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House Business and Labor Committee

Re: Testimony against Senate Bill 999

My name is David A. Schuck. I am an owner in a law firm with four attorneys whose primary practice focuses on prosecuting wage claims for Oregon employees. I am an OTLA member and am here testifying for OTLA and in support of employees around the state. The proposed amendments all add language intended to gut the wage statutes by taking away penalties paid to the injured worker when an employer fails to pay wages that the employer should have known were due.

History of wage statutes

In 1913 the legislature stated

“Whereas, The Welfare of the State of Oregon requires that women and minors should be protected from conditions of labor which have a pernicious effect on their health and morals, and inadequate wages and unduly long hours and unsanitary conditions of labor have such a pernicious effect.”

Myers v. Keasey, 145 Or 266 (1933). Since then, Oregon has built in protections from employees. The Supreme Court noted that the penalty provisions of the wage statutes are **“penal in character. Its purpose is to spur an employer to the payment of wages when they are due.”**

Nordling v. Johnston, 205 Or 315 (1955). The Court stated that:

“penalty outlined in ORS 652.150 was intended to protect employees from unscrupulous or careless employers who fail to pay wages when due.

The Supreme Court went on to say that:

“The policy of the statute is to aid an employe in the prompt collection of compensation due him and to discourage an employer from using a position of economic superiority as a lever to dissuade an employe from promptly collecting his agreed compensation.

Nilsen v. Cushing, 253 Or 262 (1969).

Jumping ahead to 1985, the Court of Appeals addresses the difference between employees and employers in wage claims stating:

“The distinction between plaintiffs and defendants is clearly based upon a legislative finding that employees as a class are at an economic disadvantage in seeking legal redress for their claims.”

Kling v. Exxon, 74 Or App 399 (1985).

SB 999 seeks to undo this proud culture of protecting employees spanning more than 100 years knowing that these employees are at a clear disadvantage to their employers in seeking redress for the wage claims. This Committee should reject SB 999.

Specific Issues

It is important to understand that these proposed changes will limit the employee’s ability to sue an employer for multiple violations of the law. The amendments repeatedly state that claims cannot be brought “**simultaneously or consecutively.**” This allows employers to violate multiple laws without punishment. This contravenes the public policy behind the wage statutes.

1. ORS 652.020 - would be amended to state that no other wage penalties apply to wages due under ORS 652.020. What it ignores, is that no penalties are due under ORS 652.020 for violation of that statute. Instead, it simply states that the wages must be paid. So the employee is left with a wage claim for the amount of the unpaid wages.
2. ORS 652.120 - Like ORS 652.020, ORS 652.120 provides no independent penalties for wage violations. In fact, other statutes, such as overtime and minimum wage, rely upon the due date set by ORS 652.120 to determine when those wages must be paid. Each provides its own statutory remedy which allows for a civil penalty. However, under this provision, a court could easily rule that the amendment to ORS 652.120 disposes of those claims.

The Oregon Court of Appeals referred to this inability to get a penalty for failure to pay overtime and minimum wage, similar to but not as drastic as what is being requested here, as:

“An Alice-in-Wonderland system in which an employer could underpay his or her entire workforce for overtime, or pay it less than minimum wage, without fear of incurring any penalty, by simply deciding to withhold payment until an employee quits or is fired and sues for unpaid wages.”

Cornier v. Paul Tulacz, 176 Or App 245 (2001). The only difference is, under the Alice-in-Wonderland system described by the Court, the employee could get at least one penalty. Here, no penalty could exist.

3. ORS 652.150 - Currently ORS 652.150 allows an employer to limit an employee’s penalty wages if it pays within 12 days of written demand unless it is a repeat offender. It seems obvious, that the Legislature did not want repeat offenders. However, the proposed amendments

would essentially allow repeat offenders to avoid liability for the actions. As a wage and hour attorney, I can attest that few wage claimants actually choose to bring cases. Of the small percentage that actually sue, most of those are settled and never get to judgment. If few employees actually bring their legitimate wage claims and even fewer result in a judgment, how will any employee ever be able to prove that the employer is a repeat offender. Changing this portion of the statute simply encourages repeat offenders. It does nothing to protect employers who regularly comply with Oregon's wage and hour laws.

This amendment makes the reason why an employee is fired relevant to whether another employee is entitled to their full penalty for wage violations. The exceptions allowing for a full 30 day penalty generally seek to punish bad employers who violate the wage laws and the reason for the termination of another employee has no bearing on whether the employer is a bad actor.

4. ORS 653.055 - The amendment seeks to reduce the civil penalty to an amount equal to the unpaid wages. It also seeks to limit the employee's ability to bring a claim under this section and a late payment claim under ORS 652.140 for the employer's failure to pay all final wages timely. What this means, is that less concern for small violations exists.

5. ORS 652.615 - Once again, the change seeks to limit deduction claims from being brought simultaneously with any other claim.

The thing that is missing from any of these amendments is any employer responsibility. Why is the employer violating so many laws? These penalties, and the wage and hour laws have been around for a long time. Yet somehow, employers do not comply. Why is it that employers cannot pay minimum wage, or pay overtime wages? Without strong enforcement mechanisms, these claims will not be prosecuted. The fact that the proposed amendments seek to make it hard to prove that employers are repeat offenders show that it is not the actions of good employers that this bill seeks to protect, but instead, focuses on protecting the bad employers taking advantage of their workforce. There is no part of this proposed bill that does not promote the non-payment of wages to employees.

Sincerely,

/s/ David A. Schuck