relating to wage theft, and coordinate interagency cooperation.

Most importantly, this office would not be limited to reactive enforcement in response to complaints. Particularly because workers may not understand that their rights are being violated or may be too scared to come forward, most violations are never reported by victimized workers.

¹⁴ N.M. Stat. § 50-4-26 (“An action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and on behalf of the employee or employees and for other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action on behalf of all employees similarly situated.”).

¹⁵ See, e.g., Colorado Division of Labor Standards and Statistics, Authorized Representative Forms, available at <https://www.colorado.gov/pacific/sites/default/files/Authorized%20Representative%20Form%2008-15-16.pdf>.

¹⁶ Colo. Rev. Stat. § 8-4-111(8); see also *Berges v. Cty. Court of Douglas Cty.*, 409 P.3d 592, 595 (Colo. Ct. App. 2016) (“We begin by recognizing that a district attorney is ordinarily vested with authority to prosecute all violations of law that occur in his or her judicial district.”).



Indeed, available statistics from the CDLE suggest that many workers, and low-wage immigrant workers in particular, are not reporting violations. According to the University of Denver, while evidence suggests that foreign-born Latinos experience minimum wage violations at “double the rate of US-born Latinos and nearly six times that of U.S. born whites,”¹⁷ only 16.9% of CDLE claims in 2016 were Spanish language claims. Research demonstrates that workers laboring in jobs with the poorest conditions are also the least likely to complain and submit claims.¹⁸ This suggests that if state-level enforcement agencies wait for complaints of wage theft to come to them, they will never be able to address the problem.¹⁹

It is imperative, therefore, that enforcement agencies use proactive, strategic enforcement strategies to identify and root out wage theft. This office could identify chronic repeat violators through public filings—including the public database of CDLE adjudications created pursuant to Colorado’s Wage Theft Transparency Act²⁰—and perform investigations and enforcement in those workplaces. The office could also perform proactive investigation against employers reported by workers’ representatives for having violated wage theft laws.

Other cities have had considerable success creating specialized agencies to focus on wage theft enforcement. For example, San Francisco has an Office of Labor Standards Enforcement²¹ and Los Angeles has an Office of Wage Standards,²² with dozens of investigators responsible for

¹⁷ Bernhardt, Annette, Ruth Milkman, Nik Theodore, Douglas Heckathorn, Mirabai Auer, James DeFilippis, Ana Luz González, Victor Narro, Jason Perselshteyn, Diana Polson, and Michael Spiller. 2009. *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America’s Cities*. Center for Urban Economic Development, National Employment Law Project, & UCLA Institute for Research on Labor and Employment.

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

¹⁸ Weil, David and Amanda Pyles. Fall 2005. “Why Complain? Complaints, Compliance, and the Problem of Enforcement in the US Workplace.” *Comparative Labor Law and Policy Journal* 27(1): 59-92.

¹⁹ See Fine, Janice and Jennifer Gordon. 2010. “Strengthening Labor Standards Enforcement through Partnerships with Workers’ Organizations.” *Politics and Society* 38(4): 552-585. Drawing from: Weil, David and Amanda Pyles. Fall 2005. “Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace.” *Comparative Labor Law and Policy Journal* 27(1): 59-92.

²⁰ Adrian Garcia, *Newly Available Wage Theft Data Shows Nearly 130 Colorado Employers Violations*, The Denverite, Aug. 24, 2017, *available at* <https://www.denverite.com/newly-available-wage-theft-data-shows-nearly-130-colorado-employers-violations-41390/>

²¹ Office of Labor Standards Enforcement, S.F., *available at* <http://sfgov.org/olse/>.

²² The Office of Wage Standards, L.A., *available at* <http://wagesla.lacity.org/>.

investigating violations and performing enforcement functions. Miami-Dade County established an agency and process responsible for processing and adjudicating disputes.²³

Dedicating an office to prosecuting wage theft violations and proactively investigating wrongdoing would be a modest effort, but it would yield substantial benefits for workers. And by creating a formal bureau responsible for wage theft enforcement within the City Attorney's office, Denver would ensure that the City has the expertise to enforce wage theft violations and would signal to violators that they cannot avoid being held accountable.

Providing Information and Resources to Workers

Misconceptions about wage theft run rampant among workers and employers. Denver should consider targeted public education campaigns. For example, the City should explain to workers that they have a right to minimum wage and overtime whether or not they have documents to work in the United States legally and that workers can call the City or partnering community-based organization if they think their rights have been violated.

Partnering with Community-Based Organizations

Recent research documents the importance of partnering with community-based and labor-management organizations with strong ties to low-wage and immigrant workers. These organizations can help to serve as a bridge between workers and government agencies, as well as to expand the investigatory eyes and reach of the state.²⁴

The City's collaboration with non-government organizations in the investigation and enforcement of wage theft violations should take two forms. First, like Burlington, VT, San Francisco, and Seattle, along with many others,²⁵ Denver should partner with community-based organizations in performing intake functions for workers complaining of wage theft and investigating non-compliance. In doing so, the City could provide workers with a culturally- and linguistically-appropriate mechanism for reporting violations, which is critically important for low-wage immigrant workers who may be fearful about making first contact with a public enforcement agency. Collaboration of this sort would also expedite the complaint-resolution process for certain workers whom community organizations could help compile relevant

²³ Miami-Dade Ordinances § 22-5, available at https://library.municode.com/fl/miami-dade-county/codes/code-of-ordinances?nodeId=PTIICOOR_CH22WATH_S22-5ENWATHVI.

²⁴ Fine, Janice and Jennifer Gordon, *Strengthening Labor Standards Enforcement through Partnerships with Workers' Organizations*, *Politics and Society* 38(4): 552-585.

²⁵ See *id.*

documents and provide basic know-your-rights training. Further, worker advocacy organizations could help provide the City with timely information regarding ongoing violations.²⁶

The experience of day laborers in Denver highlights the potential effectiveness of partnering with community-based organizations to expand the City's outreach efforts. Of the 253 day laborers surveyed by the University of Denver who experienced wage theft and sought assistance, only 5.6% called the CDLE for help. In contrast, at least 40% sought assistance from just one community-based organization: El Centro Humanitario in Denver.

Additionally, the City should authorize the City Attorney's office to contract with private attorneys to bring enforcement actions on behalf of the City where public enforcement resources are insufficient to combat systemic violations. This would increase the City's ability to fund its wage-theft enforcement efforts and augment its public enforcement capacity.²⁷ Expanding public enforcement is particularly critical because impediments to private enforcement—for example, forced arbitration clauses, class waivers, and the threat of retaliation—often make it difficult for workers to bring actions to recover wages through private lawsuits.²⁸

Increasing Penalties for and Enforcement of Occupational Privilege Tax Violations in Industries with Rampant Misclassification

One of the most rampant forms of wage theft is the misclassification of employees as independent contractors. The problem is especially serious in the construction industry where, according to some estimates, approximately one-third of workers are misclassified.²⁹ Misclassification may be even more prevalent in Denver where recent high-profile wage theft

²⁶ Andrew Elmore & Muzaffar Chishti, *Strategic Leverage*, Migration Policy Inst., March 2018, *available at* <https://www.migrationpolicy.org/research/strategic-leverage-use-state-and-local-laws-enforce-labor-standards-immigrant> (“An investigation by [the New York Attorney General’s Office] benefited from timely information provided by a community-based organization called Wash New York that aims to improve conditions in the industry.”).

²⁷ *Am. Bankers Mgmt. Co., Inc. v. Heryford*, No. 16-16103, 2018 WL 1321084, at *2, --- F.3d ---- (9th Cir. Mar. 15, 2018) (permitting district attorney to enter into contingency-fee arrangement with private counsel to recover share of civil penalties).

²⁸ Through its Private Attorney General Act, California has created a robust mechanism for expanding public enforcement while minimizing the outlay of scarce state funds. Other states are considering doing the same. Kriston Capps, *Sorry, You Still Can't Sue Your Employer*, CityLab, July 11, 2017, *available at* <https://www.citylab.com/equity/2017/07/the-fine-print-that-keeps-you-from-suing-your-employer/533145/>.

²⁹ Françoise Carre, *(In)dependent Contractor Misclassification*, EPI, June 2015, *available at* <http://www.epi.org/publication/independent-contractor-misclassification/>.

cases have exposed systemic efforts to misclassify workers to avoid employment protections and payroll taxes.³⁰

Misclassification causes serious harm to workers in the form of the denial of overtime premiums, workers' compensation coverage, unemployment benefits, and social security. But it also causes substantial collateral harm to government revenue in the form of unpaid taxes. Much of the tax loss is borne by federal and state governments, but misclassification also reduces the City's tax revenue.

Among other taxes, the City collects an Occupational Privilege Tax (sometimes called a "head tax")³¹ that amounts to around \$10.00 per employee per month; some of this tax is paid by the employer directly and some is paid by the employee via a mandatory employer withholding. When employers misclassify workers, their goal is often to fraudulently avoid paying overtime, unemployment insurance, and workers' compensation premiums, but they also defraud the City of Denver by underpaying their Occupational Privilege Tax.

The City should increase penalties for employers that misclassify their employees and underpay Occupational Privilege Tax and should increase enforcement of these violations, particularly in the construction industries where abuses are likely to be rampant.

Using Licensing, Contracting, and Permitting Laws to Deter Misconduct and Facilitate Recovery of Unpaid Wages

Use Contracting Power to Deny Contracts to Violators and Ensure Payment of Lawful Wages

Denver has contracts with hundreds of businesses, ranging from cable and internet providers to contractors on City construction projects. The City should use its contracting power to ensure that workers on City projects are paid their lawful wages.

Before granting contracts, the City should require prospective contractors to disclose past workplace violations and deny contracts to prospective contractors that have been adjudicated to have violated labor standards without remedying the violation and identifying measures for future compliance, similar to the process that the Obama Administration implemented with its

³⁰ See, e.g., *Solis v. Circle Grp., LLC*, 2017 WL 1246487, at *1 (D. Colo. Apr. 5, 2017).

³¹ City of Denver, Occupational Privilege Taxes, Topic No. 61, available at https://www.denvergov.org/content/dam/denvergov/Portals/571/documents/TaxGuide/Occupational_Privilege_Tax.pdf.

Fair Pay and Safe Workplaces Executive Order.³² Denver should also require contractors to agree to be responsible for paying all employees working on their projects, and the City should establish a mechanism for withholding City funds owed under a contract until all employees on the project have received their lawful wages.

Leverage Licensing Authority

The City of Denver licenses well over fifty different kinds of businesses, including many in industries that are marked by pervasive wage theft, like restaurants, cleaning companies, and exotic dancer establishments. The City's licensing power is also a powerful lever in wage theft enforcement. No employer who has an unresolved complaint of wage theft at the City or State level should be granted a license to do business in the City or granted a City contract. Additionally, the City should consider a "three strikes and you're out" policy that would authorize the City to suspend the licenses of employers or issue other sanctions that have been adjudicated to have violated wage theft prohibitions on three occasions—even when they have compensated the complaining employee.

There is substantial precedent for policies of this sort. New Jersey municipalities like New Brunswick and Princeton have passed laws empowering the city to refuse to renew the license of a business found guilty of not paying for all hours worked, not paying at least the minimum wage, or not paying overtime. San Francisco agencies or departments can revoke or suspend any registration certificates, permits, or licenses for businesses that do not respond to wage theft complaints, at least until those complaints are resolved. Seattle agencies can refuse or revoke a license for at least one year if an employer has not paid an employee within 30 days after adjudication of a wage theft dispute. And Chicago agencies can deny an application for a business license if the applicant has either admitted guilt or been found liable of committing or attempting to commit a willful violation of the state wage theft law or two or more non-willful violations.³³

Prohibiting Building Permits for Developers or Contractors that Facilitate Wage Theft & Expediting Permits for Responsible Developers

The City should also use its building permitting process to hold accountable contractors and developers that facilitate wage theft by contracting with known, chronic violators of wage theft protections and payroll tax requirements. While developers may argue that they do not directly

³² Exec. Order, *Fair Pay and Safe Workplaces*, July 2014, available at <https://obamawhitehouse.archives.gov/the-press-office/2014/07/31/executive-order-fair-pay-and-safe-workplaces>.

³³ Local Progress: The National Municipal Policy Network, *Ending Wage Theft*, Sept. 9, 2013, available at <http://localprogress.org/wp-content/uploads/2013/09/Ending-Wage-Theft-1.pdf>.

employ the tens of thousands of misclassified and mistreated construction workers who toil on their projects, placing pressure on developers and general contractors is often the most effective means of deterring wage theft in the construction industry.

For these reason, California law now holds, in certain contexts, that contractors and developers are liable for wage theft committed on their projects by subcontractors or labor brokers.³⁴ Denver should follow a similar model by authorizing the Executive Branch to deny building permits to developers or general contractors whose subcontractors have on three or more occasions within a designated time period been deemed by a governmental agency or court to have committed wage theft or payroll fraud, *except* if the entity seeking the permit certifies that it will assume liability for the unpaid wages or benefits of any worker employed on the project.

Along with this stick, the City should consider providing a carrot for firms that play by the rules and encourage compliance. Like Austin, TX, the City should implement an expedited permitting program for building-permit seekers that have obtained certification for a labor standards compliance plan from the City or an approved third-party.³⁵

Expanding Licensing

The City should also consider expanding licensing to cover businesses that frequently facilitate wage theft. For example, the City could license check-cashing establishments and ensure that they do not kickback wages to employers that encourage their workers to use the check casher to check their paychecks. Illinois has used its licensing authority in a similar fashion to crack down on the systemic nickel and diming of employees of staffing agencies who are frequently unbanked and rely on check cashers to access their wages.³⁶

³⁴ Cal. Lab. Code § 2810.3 (“a direct contractor making or taking a contract in the state for the erection, construction, alteration, or repair of a building, structure, or other private work, shall assume, and is liable for, any debt owed to a wage claimant or third party on the wage claimant's behalf, incurred by a subcontractor at any tier acting under, by, or for the direct contractor for the wage claimant's performance of labor included in the subject of the contract between the direct contractor and the owner.”).

³⁵ Christopher Neely, *Austin City Council requires workers' protection for new expedited permitting program*, Community Impact Newspaper, Feb. 2, 2017, available at <https://communityimpact.com/austin/city-county/2017/02/02/austin-city-council-requires-workers-protection-new-expedited-permitting-program/>.

³⁶ Michael Grabel, *Illinois Revokes License of Temp Agency Check Cashing Store*, ProPublica, Jan. 6, 2015, available at <https://www.propublica.org/article/illinois-revokes-license-of-temp-agency-check-cashing-store>.



Requiring Certain Businesses to Post Surety Wage Bonds

Even where it is clear that a worker has not received the wages to which she is entitled by law, she often faces considerable difficulty recovering unpaid wages. Some of these difficulties result from impediments to accessing justice, like limited resources for public enforcement. But another significant obstacle to recovery arises when her employer is judgment proof or appears judgment proof. In these cases, it can take many years for an employee to recover lost wages if she is able to recover them at all.

Currently, Colorado has some protections for a segment of the workforce. Under the Colorado Mechanics Lien statute, contractors (including employees) can place a lien on the title of a property on which they worked when they do not receive wages owed to them by law.³⁷ But unlike other states like Wisconsin, Colorado does not provide other employees with the right to place a general “wage lien” on their employer’s property.³⁸ This means that in many cases, employees have tremendous difficulty enforcing judgments against the employers who have denied them their legal wages.

The City can help protect employees recover unpaid wages by requiring employers to obtain a “wage bond” as a condition of doing business in the City. Like the requirement to obtain other kinds of business bonds, this measure would require businesses in Denver to work with a third-party guarantor, who would ensure that workers are paid for their unlawfully denied wages. The City requires many of the businesses it licenses to obtain surety bonds—for example, marijuana dispensaries and pawn shops—so a “wage bond” requirement would impose minimal increased administrative burdens for the City.

After reviewing the issue and coordinating with advocates, community-based organizations, and experts, the City may determine that not all businesses need “wage bonds” or that the amount of the bond should vary from employer to employer. The City should focus on industries where wage theft is particularly common and where employers are most likely to claim poverty as a defense to wage theft claims.

As a model, the City can look to other states and cities that have implemented similar requirements in certain industries. Recently, the New York Department of State promulgated regulations requiring nail and beauty salons, some of the most common perpetrators of wage theft, to post wage bonds.³⁹ The amount of the bond varies depending on the number of

³⁷ Colo. Rev. Stat. § 38-22-101.

³⁸ Wis. Stat. § 109.09

³⁹ New York Nail Salon Industry Enforcement Task Force, Nail Salon Bond Coverage FAQ’s, *available at* <http://www.dos.ny.gov/licensing/appearance/Wage%20Bond%20FAQs.pdf>.

employees, and the State imposes penalties on businesses that do not post the bond. In New York City and California, legislators have enacted license and wage bond requirements for car wash employers.⁴⁰

Empowering Workers

Creating a Wage Theft Advisory Board

The City can empower workers in implementing wage theft protections and enforcing the law by establishing an official advisory board with a direct line of communication to the City Attorney's office and licensing authorities. Advocates have already established a Wage Theft Task Force to increase collaboration around the issue.⁴¹ But a formal relationship to the City's wage theft efforts would serve to further leverage community resources, increase accountability, and empower workers.

The Advisory Board could be constituted by elected officials, advocates, business leaders, academics, and workers. It could hold hearings, conduct investigations, and make recommendations for reforms to the City's labor laws. The Task Force could also be charged with preparing periodic reports to the City on the wage theft enforcement landscape and preparing evidence-based recommendations for increasing compliance with labor standards among Denver employers.

Requiring Employers to Honor Voluntary Requests to Deduct Contributions to Workers' Centers and Labor-Management Organizations

The City should also empower non-unionized workers to support labor organizations that represent their interests. New York City has implemented a landmark protection that requires fast food employers "upon authorization from a fast food employee . . . to deduct voluntary contributions from [that] employee's paycheck and remit them to the not-for-profit designated by such fast food employee."⁴² The ordinance is currently being challenged by employers who argue that they do not want to fund non-profit workers' advocacy organization, but the funds

⁴⁰ Andrew Elmore & Muzaffar Chishti, *Strategic Leverage*, Migration Policy Inst., March 2018, at 27, available at <https://www.migrationpolicy.org/research/strategic-leverage-use-state-and-local-laws-enforce-labor-standards-immigrant> ("An investigation by [the New York Attorney General's Office] benefited from timely information provided by a community-based organization called Wash New York that aims to improve conditions in the industry.").

⁴¹ See generally Wage Theft Campaign, *Centro Humanitario*, <http://www.centrohumanitario.org/campaigns/wage-theft-campaign/>.

⁴² N.Y.C. Code § 20-1302.



dedicated for these purposes are wages earned by employees, and they are remitted to labor organizations only upon authorization of the employee.

Employees who are members of unions often contribute union dues to support the union's activities on their behalf, but non-union workers rarely have a formal connection to the hundreds of organizations around the country that represent their interests. Experience in New York shows that non-union workers want to support these efforts and that laws like New York's can employer them to do so. Just one workers' advocacy organization in New York recently reported that 1,200 New York fast-food workers have pledged to contribute \$13.50 a month to the organization.⁴³ A Papa John's employee reported that workers like her volunteer to support organizations because "[w]e want to bring change not only in the fast-food industry, but in our communities."⁴⁴

⁴³ Steven Greenhouse, *Fast-Food Workers Claim Victory in a New York Labor Effort*, N.Y. Times, Jan. 9, 2018, available at <http://www.centrohumanitario.org/campaigns/wage-theft-campaign/>.

⁴⁴ *Id.*