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## Protecting Wages: The EJC Fights Wage Theft in D.C.

***Wage theft occurs when employers refuse to pay employees the correct wages by withholding an employee's stated rate of pay, overtime, or other earned compensation such as vacation. Every week, more than two-thirds of employees experience at least one incident of wage theft due to loopholes and a lack of enforcement. For low-wage earners, wage theft can result in incredibly severe consequences, like missed payments, high-cost loans and even foreclosures and repossessions. The EJC is leading efforts to secure workers their rightful wages.***

- A 2008 survey of large cities found that 64% of low-wage workers experience wage theft in the prior week. Twenty-six percent are paid under the legal minimum wage and 76% are denied overtime.<sup>1</sup>
- On average, each low-wage worker loses \$51 per week to wage theft, or \$2,634 per year. That amounts to 15% of their annual income, at average earnings of \$17,616 per year. The vast majority of these workers are over the age of twenty-five, and most are supporting at least one child.<sup>2</sup>
- Wage theft does not just impact underpaid individual workers: it also reduces state revenues through billions of dollars per year in tax and payroll fraud, places law-abiding employers at a competitive disadvantage, and depresses the consumer spending needed to fuel economic growth.
- Although D.C. mandates a minimum wage higher than national requirements and provides living or prevailing wages to government contractors, wage theft is critically under-enforced in the District. A recent report on wage theft gave D.C. an F in terms of wage theft protections.<sup>3</sup> The poor performance is due largely to the fact that, although D.C.'s laws are protective in theory, in practice workers have little opportunity to press claims independently, little protection from retaliation, and little financial benefit if they prevail.

### **Misclassifying employees robs them of their earned wages and benefits, and it's illegal.**

- An overarching problem in the arena of wage theft is misclassification, which occurs when employers treat employees as independent contractors rather than as employees. While employees are entitled to a number of rights under the law, including minimum wage and overtime pay, independent contractors are viewed as self-employed, and so are not entitled to these protections.
- No matter what an employer calls a worker, the law determines whether that worker falls under the category of employee or contractor. There is no bright line rule, but in general, the more control an employer has over the circumstances of a worker's employment, the more likely the worker should be considered an employee, and accrue rights and benefits accordingly.
- Too often, employers take advantage of workers' ignorance on this issue, and deny rightful wages, overtime, breaks, sick leave, vacation and other benefits while telling workers they are doing so legally. They are not. Misclassifying employees is in contravention of the law, and employers who do so face penalties in D.C.

### **Every employee is entitled to minimum wage.**

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<sup>1</sup> Tim Judson & Cristina Francisco-McGuire, "[Where Theft is Legal: Mapping Wage Theft Laws in the 50 States.](#)" Progressive States Network. June 2012 (at page 2).

<sup>2</sup> *Ibid.*

<sup>3</sup> *Id.* at page 7.

- Minimum wage in the District of Columbia is \$8.25 per hour. *All* employees, regardless of immigration status, are entitled to this wage. Tipped employees have slightly different minimum wage rules, but at all times workers must have net pay equal to the minimum wage. This means that, where tips plus the employee's wages do not equal minimum wage, the employer is responsible for covering the shortfall.
- Additionally, D.C. requires a minimum daily wage: workers must be paid for four hours on any day they are scheduled to work, unless they are regularly scheduled for shorter shifts than that. Employees are entitled to their agreed-upon wage for a full four hours, and minimum wage for any remaining scheduled hours not worked. Workers frequently are not aware of this law, and do not know to assert their rights under it.

#### **Employers must pay their employees what they promise.**

- Many protections are geared toward ensuring that all employees receive a minimum wage. But minimum wage employees are not the only employees at risk of losing wages to employer theft. Where employers have agreements for higher wages, employees are still vulnerable to reduced compensation.
- The D.C. Office of Wage and Hour (OWH) will not seek higher wages without concrete proof of the wage. Instead, it will only help workers to recover minimum wage, even if workers have been earning more than this for years. This means that employers who don't keep records are in a win-win position: Not only do they save time or money by not keeping records, but when an employee brings a wage theft claim, OWH doesn't require them to pay the employee's full wages.

#### **Minimum wage is not enough: Employers must pay living or prevailing wages where the law requires.**

- In D.C., all workers performing services under public contracts for more than \$100,000 are entitled to the D.C. living wage of \$12.50 per hour. In some cases, government contractors are entitled to a prevailing wage, which often exceeds the living wage.
- Though the Living Wage Act has been in force since 2008, the OWH has not adopted appropriate procedures for determining when a worker is entitled to a living wage, and has expressed uncertainty about its power to enforce the law. This leaves the law without teeth, and living wage workers with little recourse.

#### **By denying overtime pay, employers are robbing the hard working men and women who go over and above to do a job.**

- A standard work week is 40 hours. Those employees who work longer than that are entitled to compensation. Regardless of whether a non-exempt employee is paid a salary or by the hour, if he or she works more than 40 hours in one week, they must be paid overtime pay for every additional hour, equal to base rate of pay plus half. Employees are also entitled to overtime for every hour over eight hours worked in one day.

#### **Workers can't assert their rights if their employers can punish them for it.**

- Workers fear getting fired or facing other forms of retaliation when they come forward with wage violations. When retaliation occurs, little is done to punish employers or remedy the situation for the worker, further discouraging workers from asserting their rights.

#### **There are time limits to enforcing worker rights.**

- Many workers do not realize that there is a time limit to filing a claim for a wage-hour violation. In D.C., this time limit is three years from the date of violation – even though employees may not realize that a violation occurred until later, especially if an employer has failed to post information about an employee's rights. (A court may hold

that an employee’s “clock” doesn’t start until the employer posts required information or until the employee became aware of the violation of her rights). An employee is entitled to recoup damages for the three years preceding the date of filing.

- Many workers lose a portion of their wages because they have only three years to file unpaid wage claims in court – and this time is not tolled, or paused, while a claim is pending before the administrative agency. This is especially problematic because claims tend to languish at the OWH, which means a worker may lose the option to file in court if the OWH takes too long to resolve the case or the Attorney General delays filing a complaint in court.

## **The EJC’s Solutions**

***After years of experience with wage theft at the Workers’ Rights Clinic, the EJC knows exactly the pitfalls employees face with D.C.’s current wage and hour laws. To solve these problems, the EJC developed a comprehensive list of reforms for wage and hour violations in consultation with workers, community organizations, employment law practitioners, and government officials. The EJC continues to press for these reforms.***

- In coalition with D.C. Jobs with Justice, the EJC helped form a group of construction workers called La Unión de Trabajadores to advocate for their own rights. In June, this group secured a significant victory: a new partnership with the Metropolitan Police Department, wherein police officers agreed to investigate and document wage theft cases. MPD agreed to train officers to document all reports of wage and hour violations in their notebooks capturing as much detail as possible surrounding the dispute.
- In coalition with other community groups and unions, the EJC has convened a group of experienced wage-and-hour law practitioners to strengthen D.C. wage statutes. It demonstrated the need for reform to the D.C. Council Committee on Housing and Workforce Development at several hearings during this council term. EJC-trained worker activist Rudolfo Sanchez testified before the committee.
- In amending wage theft legislation, Committee Chair Michael Brown relied upon the EJC’s expertise and testimony regarding current flaws with the Office of Wage-Hour’s handling of wage theft claims, and adopted several of the EJC’s recommendations to counteract workplace fraud.

### **Employees have a right to know and enforce the terms of their employment.**

- The EJC believes the law should require companies to give workers written notice of the terms of employment as soon as an employee starts work, including rate of pay, work schedule, job duties, training terms, and other information that will help workers identify employers and recoup unpaid wages.
- When employers fail to keep proper employment records, a worker’s testimony about their rate of pay and hours worked should be presumed true. This means that, unless an employer comes forward with compelling evidence to the contrary, the employee’s records and testimony about hours and working dates should be considered true by the court or administrative judge. This eliminates the moral hazard employers currently face, where it may be in their interest to disregard record keeping requirements.
- To discourage the illegal misclassification of workers, the EJC is working to strengthen laws, penalties, and enforcement concerning this intentional and costly type of abuse that systematically exploits workers.

### **Employers who violate the law should fully compensate employees and pay appropriate penalties.**

- In states with strong employment rights, employers are on notice that failure to follow the law will result in penalties. In California, for example, for every day after a termination that an employer fails to pay final wages owed, the employer is assessed a fine equal to a full day’s wages (up to 30 days). In D.C., however, companies have little incentive to comply with the minimum wage, living wage, prevailing wage, paid sick leave, or overtime laws

because OWH will not allow employees to recoup liquidated damages or secure penalties. Even when workers win their wage theft claims in court, many have trouble recovering the money owed to them.

- Workers should automatically be awarded liquidated damages to fully make them “whole,” or compensate them for the economic hardship caused by missed wages. Liquidated damages take into account all of the losses incurred when an employee is denied their wages. For low-income workers especially, missing a paycheck can have dramatic consequences, as workers may be forced to incur high-cost loans or forgo paying bills – like rent, utilities and car payments. D.C. should look to Massachusetts as a model, where employees are able to recover double-liquidated damages, interest on unpaid wages, court costs, and attorney fees.
- To discourage wage theft on a broader scale, employers who violate the law, especially repeat violators, must be required to pay more than just wages due; they must also pay penalties. Effective penalties should be of an amount sufficient to discourage employers from engaging in wage theft.
- When an employer fails to pay ordered wages and costs, D.C. should assist workers in establishing liens against wage theft perpetrators and should suspend business licenses of companies that fail to comply with orders until full payment is made.
- Even with strong enforcement of the law, workers may be reluctant to pursue wage violations if an employer can retaliate against them for speaking out, by cutting hours, giving undesirable shifts or even firing the employee. The law must include broad protections for workers, including a broad presumption that adverse action within 90 days of a complaint is unlawful retaliation. The law should specify that victims of retaliation are entitled to reinstatement and liquidated damages.

**The Office of Wage-Hour must enforce laws that protect against wage theft. Without enforcement, current wage and hour laws are meaningless.**

- Put simply, OWH must step up to the plate. OWH must fully investigate claims to help workers recoup wage shortfalls and fully enforce the protections provided by the law. OWH, or the Office of Administrative Hearings, must adjudicate workers’ unpaid wage claims promptly, issuing final orders that are enforceable in court. The factual findings of the administrative law judges should be given deference during appellate review.
- Workers should be allowed to bring “representative” actions, where one or more workers or another interested party can file claims for an entire group, or class of similarly-situated workers. This ensures that those who fear coming forward as individuals can recover lost wages.
- The statute of limitations period should not begin until an employer posts required legal notices of workplace rights or workers gain actual knowledge of their legal rights. Though, currently, many courts would agree to toll the statute if an employer unlawfully fails to post notice of an employees’ rights, the law should clearly state that this is the case. The limitations period should also be tolled while claims are pending at OWH so that workers do not lose the opportunity to vindicate their rights in court because their claim is bogged down in D.C.’s bureaucracy.