NORTHWEST WORKERS' JUSTICE PROJECT

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Testimony of D. Michael Dale
House Committee on Business and Labor
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HB 3142 – Standardizing Employment Definitions

I am the Executive Director of the Northwest Workers' Justice Project. I have been a lawyer in Oregon since 1977, and have spent most of that time representing migrant and seasonal agricultural workers. The Northwest Workers' Justice Project provides legal representation to low wage contingent workers throughout the economy in sectors such as construction, building maintenance, landscaping, hotel and restaurant industry, food processing, agriculture and reforestation. This bill is sponsored by the Coalition to Stop Wage Theft, of which NWJP is a member. The Coalition includes 35 civic, labor, religious and business organizations.[1]

The principal provisions of Oregon law regarding recruitment of temporary workers and payment of wages are found in ORS Chapters 652, 653, 658 and 701. There are numerous, slightly different definitions in these statutes that can lead to inconsistent results with respect to whether a worker is "employed," who is an "employer," and what constitutes "wages" or a "wage claim." In addition, most employment situations are also covered by the federal Fair Labor Standards Act, which has its own definitions that are contained in some, but not all, of our wage statutes. This can lead to confusion and misunderstanding.

Oregon's minimum wage and overtime statute, modeled after the federal Fair Labor Standards Act, uses the same definition of "employ" as the federal law. Yet other sections of Oregon wage law have different, inconsistent definitions. The cases of the Oregon Court of Appeals have struggled with which definition to use.

HB 3142 will resolve this legal technicality, and will give workers better tools to claim the wages they have earned. Some employers have used the ambiguities and inconsistencies in Oregon state law definitions illegally to misclassify their employees as independent contractors. Employers have a huge incentive to misclassify. If a worker is an independent contractor rather

[1] Adelante Mujeres, AFL/CIO of Oregon, American Friends Service Committee, CAUSA, Beyond Toxics, Catholic Office of Life, Justice and Peace, Archdiocese of Portland, Centro Latino Americano of Eugene, Common Cause Oregon, Community Alliance of Lane County, Economic Fairness Oregon, Ecumenical Ministries of Oregon, Family Forward Oregon, Human Dignity Advocates of Crook County, Jewish Federation of Greater Portland, Mainstreet Alliance, Northwest Workers' Justice Project, Oregon Action, Oregon School Employees Association, Oregon Center for Christian Voices, Oregon Center for Public Policy, Oregon Strong Voice - Southern OR Chapter, Oregon Thrives, PCUN, Portland Jobs with Justice, Project REconomy, Rural Organizing Project, Oregon New Sanctuary Movement, SEIU Local 49, SEIU Local 503, Tax Fairness Oregon, Teamsters Local 26, United Food and Commercial Workers Local 555, VOZ Workers Education Project and We Are Oregon.

than an employee, the employer is not required to pay payroll taxes, unemployment insurance, worker's compensation, minimum wage, or overtime. This allows the employer to reduce his/her total payroll costs by 15-30%.[2] Misclassification hurts workers and their communities by stealing wages and benefits. Misclassification hurts taxpayers, who have to make up for the taxes that don't get paid on wages that are never paid. Misclassification makes it difficult for ethical employers, who pay legally required wages, benefits, and taxes, to compete.

Misclassification of employees as independent contractors has become a widespread problem. According to the Government Accountability Office, 15 percent of employers engage in misclassification, denying worker protections and benefits to at least 3.4 million workers a year.[3] Misclassification is an even greater problem among construction workers. According to the Department of Labor, it constitutes "One of the most common problems" in the industry.[4]

Some examples of misclassification, and the exploitation that can result, include:

- "Independent contractor" janitors pay larger contractors for the privilege of cleaning certain floors in buildings managed by yet another contractor on behalf of the building owner. The janitors are claimed to be responsible for their own industrial accident insurance and not covered by the minimum wage.

- In the construction industry, one member of a crew of workers is designated by the true employer as the "independent contractor" responsible for the crew, even though the individual has no business, no assets, and no control over the employment. When the individual isn't paid by the true employer, he has no resources to pay the other workers, for whom the true employer claims no responsibility.

- In the cucumber industry, some farm workers characterized as independent business people investing in growing a crop on their own leased plot of land. The reality is that they are sharecroppers. They tend a small portion of a corporate farmer's land, having virtually no opportunity for real profit (despite much downside risk), and virtually no autonomy to exercise independent judgment, as that might jeopardize the marketability of the farmer's crop. The farmer denies responsibility for paying minimum wage.

This bill seeks to standardize definitional terms within ORS Chapters 652, 653, 658 and 701, using the federal definitions except where there is a separate state policy objective that requires a different definition. The federal definition of employment has been in existence since 1933, was drawn from even older state child labor laws dating to the early 1900's, and thus has a rich history of interpretive case law that significantly clarifies coverage. In addition, this

[2] "Fact Sheet, 1099'd," National Employment Law Project, available at http://nelp.3cdn.net/69b8fb3896de8fe734_vjm6bn9kl.pdf.
[3] U.S. Government Accounting Office, *Employee Misclassification: Improved Outreach Could Help Ensure Proper Worker Classification* (Washington DC: U.S. Government Accountability Office, May 2007).
[4] U.S. Department of Labor, Employment Standards Administration, Fact Sheet #13: Employment Relationship under the Fair Labor Standards Act (FLSA).

traditional, federal definition is flexible enough to allow its application to modern and constantly changing employment practices.

The case law dating back to early model statutes on child labor establishes that the federal definition ("employ includes to suffer or permit to work") means that whenever a worker is employed in carrying out the business of an enterprise, and, as a matter of practical economic realities, the enterprise knows, or could, with reasonable inquiry, know, of employment violations and has the economic power to prevent the abuse, that enterprise will be regarded to be an employer. The courts have devolved a set of factors to be evaluated to determine whether this is the case. *See*, *Torres-Lopez v. May,* 111 F3d 633 (9th Cir 1997). Since the great majority of employers in Oregon are subject to this standard under federal law and state minimum wage and overtime law, in any case, it is good policy to standardize these definitions.

Workers and employers should not have to guess about what the standards are. We believe that this house-keeping measure will lead to greater clarity and consistency within Oregon wage and recruitment law. We recommend its adoption with a do pass recommendation.