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**Testimony of D. Michael Dale
Before the House Committee on Business and Labor
February 13, 2017**

HB 2169 – Removing Obstacles to Private Enforcement of Wage Claims – Attorneys’ fees

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 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 about 40 civic, labor, religious and business organizations.¹

Today more than ever, workers’ wages are being stolen from them: a 2008 study of 4,387 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.² 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 shows that Oregon workers filed 8,558 wage claims worth \$24.5 million during the five-year period ending June 2011.³ 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.

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 (IMiJ), 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 Annette Bernhardt, Ruth Milkman, Nik Theodore, Douglas Heckathorn, 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.

³ “Evidence of Widespread Wage Theft,” Oregon Center for Public Policy (May 21, 2012), <http://www.ocpp.org/2012/05/21/fs20120521-evidence-widespread-wage-theft/>

In 2016, the legislature made modest improvements in BOLI's capacity to investigate wage theft, but the agency remains grossly underfunded, and a part of the solution must be improving the ability of workers to enforce their wage rights on their own, without the need of assistance from a government agency. However, workers face significant barriers if they decide to litigate against an employer who has committed wage theft. A key barrier is the threat of being held responsible to pay their employer's attorney fees.

Most employment statutes provide that an employee whose rights are violated can seek relief in court, and, if successful, can recover attorneys' fees from the employer. However, there are two important wage collection statutes, the minimum wage, ORS 653.055, and the statute that specifies what deductions can be taken from paychecks, ORS 652.620, that allow either side to collect attorney fees in a wage dispute.

This deters workers from bringing claims, since they often fear that they could end up having to pay their employer's attorney's fees should they not prevail on their claim. Losing a court case doesn't mean that wages were properly paid; it only means that the worker was unable to convince a jury that she was not properly paid. At the beginning of a case, it's hard to predict with certainty what the outcome might be.

HB 2169 would bring the language in these two statutes⁴ in line with other statutes protecting workers' rights—awarding fees only to prevailing employees. It would change one word: "prevailing party" to "prevailing plaintiff." This provision would make it so that attorney fees in a wage claim would only be awarded if an employee proves that wage theft took place.

In practice, the current language rarely results in an employer actually collecting its attorneys' fees from the employee. In forty years of practice in this area, I have never seen that happen. The principal function of the current language is simply to intimidate workers with valid claims from pursuing them.

Note that any person who brings a frivolous claim in Oregon can still be liable for the opposing party's attorney fees, so a worker's claim must have a reasonable basis or the employee could be assessed fees. ORS 20.105(1). Indeed, any attorney who files a frivolous claim can be personally held liable for paying the opposing party's attorneys' fees. O.R.C.P. Rule 17.

We recommend that this bill be approved with a do pass recommendation.

⁴ As drafted by LC, HB 2169 would change additional statutes. An amendment limiting the bill to minimum wage and deductions has been submitted for drafting; a draft of that amendment is attached.