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Testimony to the House Civil Law Subcommittee of the Judiciary Committee
HB 2205: The Just Enforcement Act
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Good Morning Chair Power, Vice Chair Wallan and members of the Committee.

My name is Kate Suisman. I am an attorney at the Northwest Workers' Justice Project. We are a non-profit law firm that represents low-wage workers in employment matters. NWJJP has helped draft the bill before you today, in coalition with PCUN: Oregon's Farmworker Union, the Oregon AFL-CIO and many others.

As this committee knows, the last few legislative sessions have brought many new protections for workers: increases to the minimum wage, earned sick leave, equal pay guarantees and fair scheduling. But laws need to be enforced to be meaningful.

One important function of state agencies is to enforce the law. The pandemic has shown us that our hardworking state agencies cannot possibly meet the needs of Oregon's workers. Even before the pandemic, BOLI's budget was inadequate to meet workers' needs. I refer to the testimony submitted by Janet Bauer of the Oregon Center for Public Policy as well as [this 2019 fact sheet](#) regarding BOLI's budget. Oregon OSHA has been inundated by complaints in the last year, receiving literally [ten times](#) as many complaints as usual.

The Just Enforcement Act provides an effective solution to under-enforcement that will not cost the State money, and will in fact provide revenue for the State. This model is based on an ancient cause of action known as *qui tam*, which authorizes private individuals to bring

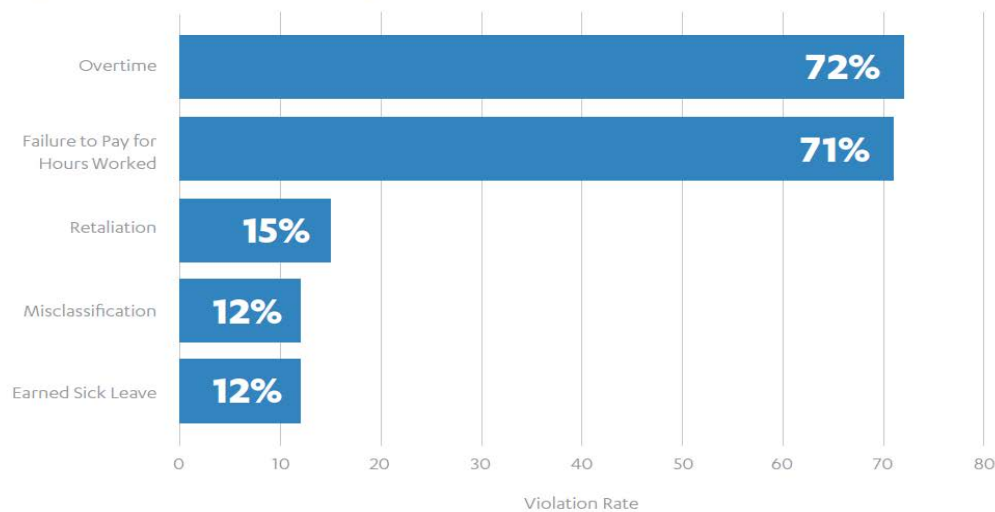
enforcement actions on behalf of the state. In the U.S., since the Civil War, the Federal False Claims Act has relied on whistleblowers with inside knowledge of fraud against the government to come forward and litigate on behalf of the state. In 2017, 92% of the total recovery in federal False Claims Act cases came from suits litigated by whistleblower plaintiffs –[resulting in the recovery of \\$3.4 billion for the U.S. government.](#)

California has had a similar law on the books since 2004, the Private Attorney General Act, or PAGA. You will likely hear from many employers and their representatives today, decrying the bill as a job killer or worse. Yet the California economy has not suffered during the 15+ years PAGA has been on the books. California’s job growth has mirrored the national growth rate for decades, but over the past five years, California’s job growth has been [stronger](#) than the national average. In 2019, job growth [accelerated](#) in California while slowing in the rest of the country. A UC Berkeley economist has found that California’s GDP [grew by 17.2%](#) between 2011 and 2016, a period in which the state enacted 51 statutes characterized as “job killers” by the California Chamber of Commerce; by comparison, the average GDP growth in Republican-controlled states with policies characterized as “business-friendly” was 9.8%. Importantly, the the California Department of Labor Standards Enforcement said on page 9 of [this](#) 2019-2020 budget proposal on PAGA, “PAGA notices have proven to be high quality leads identifying serious violations that in many cases would otherwise have remained underground.”

PAGA suits involve serious violations with severe consequences for working families, not frivolous matters as some may claim. From a [recent UCLA report](#) on PAGA, we know that nearly nine out of ten (89 percent) PAGA claims allege wage theft, including overtime violations (72 percent of cases) and failure to pay for all hours worked (71 percent of cases). A smaller share involved violations of earned sick leave rights (12 percent), fraudulent misclassification of

employees as independent contractors (12 percent), and retaliation (15 percent) (See Figure 3 in UCLA report submitted by PCUN). (Wage theft is defined in this report as failure to pay minimum wage, failure to pay overtime, failure to pay for all hours worked, failure to pay wages upon termination, other unpaid wages, and tip violations.)

Figure 3: Types of Violations Alleged in PAGA Notices, Sept. 2016-Jan. 2020



You may also hear that JEA will clog Oregon courts. This has not happened in California. There, [less than half](#) of PAGA notices filed with the Labor and Workforce Development Agency (the agency that oversees PAGA in California) result in civil complaints. In 2018, 774,202 civil cases were filed in California’s courts; of those only 2,104 - or 0.27 percent of the total - were PAGA cases, according to the Judicial Council of California’s 2018 Court Statistics report. On average, courts issue less than 700 orders and judgments in PAGA cases each year, while over twice that many cases are settled with judicial approval, according to the California Department of Labor Standards Enforcement.

A JEA action works like this:

- A worker files a complaint with BOLI or OSHA, alerting the agency to the basic facts of the alleged violation (what happened, how many affected etc.) A worker can bring a complaint regarding wage and hour violations, rest and meal breaks, discrimination, retaliation and health and safety violations.
- BOLI or OSHA then has 30 days to decide whether to investigate and enforce the law or let the whistleblower (also known as the relator) manage the suit on the state's behalf.
- If a judge finds that the company broke the law, the company is ordered to pay penalties based on the number of impacted workers – so, small businesses would pay small fines and multinational corporations would pay large ones.
- 70-80% of the penalty revenue goes to the state, with the rest rewarding the whistleblowers for stepping forward. The state can use the revenue to hire more investigators, invest in technology, or partner with community organizations to educate workers about their rights.

Legislative Counsel is working on the -1 amendment now. The -1 makes the following

important changes:

- The scope of the bill is narrowed to ORS chapter 652, 653, 654, 658, 659 or 659A, or a rule adopted pursuant thereto. (Wages, working conditions, OSHA, labor contractor registration, discrimination and retaliation.)
- There is no mention of the “Attorney General” in the -1 amended version. That was a drafting error and should not have been included.
- The suit can seek injunctive relief, i.e. that an employer is ordered to stop doing something illegal or start doing something to improve conditions or practices.
- Civil penalties are distributed 30% to the relator and 70% to the state. (The version on OLIS says 40/60.)
- A relator may not bring an action for a violation of a posting or notice requirement or minor mistakes in an itemized wage statement.
- The notice to the agency has expanded components: the substance and nature of the alleged violation, estimated number of aggrieved persons, potential statutes or rules violated, relevant events, dates and facts the relator intends to present.
- BOLI Civil Rights Division has a year to investigate JEA actions, as it does for civil rights actions brought through existing methods. We are still discussing timelines with Oregon OSHA.

- If the relator proceeds after the state has investigated but not taken enforcement action, the state may move to dismiss the action.
- If the agency initially decides not to enforce but changes its mind, the agency may intervene at any point for good cause.
- Settlements under this act may not contain a confidentiality clause.
- When a person brings a public enforcement action, no person may bring a related public enforcement action based on the same facts during the same time period unless the court determines that the previously-filed public enforcement action has not been diligently prosecuted.
- Section 8 says 25% of all penalty money collected by the agency is directed to a fund for community outreach and labor education.

As we continue to refine this bill, we are working closely with BOLI and Oregon OSHA to make sure this bill assists them in enforcement, and does not hinder the important work they do.

The pandemic has shown us something we already knew- the State cannot be everywhere at once. Effective enforcement of our worker protection laws depends on a combination of public and private enforcement. The Just Enforcement Act will help workers enforce the important protections the Legislature has enacted, while bringing revenue to the state. Thank you.