Written Testimony of
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Why the EmPIRE Worker Protection Act Should Be Added to the Budget and Why the Governor's Proposed Changes to New York Labor Law § 191 Should be Rejected

Thank you to the Committee Chairs for the opportunity to submit this written testimony. My name is Hugh Baran, and I am a Board Member of the National Employment Lawyers Association-New York affiliate. NELA/NY has more than 400 members and is the New York affiliate of the National Employment Lawyers Association (NELA), the nation's only professional bar organization comprised exclusively of lawyers who represent individual employees. I am also a partner at Katz Banks Kumin LLP, a workers' rights law firm serving workers across New York state. We represent workers in a range of disputes concerning wage theft, discrimination, sexual harassment, forced labor, and other violations of state workplace laws.

I submit this testimony concerning the Executive Budget's funding of workplace enforcement, and why the EmPIRE Worker Protection Act (S448 Hoylman-Sigal/A4278 Simon) needs to be included in the budget as a revenue raiser to fund future DOL enforcement efforts.

My testimony will primarily cover three topics: (1) how New York is failing our workers, from whom $3 billion in wages are stolen every year, as a result of inadequate enforcement of the Labor Law; (2) how inadequate enforcement of the Labor Law undermines other proposed Labor Law reforms, including a potential increase in the minimum wages; and (3) how the EmPIRE Act would address the enforcement gap in the Labor Law while providing a dedicated revenue stream of approximately $103 million annually to fund the Department of Labor's enforcement efforts for years to come. The $103 million can be used to fund staff salaries, hire new staff, improve retention of existing staff, and much more.

In addition, I will also briefly address why the Legislature should reject the Governor's misguided proposal in her Executive Budget, ELFA Article VII, Part U to gut the protections of New York Labor Law § 191, which requires manual laborers to be paid weekly.

New York's $3 Billion Wage Theft Crisis and the Current Enforcement Gap

In the eight decades since Congress enacted the Fair Labor Standards Act, our federal wage and hour law, private litigation has been critical in establishing a national minimum wage floor to

protect employees.[1] The same has been true since New York enacted its own minimum wage and overtime laws, as state and federal labor departments cannot enforce the law alone.

Workers' access to the courts to enforce workplace rights has only become more important in recent decades due to the growing problem of wage theft in lower-paid service-based jobs. A 2008 study by the National Employment Law Project (NELP) found that 68% of 4,387 workers in low-wage industries in Chicago, Los Angeles, and New York City had experienced at least one pay-related violation in the prior week.[2] A 2014 report by the Economic Policy Institute (EPI) estimated that U.S. workers lose over $50 billion annually due to wage theft.[3]

Most directly for our state, a 2018 report in New York found that workers here are losing $3 billion annually to wage theft violations.[4] That means $3 billion in income isn't reaching our communities every single year.

New York legislators, recognizing the growing epidemic of wage theft in this state, have taken important steps to strengthen the state's private enforcement mechanisms. The Legislature passed the groundbreaking Wage Theft Prevention Act, creating new wage notice requirements and stiff penalties for not providing them, in order to prevent wage theft before it happens. New York also amended the liquidated damages provision of the Labor Law to provide for 100% liquidated damages in Labor Law actions. And finally and most significantly, New York significantly increased the minimum wage over the past decade, to $15/hour and, most recently, to $16/hour in New York City, Long Island, and Westchester.

But several trends have jeopardized New York workers' ability to exercise their rights under these new laws. On the public enforcement side, caseloads have risen at DOL, but staffing levels have declined. The current investigatory staffing levels of the DOL actually represent a major decrease from decades ago. In fact, the DOL has fewer than half the investigators than it had several decades ago. In 1966, the DOL had over 300 labor inspectors. As of the end of 2017, the DOL had 115 investigative officers handling 16,400 open cases.[5]

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[1] *See* J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1150 & n.42 (2012) (discussing critical role of private enforcement in statutory design of the Fair Labor Standards Act).

[2] Annette Bernhardt et al., *National Employment Law Project, Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*, at 20–21 (2009), https://www.nelp.org/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf.

[3] Brady Meixell & Ross Eisenbrey, Econ. Policy Inst., *An Epidemic of Wage Theft is Costing Workers Hundreds of Millions of Dollars A Year* 2 (2014), https://www.epi.org/files/2014/wage-theft.pdf.

[4] Center for Popular Democracy, *By a Thousand Cuts: The Complex Face of Wage Theft in New York* (Nov. 2016), https://populardemocracy.org/sites/default/files/WageTheft%2011162015%20Web.pdf.

[5] Make the Road NY, Center for Popular Democracy, *Coming Up Short: The State of Wage Theft Enforcement in New York* (2017), https://maketheroadny.org/wp-content/uploads/2019/04/Coming-Up-Short_-The-State-of-Wage-Theft-Enforcement-in-NY-4_8_19.pdf.

On the private litigation side, fear of retaliation has posed a significant hurdle to enforcement efforts. Workers in low-wage jobs face a significant risk of retaliation from their employer for reporting employment law violations. In a 2009 NELP study of more than 4,000 workers in low-wage jobs, 43% of those who "reported that they had made a complaint to their employer or attempted to form a union" in the prior year had faced one or more forms of illegal retaliation—including having their pay or hours cut, being harassed or subjected to increased workloads, being threatened with immigration consequences, and being fired or suspended.[6] In a more recent study by the Raise the Floor Alliance and the National Economic and Social Rights Initiative, 61% of workers who made a complaint to their employer faced retaliation, as did 80% of workers who made a complaint to a government agency and 89% of those who took group action to challenge employer practices.[7]

This risk of retaliation is even higher for immigrant workers, particularly given the current vicious anti-immigrant climate being stoked by the second Trump administration. The last Trump administration conducted multiple high-profile workplace raids. ICE recently conducted a highly publicized workplace raid in Newark, New Jersey—showing it is likely to pursue such raids in New York in the coming weeks and months. Such actions appear to be emboldening employers as well.

While New York has strong anti-retaliation laws and recently expanded them to include specific protections against immigration-related retaliation, a NELP 2019 study found that such strong anti-retaliation laws "remain under-utilized by low-wage workers" and are still "difficult and time-consuming to enforce."[8] While these laws "can address retaliation after the fact," "they continue to expose workers to immediate financial and emotional consequences that dissuade workers from holding employers accountable."

It is particularly scary for workers to come forward as named plaintiffs in employment law claims. Making matters worse, most courts do not allow workers to proceed anonymously (i.e., under a pseudonym) in wage theft cases, absent concrete evidence that they face much greater retaliation than the typical plaintiff.[9] Because the typical plaintiff in employment law cases faces such a high risk of retaliation already, meeting this extra hurdle is quite difficult.

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[6] *See* Bernhardt, *Broken Laws, Unprotected Workers* 24–25 (2009), https://www.nelp.org/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf.

[7] *See* Raise the Floor Alliance & National Economic & Social Rights Initiative, *Challenging the Business of Fear* 13 (2016), https://www.raisethefloralliance.org/report.

[8] *See* Laura Huizar, National Employment Law Project, *Exposing Wage Theft Without Fear* 21 (2019), https://www.nelp.org/wp-content/uploads/Retal-Report-6-26-19.pdf.

[9] *See, e.g.*, *Agerbrink v. Model Service LLC*, No. 14 Civ. 7841 (JPO)(JCF), 2016 WL 406385, at *10 (S.D.N.Y. Feb. 2, 2016) ("[C]ommonplace concerns over termination or blacklisting will not ordinarily justify anonymity unless the victim would suffer exceptional repercussions . . . . The plaintiff's worries of 'termination and blacklisting' do not rise to the level of extraordinary consequences meriting anonymity."); *Doe I v. Four Bros. Pizza, Inc.*, No. 13 CV 1505 (VB), 2013 WL 6083414, at *10 (S.D.N.Y. Nov. 19, 2013) (denying motion to proceed anonymously despite workers' evidence that Defendants had "repeatedly threatened to 'call the police or immigration on any one of their employees' and have, in fact, followed through on those threats in certain instances.").

In addition to retaliation, other hurdles, including the difficult economics for private attorneys in pursuing low-dollar violations, have posed obstacles to workers trying to address violations of their rights through private enforcement.

How the EmPIRE Act Closes the Enforcement Gap

New York can act to address the state's lack of public enforcement capacity by passing the EmPIRE Act (S448/A4278). Inspired by California's Private Attorneys General Act (PAGA), the EmPIRE Act would allow workers, whistleblowers, and labor organizations to stand in the shoes of the state and seek civil penalties, declaratory, and injunctive relief to address wage & hour violations, health & safety violations, and retaliation violations of the Labor Law.

Claims brought under the EmPIRE are public in nature. The people or labor organizations filing claims do so on behalf of the state government, not in the name of any private party.

EmPIRE encourages robust enforcement of the Labor Law, awarding the workers affected by violations of the Labor Law a share of the civil penalties recovered. Where the state chooses not to intervene in the action, relators (i.e., those filing EmPIRE claims) who succeed are awarded 40% of all civil penalties they enforce, to be equitably distributed among affected workers. The remaining 60% goes to the state Department of Labor to fund public enforcement efforts. Where the state chooses to intervene in the action, 30% of the penalties recovered would be distributed among affected workers, while the remaining 70% would go to the Department of Labor. Prevailing relators would also be able to win injunctive and declaratory relief that brings lawbreaking employers into compliance with the Labor Law, as well as reasonable attorney's fees and costs for bringing the EmPIRE action.

The EmPIRE Act does not create any new requirements for employers. It simply expands public enforcement of labor laws already on the books here in New York.

How the EmPIRE Act Raises $103 Million in Annual Revenue

The EmPIRE Act thus incentivizes more workers to play an active role in Labor Law enforcement and, in so doing, generates revenue for the New York State Department of Labor. The Act specifies that civil penalties recovered for the Department of Labor are to be used for the "enforcement of [the Labor Law] and education of employers and employees about their rights and responsibilities under [the Labor Law], to be continuously appropriated to supplement and not supplant the funding to the agency for those purposes."

Right now, the state leaves millions of dollars on the table in penalties against law-breaking employers. These penalties have already been authorized by New York statutes to deter companies from breaking the law, but the state rarely collects them to the full extent permitted by law. And more importantly, the DOL simply does not have the resources to enforce the Labor Law in every single workplace, and it never will even if the agency's funding is temporarily increased in this budget, or any given budget.

By contrast, when a relator brings a lawsuit under EmPIRE, 60% to 70% of the penalties recovered (depending on whether the state intervenes in the action) go to the state. The revenue will more than cover any administrative costs to the state associated with EmPIRE.

The Private Attorney General's Act (PAGA) in California has generated an average of $67 million per year from 2016 to 2021.[10] A recent report from the Center for Popular Democracy concluded that the EmPIRE Act would generate approximately $103 million per year in annual expected revenue once attorneys have become familiar with this new mechanism.[11]

Because the revenues generated for DOL must be continuously appropriated to supplement and not supplant the funding of the agency for enforcement of the Labor Law, a permanent revenue stream for DOL's enforcement efforts would be created and protected.

The Legislature should reject ELFA Article VII, Part U – the Governor's Proposal to Gut New York Labor Law Section 191 – in its entirety.

The National Employment Lawyers Association/New York (NELA/NY) strongly opposes the Governor's proposed ELFA Article VII. Part U – Limit Liquidated Damages in Certain Frequency of Pay Violations. The Governor's proposal—which largely mirrors the proposal the Legislature rejected in last year's budget negotiations—would gut the protections of New York Labor Law § 191, which requires manual laborers to be paid weekly. It would also apply retroactively, limiting manual laborers' rights to recover damages for late-paid wages in *already-filed* cases pending in the courts.

Under current law, liquidated damages for late-paid wages are equal to 100% of the late-paid wages. The Governor's proposal, in a bit of legislative sleight of hand, is to replace these liquidated damages with the ability to recover only "lost interest found to be due for the delayed payment of wages calculated using a daily interest rate for each day payment is late based on the annual rate of interest then in effect, as prescribed by the superintendent of financial services pursuant to section fourteen-a of the banking law." This effectively replaces an effective remedy equal to 100% of late paid wages with an annually changing calculation of "lost interest" that will end up being a minuscule amount—likely less than 5 percent of late paid wages, if even that.

The proposed bill provides that a second-time violator may be penalized by a trebling of unpaid interest, but that is meaningless because the amount being trebled is already miniscule, and will thus not disincentivize employers from stealing manual workers' wages by paying them late.[12] It is also meaningless if the repeat violation is still being challenged by the employer, as the Governor's proposal says a prior violation only triggers this higher interest payment if the employer is not currently appealing/challenging the prior finding and their time to do so has

[10] Rachel Deutsch, Rey Fuentes, Tia Koonse, Center for Popular Democracy, UCLA Labor Center, and Partnership for Working Families, *California's Hero Labor Law: The Private Attorneys General Act Fights Wage Theft and Recovers Millions from Lawbreaking Corporations* (2020), https://www.populardemocracy.org/sites/default/files/PAGA%20Report_WEB.pdf

[11] E. Karl, Ctr. for Popular Democracy, *Making Rights Real: How the Whistleblower Enforcement Model Can Address the Crisis in Labor Rights Enforcement* 18-19 (2024), https://www.populardemocracy.org/sites/default/files/CPD%20Whistleblower%20Enforcement%20Report%20Full%20Nov%202023.pdf.

[12] The Governor's proposal implicitly acknowledges this by – somewhat inexplicably – making liquidated damages available if there are 2 or more prior violations of the statute. It is unclear why manual laborers whose employers have been determined to have broken the law multiple times should be able to get adequate compensation, but not other manual laborers.

expired. (This heightened penalty is further limited by the requirement that the prior finding is one "relating to employees performing the same work.")

Without an enforceable requirement to pay weekly, employers can pay when they choose, leaving payment unpredictable for low-wage workers who live paycheck-to-paycheck. By eliminating liquidated damages and replacing them with "lost interest," which in reality will be minuscule, the proposal eliminates any meaningful incentive for employers to comply with the weekly pay requirement. The current liquidated damages available, by contrast, adequately compensate workers for the harms that flow from having your wages paid late—such as the stress and turmoil that come with falling behind on your bills and being unable to cover unexpected medical costs— that are often difficult to quantify and measure.

The frequency of pay provision of the Labor Law requires manual workers to be paid weekly, with some exceptions. Section 198 of the Labor Law allows workers to recover 100 percent of liquidated damages for any untimely payment of wages in recognition that untimely payment of wages creates hardship for manual workers, many of whom live paycheck to paycheck. Liquidated damages are critical to compensate workers for damages they may have incurred as a result of not having been paid timely all the wages they legally had earned—damages which are otherwise difficult to measure and prove.

This section acts as an incentive for employees to bring cases for payment violations and in doing so, it is common to find other underlying issues with wage theft, lack of overtime pay and other violations. Without liquidated damages, there is no adequate compensation for workers when employers violate the law.

In 2019, the Appellate Division, First Department ruled in *Vega v. CM & Associates Construction Management, LLC*, 175 A.D.3d 1144 (1st Dep't 2019), that "manual workers" who received full pay but were paid late in violation of the weekly frequency of payment provision of the Labor Law have a private right of action and can recover liquidated damages for untimely payment of wages. While the Second Department recently ruled otherwise in *Grant v. Glob. Aircraft Dispatch*, 223 A.D.3d 712 (2d Dep't 2024), most federal judges who have addressed the issue have since concluded that *Vega* was correctly decided and is consistent with the statutory purposes of the Labor Law—and would best allow workers to vindicate their rights to weekly pay. *See Phoenix v. Cushman & Wakefield U.S., Inc.*, No. 24 CV 965, 2025 U.S. Dist. LEXIS 18268, at *12 (S.D.N.Y. Jan. 31, 2024) (noting "the near unanimous view by courts within this Circuit that have weighed in on the *Vega/Grant* split" that *Vega* was correctly decided); *Zachary v. BG Retail, LLC*, No. 22 CV 10521 (VB), 2024 WL 554174, at *7–9 (S.D.N.Y. Feb. 12, 2024) (concluding that the Court of Appeals is likely to follow *Vega*, not *Grant*, and that "The stated legislative purposes of the 2010 amendments [to the Labor Law] . . . are unquestionably better served by a private right to enforce Section 191 than by requiring injured employees to submit administrative complaints and hope for an official enforcement action."); *Gamboa v. Regeneron Pharma., Inc.*, No. 22-CV-10605 (KMK), 2024 WL 815253, at *5–6 (S.D.N.Y. Feb. 27, 2024) (same); *Sarmiento v. Flagge Contracting Inc.*, No. 22- CV-9718 (VSB)(JLC), 2024 WL 806137, at *8–10 (S.D.N.Y. Feb. 27, 2024) (same); *Bazinett v. Pregis LLC*, 1:23-CV-790 (MAD/ML), 2024 WL 1116287, at *5–9 (N.D.N.Y. Mar. 14, 2024) (same); *Garcia v. Skechers USA Retail, LLC*, No. 23-CV-1055 (PKC) (JAM), 2024 WL 1142316, at *6 (E.D.N.Y. Mar. 15, 2024) (same); *Espinal v. Sephora USA, Inc*., 2024 U.S. Dist. LEXIS 170384 (S.D.N.Y. Sep. 19, 2024) (same); *Carasquillo v. Westech Sec. & Investigation Inc.*, No. 23 CV 4931, 2024 U.S. Dist. LEXIS 167856

(S.D.N.Y. Sept. 17, 2024) (same); *Charles v. United States of Aritzia Inc.*, No. 23 Civ. 09389, 2024 U.S. Dist. LEXIS 165121 (S.D.N.Y. Sept. 12, 2024) (same); *Bryant v. Buffalo Exch., Ltd.*, 2024 U.S. Dist. LEXIS 140311 (S.D.N.Y. Aug. 6, 2024) (same); *Aguilar v. Calexico Cinco LLC*, No. 22 CV 6345, 2024 U.S. Dist. LEXIS 115935 (E.D.N.Y. June 28, 2024) (same), *adopted by* 2024 U.S. Dist. LEXIS 144208 (Aug. 13, 2024); *Birthwright v. Advance Stores Co. Inc.*, 2024 U.S. Dist. LEXIS 113733 (E.D.N.Y. June 27, 2024) (same); *Covington v. Childtime Childcare, Inc.*, 2024 U.S. Dist. LEXIS 102155 (N.D.N.Y. June 10, 2024) (same); *Cooke v. Frank Brunckhorst Co., LLC*, 734 F. Supp. 3d 206 (E.D.N.Y. 2024) (same); *Levy v. Endeavor Air Inc.*, 2024 U.S. Dist. LEXIS 60332 (E.D.N.Y. Mar. 29, 2024) (same); *Garcia v. Skechers USA Retail, LLC*, 2024 U.S. Dist. LEXIS 46109 (E.D.N.Y. Mar. 15, 2024) (same); *Bazinett v. Pregis LLC*, 2024 U.S. Dist. LEXIS 44869 (N.D.N.Y. Mar. 14, 2024) (same).

The types of workers who qualify as manual workers include a wide range of professions including cleaners, construction workers, restaurant and retail staff, hotel workers, security guards, landscapers, and other workers who are paid hourly and spend at least 25% of their work time engaged in physical tasks.

The legislature decided over a century ago that manual workers have to be paid weekly, to protect low-paid workers generally "dependent upon their wages for sustenance." *People v. Vetri*, 309 N.Y. 401, 405 (1955). Without liquidated damages, which the Governor's language eliminates, there is no disincentive for employers who refuse to comply with this provision of the Labor Law.

Offending employers cannot plausibly complain that their manual workers "agreed" to be paid less frequently than what Labor Law § 191.1(a) requires. For even if a manual worker "agreed" to receive her wages less often than once a week, section 191.1(a) would be read into the parties' agreement. This is so because where a statute prohibits the term of a contract "[t]he statute reads itself into the contract, and displaces inconsistent terms." *Beth Israel Medical Center v. Horizon Blue Cross and Blue Shield of New Jersey, Inc.*, 448 F.3d 573, 584 (2d Cir. 2006) (emphasis added), quoting Chief Judge Cardozo in *Metropolitan Life Ins. Co. v. Conway*, 252 N.Y. 449, 451- 52, 169 N.E. 642 (1930).

There is nothing novel about laws imposing liquidated damages for untimely payment. For example, the Freelance Isn't Free Act, which was signed in November 2023, provides double damages for independent contractors when they are paid late. The proposed language would eliminate for manual workers a protection the Governor just made a state-wide protection for independent contractors.

Moreover, liquidated damages are available for late payment of wages under the Fair Labor Standards Act (FLSA) even though that statute does not contain an express pay frequency requirement. *See* Craig Becker, *The Check Is In the Mail: Timely Payment Under the Fair Labor Standards Act*, 40 UCLA L. Rev. 1241 (1993). It would be anomalous if liquidated damages could be imposed for untimely payment of wages under a law that does *not* contain a pay frequency requirement, but *not* imposed under one that *does* (Labor Law § 191.1).

Nor is there anything unreasonable about a 1 to 1 ratio between the untimely-paid wages and the resulting award of liquidated damages. By comparison, consider California's "waiting time" penalty statute, discussed in *Pavillard v Ignite Intl., Ltd.*, 2022 US Dist Lexis 77806, at *8-9 (CD Cal Apr. 28, 2022), *aff'd*, 2023 U.S. App. LEXIS 30624, at *2 (9th Cir Nov. 17, 2023).

There, a 30+ day delay in paying the plaintiff's wages resulting in the employer being liable for *30 times* as much in penalties as the amount of the unpaid wages. Or consider the statute protecting seamen's wages in *Griffin v. Oceanic Contractors*, 458 U.S. 564, 578 (1982). Under that statute, the delayed payment of a single $412 paycheck caused the employer to be liable for liquidated damages of a 750 to 1 ratio. If an employer can be made to pay liquidated damages of a 30 to 1 ratio under California law, or a 750 to 1 ratio under the statute in *Griffin*, then the Labor Law's 1 to 1 liquidated damages ratio is extremely modest by comparison.

In addition, as we have seen firsthand in our experience enforcing the Labor Law, manual workers are frequently underpaid due to inaccurate timekeeping policies or time-shaving. Those violations are often difficult to detect when wages are paid late. When pages are paid promptly, on a weekly basis, workers can check their wages against their recollections of hours worked and take prompt action to correct any inaccuracies. In that way, the ability to pursue damages for both late pay and off-the-clock work serves the goals of compensating manual workers fully for their work and deterring employers from underpayment and late payment—and detecting and remedying these violations when they do occur.

It is important to note that many large businesses can easily apply for a waiver of NYLL § 191 by filling out a one-page form with the Department of Labor. Nearly all waiver applications are granted.

Finally, it is simply outrageous that the Governor's proposal would affect already-filed cases that are pending in the courts. Workers have filed these actions to enforce the Labor Law in reliance on the existing remedy of liquidated damages, and employers have been well aware of the Labor Law's weekly pay requirement for decades. It would be an insult to the hardworking employees who have brought these cases to limit their ability to recover their available damages under current law in currently pending cases.

Conclusion: Add the EmPIRE Act to this Year's State Budget & Reject Any Proposal to Gut New York Labor Law Section 191

In 2023, the Legislature took an important step to raise the minimum wage in New York as part of the State Budget. However, this important increase in the minimum wage will be undermined if the current Labor Law enforcement crisis continues unabated.

For this reason, and for all the reasons explained above, it is critical that the Legislature pass a budget that includes the EmPIRE Worker Protection Act – to close the enforcement gap and create a dedicated revenue stream for future enforcement efforts for years to come. At the same time, the Legislature must reject the Governor's proposed ELFA Article VII - Part U, as well as any other proposal to limit the availability of liquidated damages for late payments of wages to manual workers.

If you have any questions about this testimony, the EmPIRE Act, or the Governor's proposed changes to NYLL Section 191, please do not hesitate to contact me.