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Testimony of D. Michael Dale
Before the House Committee on Business and Labor
May 24, 2017
SB 279 – Avoidance of Wage Theft Penalties

I am the Executive Director of the Northwest Workers' Justice Project. I have been a lawyer since 1975, and have spent most of that time representing migrant and seasonal workers. The Northwest Workers' Justice Project provides legal representation to low wage contingent workers throughout the economy in sectors such as construction, building services, landscaping, hotel and restaurant industry, food processing, agriculture and reforestation. This bill is opposed by the Coalition to Stop Wage Theft, of which NWJP is a member. The Coalition includes about 40 civic, labor, religious and business organizations.¹

Given the wide spread and growing epidemic of wage theft in Oregon,² one would assume that employers who violate wage laws would be subject to heavy penalties to deter such lawlessness. Sadly nothing could be further from the actual situation. Although penalties are provided by law, in most of the cases that workers take to BOLI for resolution, if the

¹ Adelante Mujeres, AFL/CIO of Oregon, AFT Oregon, American Friends Service Committee, Beyond Toxics, CAUSA, 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, Interfaith Movement for Immigrant Justice (IMiR), Jewish Federation of Greater Portland, Mainstreet Alliance, Northwest Forest Worker Center, Northwest Workers' Justice Project, Oregon Action, Oregon AFSCME, Oregon School Employees Association, Oregon Center for Christian Voices, Oregon Center for Public Policy, Oregon Strong Voice - Southern OR Chapter, Oregon Thrives, Oregon Trial Lawyers Association (OTLA), Oregon Working Families, PCUN, Portland Jobs with Justice, Project REconomy, Rural Organizing Project, SEIU Local 49, SEIU Local 503, Tax Fairness Oregon, Teamsters Local 26, Unidos Bridging Community, United Food and Commercial Workers Local 555, and VOZ Workers Education Project.

² Today more than ever, workers' wages are being stolen from them: a 2008 study of low wage workers found that a shocking percentage are paid less than minimum wage, denied compensation for overtime, illegally charged for equipment and other expenses, or not paid at all. Annette Bernhardt, Ruth Milkman, Nik Theodore, Douglas Hckathorn, Mirabai Auer, James DeFilippis, Ana Luz Gonzalez, Victor Narro, Jason Perelshteyn, Diana Polson, and Michael Spiller, *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities* (Chicago: Center for Urban Economic Development, 2009). Available at www.unprotectedworkers.org/index.php/broken_laws/index. While percentages vary between industries, more than two thirds of the workers surveyed had experienced at least one pay-related violation in the previous week. Some of the most egregious violations occur in day labor. Oregon has not been exempt from these trends. An analysis of wage claims filed with BOLI since 2006 shows that Oregon workers filed \$45 million in wage claims. "Wage Theft Increases Poverty and Costs to the Public," Oregon Center for Public Policy (February 13, 2017), <http://www.ocpp.org/2017/02/13/fs20170213-wage-theft-poverty-public-costs/>. Of course, this is just the tip of the iceberg, since many victims do not file claims with BOLI due to fear of retaliation, lack of knowledge of how to file or geographic isolation.

employer simply pays the wages that were due weeks or months earlier, there is no penalty assessed. This lack of an incentive to comply, no doubt, contributes significantly to growing pervasiveness of wage theft in our economy.

SB 279 creates another unnecessary hurdle to workers being able to recover penalties. In Oregon, all wages are due on the last day of work or within a few days later, at most. This has been the law in Oregon for many decades, and should be reasonably well-known among employers. Penalties for not paying begin accruing the next day after payment was due. This has also long been the law in Oregon.

More recently, the law was amended to assure that, before suffering significant sanctions, an employer be on clear notice that wages are unpaid; workers are required to notify employers in writing of their claim in order to be eligible to collect full penalties. SB 279 would further require that this written notice advise the employer that penalties would be limited to the amount of unpaid wages if the employer pays up within twelve days.

Wage theft is most common when the victim is most vulnerable. Many victims have limited knowledge of the law, may have limited ability to communicate in writing and may not even speak or write English. On the other hand, one assumes that those managing a business are much more likely to be knowledgeable of the law and have better access to legal counsel. Of these two parties it makes little sense to put the burden of knowing the law on the employee.

Speaking of access to legal counsel, very few low wage workers can find a lawyer to take their cases, and are relegated either to the BOLI process (where, as noted above, assessment of penalties is unlikely) or to self-help. Adoption of SB 279 would create a trap for the unknowledgeable that would frustrate self-help efforts. (I am enclosing testimony from John Hoffman, a worker who testified before the House Business and Labor Committee on HB 2856, concerning how difficult and confusing this process is, even for a worker who is experienced and well-educated.) Even if the worker ultimately is able to find a lawyer, employers would be able to postpone payment of wages even further while faulty notice is corrected, and a further grace period to pay elapses.

Proponents of this bill may say that it is needed to protect innocent employers who just made an honest mistake. This argument does not withstand scrutiny. First, current law provides that penalties are only assessed for wage violations that are willful, i.e., where an employer knew what it was doing and meant to do it. Further, existing law gives the employer 12 days to pay after being advised of the wage claim. This is ample time to correct an oversight or resolve misunderstandings. The only reason for the extra notice provided by SB 279 would be to protect from penalties an employer who makes the calculated decision to pay wages only because otherwise the employer will have to pay penalties. This is not “innocent.”

This bill is a big step backward in the struggle to end wage theft in Oregon. We recommend that you take no further action on the bill.

If the committee feels that it must move this concept forward, we could reluctantly support either of two possible compromise amendments.

Workers are routinely provided notice of many important employment rights by requiring those rights to be posted at the place of employment. BOLI publishes a comprehensive poster that includes all of the required postings. In lieu of making workers provide notice of rights in their request to be paid, all employers could be notified of the safe haven to avoid wage penalties provided by existing law by including this provision on the poster. If this type of notice is sufficient to inform workers, surely employers could comprehend their ability to avoid higher penalties by paying within 12 days of receiving a demand for wage payment.

There has also been discussion about only requiring the notice of safe haven when the notice of nonpayment is sent by a lawyer. We have no fundamental objection to this requirement, with one caveat. If a worker has already perfected her claim for full penalties, and then is later forced to get a lawyer to pursue the claim, the lawyer should not later be required to provide another notice, with a new grace period, of the safe haven to pay.

**Excerpts from
House Bill 2856 Testimony: John Hoffmann, Portland, OR**

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“This contradicted what I knew to be the law. I spoke with the BOLI rep again. She confirmed my assessment. Based on the documents provided, the relationship was that of an employee. I had tendered proper notice. And, to comply with the law, I should have been paid ALL earned and unpaid wages on my final day of work. The BOLI rep pointed out labor code indicating the continuation of wages, as penalty wages, until I was paid in full.

“The rep also provided a practical assessment of how the claim would proceed. I could file a claim. BOLI would pursue the earned wages. But, they would not pursue the penalty wages if the company paid the earned wages in response to the claim. If I wanted to pursue penalty wages, I could do that in Small Claims. But, if I filed a claim through BOLI, that would preclude further action in small claims court. Essentially, I would waive my right to pursue the penalty wages if I filed a claim through BOLI. Also, due to case load and limited resources, it was highly likely that the company would pay me prior to BOLI processing the claim.

“I came to the conclusion I was on my own to ensure that my rights were upheld. Taking the information provided by the BOLI rep, I continued to seek assistance. I entered an interagency complaint on the oregonindependentcontractors.com website. I followed up with phone calls, which led me back to the website or referring me to BOLI to address the issue. In essence, I encountered a circle of referrals.

“Through the Oregon Bar referral system, I consulted two attorneys. The first attorney did not have time to consult with me. The second referral consulted with me. She felt confident about the violations. She offered to take the case on a contingency basis. While I would not pay any fees unless I received an award, I would be responsible for filing and deposition fees throughout the case. How much would that cost? It could be in the thousands of dollars. The attorney outlined the small claims option. She also communicated that the defendant could request a jury trial which would take the issue into civil court. If that were the case, she recommended hiring an attorney.

“In my case, a company based in California was conducting business in Oregon, without registering as an Oregon business, employing Oregonians and circumventing its responsibilities as required by State Law. Not only did they impose a document which falsely defined the work relationship, they implemented policies which directly contradict law regarding payment of wages and falsely denied earned wages if an employee got sick or had car trouble. They also committed wage theft of 15 minutes each day on each worker’s earnings.

“These are blatant violations And, yet, as a worker, I have a tremendous task in finding resources to ensure the enforcement of my rights as a worker, to ensure timely payment of my wages and to hold companies accountable for their blatant violation of my rights.”